

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

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

**CIV02021-404-000533  
[2021] NZHC 1266**

UNDER	the Overseas Investment Act 2005
BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	CONG ZHANG Defendant

Hearing: 31 May 2021

Appearances: F J Cuncannon & K R Muirhead for the Plaintiff  
M R Heron QC & C E M Agnew-Harington for the Defendant

Judgment: 1 June 2021

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**JUDGMENT OF VAN BOHEMEN J**

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*This judgment was delivered by me on 01 June 2021 at 12 noon  
Pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

Solicitors/Counsel:  
Meredith Connell, Auckland  
Britomart Chambers, Auckland  
Domain Legal, Auckland

## **Introduction**

[1] The plaintiff, the Chief Executive of Land Information New Zealand and the Regulator under the Overseas Investment Act 2005 (the Act), alleges that the defendant, Cong Zhang, acquired a legal interest in “sensitive land” without obtaining consent as required under the Act.

[2] The land in question comprises two properties at Mellons Bay, Auckland (the Properties).

[3] Ms Zhang admits the breach of the Act.

[4] The parties have agreed on how the breach should be resolved. They seek orders that Ms Zhang pays a civil pecuniary penalty of \$110,000 and \$15,000 towards the Regulator’s costs.

[5] The purpose of this hearing is to decide the quantum of the penalty to be imposed under s 48(2) of the Act.

## **The relevant circumstances**

[6] The parties have submitted an agreed statement of facts.

[7] The Properties comprise 0.61 ha of land and are categorised as “associated land” under s 8(4) of the Act because they adjoin each other and both are owned by Ms Zhang. They are assessed as “sensitive land” under s 12 and sch 1 pt 1 of the Act because one of the properties adjoins the foreshore of Mellons Bay, and the properties have a combined land area that exceeds the applicable 0.2 ha threshold. In addition, one of the properties contains a Heritage New Zealand listed site (known as “Mellons Bay Gun Emplacement”) and the combined land area exceeded the applicable 0.4 ha threshold. For these reasons, any “overseas person”, as that term is defined in s 7 of the Act, who wishes to obtain an interest in the Properties must obtain consent in accordance with ss 10 and 12 of the Act.

[8] Ms Zhang is a Chinese citizen and businessperson. She was approved in principle for a residence class visa on 14 July 2015. However, that visa was not issued until 17 March 2017. Ms Zhang entered New Zealand under that visa on 17 March 2018. Therefore, prior to 17 March 2018, Ms Zhang was an “overseas person” under s 7(2)(a) of the Act because she was neither a New Zealand citizen nor ordinarily resident in New Zealand.

[9] Ms Zhang acquired an equitable interest in the Mellons Bay properties on 13 September 2015 by entering into a sale and purchase agreement for the Properties (the Agreement). Under the Agreement, Ms Zhang obtained legal title of the properties on 18 September 2015. Both steps were taken without obtaining consent under the Act.

[10] Ms Zhang had submitted two applications to the Regulator for consent in 2013. However, neither of these was successful.

[11] The Agreement was in the standard form issued by the Real Estate Institute of New Zealand and Auckland District Law Society and provided that Ms Zhang would acquire a fee simply estate in the Properties upon payment of the purchase price of \$9,400,000 inclusive of GST. Clause 9.4(1) of the Agreement provided a yes/no option to indicate whether consent was required under the Act. The “no” option was circled and initialled. As a consequence, the Agreement was not conditional on Ms Zhang obtaining consent under the Act.

[12] When legal title to the Properties transferred to Ms Zhang on 18 September 2015, Ms Zhang was in breach of s 42 of the Act because she had not obtained consent under the Act before obtaining a legal or equitable interest in the Properties.

[13] Ms Zhang has admitted the breach and accepts that the Regulator is entitled to seek judgment against her in respect of these proceedings. She has agreed to pay a civil penalty to the Regulator under s 48(2)(a) of the Act in respect of this breach.

### **Approach to fixing civil penalties**

[14] Section 48 of the Act provides that the Court may order the payment of a pecuniary penalty for a breach of the Act.

[15] In 2015, at the time Ms Zhang acquired the Property, s 48(2) provided that a civil penalty for failure to obtain consent must not exceed:

- (a) \$300,000; or
- (b) Any quantifiable gain (for example, the increase in the value since acquisition) by the person in breach in relation to the property for which a consent should have been obtained.

[16] That is the scale of penalties that may be imposed in the present case. I noted earlier this year in *Chief Executive of Land Information New Zealand v West Drury Holding Limited*,<sup>1</sup> the scale of the penalties that may be imposed under s 48 was significantly increased last year by the Overseas Investment (Urgent Measures) Amendment Act 2020. While the parties have agreed a penalty of \$110,000 in the present case, there may need to be some reconsideration of the appropriate penalty to be paid in cases arising after 16 June 2020, when that amendment came into force.

[17] The Court has made a number of decisions imposing civil penalties under s 48. Most concerned a failure to obtain consent before an overseas person invested in sensitive land. These include *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*,<sup>2</sup> *Chief Executive of Land Information New Zealand v Tang*,<sup>3</sup> *Chief Executive of Land Information New Zealand v Hong*,<sup>4</sup> *Chief Executive of Land Information New Zealand v BCH Investments Ltd*,<sup>5</sup> *Chief Executive of Land Information New Zealand v FFG Investment Ltd*,<sup>6</sup> *Chief Executive of Land Information New Zealand v Chor Ltd*,<sup>7</sup> and *Chief Executive of Land Information New Zealand v West Drury Holding Limited*.<sup>8</sup>

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<sup>1</sup> *Chief Executive of Land Information New Zealand v West Drury Holding Limited* [2021] NZHC 704. (*West Drury Holding*).

<sup>2</sup> *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558. (*Carbon Conscious*).

<sup>3</sup> *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382, (2018) 19 NZCPR 460. (*Tang*).

<sup>4</sup> *Chief Executive of Land Information New Zealand v Hong & Others* [2019] NZHC 1561. (*Hong*).

<sup>5</sup> *Chief Executive of Land Information New Zealand v BCH Investments Ltd* [2019] NZHC 1630. (*BCH Investments*).

<sup>6</sup> *Chief Executive of Land Information New Zealand v FFG Investment Ltd* [2019] NZHC 3293. (*FFG Investment*).

<sup>7</sup> *Chief Executive of Land Information New Zealand v Chor Ltd* [2020] NZHC 1254. (*Chor*).

<sup>8</sup> *West Drury Holding*, above n 1.

[18] In these decisions, the Court has adopted an approach similar to that used to fix pecuniary penalties under the Commerce Act 1986. The Court has fixed a starting point by assessing the seriousness of the breach, taking into account relevant aggravating and mitigating factors specific to the breach. It has then regard to any factors specific to the defendant that may warrant an uplift in or discount from the starting point.<sup>9</sup> Similar to the approach adopted in Commerce Act cases, these decisions have also held that the primary purpose of civil penalties imposed under the Act is deterrence of both the person in breach and those who might be tempted to breach the requirements of the Act in a similar way in the future.<sup>10</sup> That purpose has been reinforced by the increase in the scale of penalties enacted last year.

[19] It has also been accepted that where penalties are agreed between the parties the Court is not required to embark on its own enquiry as to an appropriate figure but rather to consider whether the proposed penalties are within the proper range.<sup>11</sup>

### **The Regulator's assessment**

[20] The Regulator advises that Ms Zhang has agreed to pay \$15,000 to the Regulator as a contribution to its costs, with costs to lie where they fall outside of that figure. She has also agreed to \$110,000 as a civil pecuniary penalty.

[21] The Regulator advises that the parties agree that Ms Zhang made no quantifiable gain from holding the properties in breach of the Act between the time of acquisition and 17 March 2018 when she ceased to be an overseas person. Accordingly, the maximum penalty available is \$300,000 under s 48(2)(a).

[22] The parties have agreed that Ms Zhang's breach was moderately serious given the size of the properties (0.61 ha), the heritage value of "Mellons Bay Gun Emplacement," the value of the properties (joint current rateable value of

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<sup>9</sup> See, for example, the approach taken in *Commerce Commission v Alstom Holdings Ltd SA* (2009) NZCCLR 22 (HC) at [14], as applied in *Carbon Conscious*, above n 2, at [47]; in *Tang*, above n 3, at [15]; in *Chief Executive of Land Information New Zealand v Agria (Singapore) PTE Ltd* [2019] NZHC 514 at [34] (*Agria*); in *Hong*, above n 4, at [22]; and in *FFG Investment*, above n 6, at [17].

<sup>10</sup> *Carbon Conscious*, above n 2, at [24]; *Tang*, above n 3, at [19]; *Agria*, above n 9, at [40]; *Hong*, above n 4, at [19]; and *FFG Investment*, above n 6, at [18].

<sup>11</sup> *Tang*, above n 3, at [19]; *Agria*, above n 9, at [36]; *BCH Investments*, above n 5, at [8]; *West Drury Holding Limited*, above n 1, at [20].

\$13,780,000), the purchase price of \$9,400,000 and the location adjoining the foreshore.

[23] The Regulator accepts that Ms Zhang has not made a quantifiable gain but says that Ms Zhang has received a non-quantifiable benefit from being able to use the Properties as her family's residential home without obtaining consent.

[24] The Regulator characterises Ms Zhang's breach as inadvertent. The Regulator acknowledges that, at the time Ms Zhang acquired the properties, she believed she was ordinarily resident in New Zealand under s 6(2)(a) of the Act because Immigration New Zealand had approved her application for a residence class visa in principle. This belief was based on a misunderstanding that this approval was sufficient to make her ordinarily resident in New Zealand, when she did not in fact become ordinarily resident until 17 March 2018.

[25] The Regulator submits that a starting range in the vicinity of \$135,000 to \$140,000 is appropriate in the circumstances. This is assessed with reference to *FFG Investment*, *West Drury Holding* and *Tang*. The Regulator submits that Ms Zhang's culpability is:

- (a) Greater than that in *FFG Investment* which attracted a starting point of \$103,000, and concerned a property with a purchase price of \$4.76 million,<sup>12</sup> as compared with the purchase price of \$9.4 million for the Properties in this proceeding;
- (b) Slightly greater than that in *Tang*, which attracted a starting point of \$130,000 where Mr Tang, the first respondent, had acquired only an equitable interest for three months,<sup>13</sup> unlike Ms Zhang who has had the benefit of legal title to and use of the properties as her family home for more than five years;

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<sup>12</sup> *FFG Investment*, above n 6, at [9] and [28].

<sup>13</sup> *Tang*, above n 3, at [5] and [24].

- (c) Less than *West Drury Holding*, which had a starting point of \$160,000 to \$170,000, because, although the purchase price of \$9.2 million was comparable to \$9.4 million Ms Zhang paid for the Properties, West Drury Holding had obtained its property for commercial development.

[26] The Regulator submits that a discount of 20 per cent is appropriate to reflect the mitigating personal factors in this case. That reduces the penalty to \$110,000. This discount reflects Ms Zhang's cooperation with the Regulator through an early admission of liability, compliance with requests for documents, and agreement to pay a civil pecuniary penalty. The Regulator accepts that there are no aggravating features.

[27] Accordingly, the Regulator requests that Ms Zhang pay a pecuniary penalty of \$110,000 and \$15,000 toward the Regulator's costs and disbursements. Costs are to otherwise lie where they fall.

#### **Defendant's submissions on penalty**

[28] Mr Heron and Ms Agnew-Harington, counsel for Ms Zhang, also seek orders for a civil pecuniary penalty of \$110,000 and for payment of \$15,000 towards the Regulator's costs. They submit that the penalty reflects the fact that Ms Zhang's breach was inadvertent and moderately serious.

[29] While counsel for the Regulator and Ms Zhang are in agreement on the relevant law and the methodology for arriving at a penalty, counsel for Ms Zhang submit that the Regulator's submissions do not give sufficient emphasis to the facts that:

- (a) The breach was inadvertent, and the fact Ms Zhang had previously sought consent from the Regulator indicates that she was operating under a mistaken understanding as to the relevance of the "in principle" residency approval rather than intending to disregard her compliance obligations;
- (b) Ms Zhang has since been ordinarily resident in New Zealand since March 2018 and, therefore, there is no continuing breach;

(c) Ms Zhang made no quantifiable gain; and

(d) Ms Zhang has cooperated with the Regulator.

[30] Counsel for Ms Zhang agree that *FGG, Tang* and *West Drury Holding* are most analogous to this proceeding, and generally agree with the Regulator's assessment. However, they emphasise that the non-quantifiable benefit derived is limited to the use of the properties for 2.5 years before Ms Tang became ordinarily resident in New Zealand and not five years as the Regulator argued.

[31] Counsel for Ms Zhang also submit that the deterrent purpose of civil penalties does not engage vis-à-vis Ms Zhang. That is, because Ms Zhang is now ordinarily resident in New Zealand, she is presently incapable of further breaches of the Act.

## **Discussion**

### *Appropriate starting point*

[32] The value of the Mellon Bay properties is closely comparable to that of the property in *West Drury Holding*. However, the nature of the land is significantly different. Where the property in *West Drury Holding Ltd* was commercial, here the Mellon Bay properties are residential, adjacent to the foreshore and have some heritage value. Give those features and the price paid, I consider the breach to be moderately serious. However, it was a single breach that ceased in 2018 when Ms Zhang became ordinarily resident. It was not part of a wider scheme.<sup>14</sup>

[33] It is common ground that the breach was inadvertent. Ms Zhang was not attempting to circumvent the system for personal gain. Ms Zhang had been given a residential visa "in principle." She had applied for consent in 2013, notwithstanding that this had been refused. On the facts, it appears that this property was used as a family home. Ms Zhang's mistaken belief that her residency "in principle" made her ordinarily resident may be understandable at a human level. However, a modicum of

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<sup>14</sup> Contrast *FFG Investment*, above n 6, where there was a failure on two separate occasions to obtain the required consent.



due diligence by Ms Zhang or her advisors, which could reasonably be expected in a purchase of this scale and significance, should have corrected that error.

[34] As the Regulator submits and Ms Zhang accepts, the relevant previous decisions are *FFG Investment*, *Tang* and *West Drury Holding*.

- (a) In *FFG Investment*, a starting point of \$103,000 was adopted with respect to an acquisition of 2.87 ha of residential land worth \$4.76 million and which the defendant intended to subdivide. The land was sensitive because it adjoined a reserve.
- (b) In *Tang*, a starting point of \$130,000 was adopted for breaches of s 42 in acquiring a property for \$5.128 million. In that case the property was also residential, coastal land. Mr Tang's conduct was said to be negligent as he (unlike Ms Zhang) had experience investing in New Zealand. In addition, Mr Tang entered into a deed of nomination with the second to fourth defendants, through which each received a quantifiable gain of about \$269,000 upon resale (although Mr Tang received no quantifiable gain himself).
- (c) In *West Drury Holding*, a starting point of \$300,000 was adopted with respect to the purchase of a property of 23.3 ha valued at \$9,200,000. This property was acquired by the defendant for commercial purposes under a similarly mistaken belief that company was not an "overseas person" under the Act.

[35] The properties acquired by Ms Zhang have some features not found in some of the earlier cases, in particular the presence of a heritage site and being adjacent to the foreshore. These features underscore the importance of compliance with the Act. Ms Zhang enjoyed the benefit of the Properties, in breach of the Act, between September 2015 and March 2018. Given these features, it is arguable that a higher starting point than those adopted in *Tang* and *FFG Investment* may have been appropriate.

[36] However, I accept that the Properties were purchased for use as a home by Ms Zhang and her children, who are New Zealand residents, in the belief that consent was no longer required. The breach of the Act was also effectively remedied in 2018 when Ms Zhang became ordinarily resident in New Zealand.

[37] For these reasons, I am satisfied that the starting point of \$135,000 to \$140,000 proposed by the parties is appropriate in the circumstances.

### **Adjustment of penalty to reflect specific factors**

[38] I accept that there are no aggravating factors. Ms Zhang has been cooperative with the Regulator as described in the Regulator's submissions.

[39] I consider a discount of 20 per cent appropriate in the circumstances of this case. While the breach was not deliberate, it may have been avoided if appropriate due diligence had been exercised.

[40] I accept that deterrence has no direct application to Ms Zhang's circumstances. However, while individual deterrence may not be relevant to Ms Zhang, s 48 is also aimed at a wider general deterrence for others who may make similar purchases in future.

### **Result**

[41] I am satisfied that a civil pecuniary penalty of \$110,000 is appropriate.

[42] I am also satisfied that it is appropriate for Ms Zhang to pay \$15,000 towards the Regulator's costs.

[43] I make no other award of costs.

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G J van Bohemen J