IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-198
[2019] NZHC 1630

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	BCH INVESTMENTS LIMITED Defendant

Hearing: 8 July 2019

Appearances: F J Cuncannon and M L Clarke-Parker for the Plaintiff
G M Illingworth QC for the Defendant

Judgment: 12 July 2018

JUDGMENT OF POWELL J
[Civil Penalty]

This judgment was delivered by me on 12 July 2019 at 5 pm pursuant to R 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The plaintiff, the Chief Executive of Land Information New Zealand ("LINZ"), and the defendant, BCH Investments Ltd ("BCH"), seek approval for orders under the Overseas Investment Act 2005 ("the Act") and, in particular, orders that:

(a) BCH pay within 20 working days:

(i) a civil penalty of $300,000;

(ii) account taker's costs of $260,282.68; and

(iii) scale costs on a 2B basis of $27,763.50.

(b) BCH is to divest to independent third parties its entire interest in two properties within two years with leave reserved to LINZ to seek further orders under s 47 of the Act if divestment has not occurred within that time.

[2] The orders are sought following the acquisition by BCH of the two properties referred to, 79 and 95 Gills Road, Albany ("the properties"). The properties are sensitive for the purposes of Part 1 of the Act because 79 Gills Road adjoins a scenic reserve. As a result, there was no dispute that BCH, an overseas person for the purposes of s 7 of the Act, breached s 22 of the Act in acquiring first an equitable and then a legal interest in the properties without the acquisition of those interests being conditional on consent being obtained under the Act.

[3] Since it acquired the properties, BCH has proceeded to sub-divide the properties including:

(a) obtaining resource consent;

(b) undertaking earthworks and sediment and erosion control work;

(c) connecting essential facilities (such as sewerage, underground power, storm and wastewater) to the individual lots; and

(d) providing for footpaths, kerbs and street lighting to the development.

[4] LINZ, as the regulator under the Act has, since BCH's non-compliance came to light and notwithstanding the issue of the present proceedings in 2017, worked with BCH to enable the sub-division to be completed in an orderly manner. This has enabled the interests of third parties, including both contractors and subsequent purchasers of the properties, to be protected. This process was facilitated by first, BCH admitting liability four months after the proceedings were issued and secondly, the appointment of Stephen Bell of KPMG as an "account taker" under Part 16 of the High Court Rules 2016, on the understanding that the costs of KPMG, would ultimately be met by the defendant. Although the development is yet to be finally completed KPMG has also been able to confirm that there will, for various reasons, ultimately be no financial benefit to BCH in carrying out the development.

Legal principles

[5] The authority for the orders sought by the parties is set out in s 48 of the Act which at the time BCH acquired its interests in the properties relevantly provided:

> **48 Court may order person in breach to pay civil penalty**
>
> (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; …
>
> (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; …

[6] In the cases involving s 48 to date this Court has accepted that the method for determining a quantum of pecuniary penalties under the Commerce Act 1986 should be applied with any necessary modifications for the jurisdiction. In particular, criminal sentencing principles are used to fix an appropriate pecuniary penalty, including assessing the seriousness of the offending and relevant aggravating and mitigating

factors to determine a starting point, before considering matters specific to the defendant that may warrant an uplift or reduction from that starting point.

[7] In particular, in *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, Edwards J identified a number of factors that may provide guidance when fixing the quantum of pecuniary penalties,[1] as well as identifying a number of factors said to be relevant in the Commerce Act context in considering features specific to the offender.[2]

[8] Similarly, Lang J commented in *Chief Executive of Land Information New Zealand v Tang:*[3]

> Where penalties are agreed between the parties, as in the present case, 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.[4] The policy rationale behind this is to promote acknowledgement of wrongdoing and ensure that defendants who negotiate a resolution are not deterred by the fear that the Court will reject their proposed penalty because it does not "precisely coincide with the penalty the Court might have imposed".[5]
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> (Footnotes in original.)

Discussion and analysis

[9] The principal issue is whether, on the facts of this case, the principles set out above can be reconciled with the orders sought, given these represent the maximum penalty that this Court can order.

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1 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [31], citing Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at [16.47].

2 At [47].

3 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 (2018) 92 NZ CPR 460 at [19].

4 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [24], citing *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

5 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC)at [18].

Setting the starting point

[10] Having considered the submissions of the parties and relevant legal principles I am satisfied that the starting point for the civil penalties in this case is appropriately fixed at $300,000. In particular, the following matters are relevant:

(a) The penalty proposed encompasses two breaches of the Act; the acquisition of an equitable interest followed by the acquisition of a legal interest in the properties. Although these events occurred simultaneously the single penalty reflects the totality of the offending.

(b) The breaches involved the acquisition of two properties at a purchase price of $12,950,000.00, totalling almost 5 hectares. The properties were purchased for the purpose of carrying out a 117 lot residential development with a potential for significant commercial gain.

(c) While as noted there was no financial gain resulting from the breach it was nonetheless a significant commercial undertaking.

(d) Had BCH made a quantifiable gain on the acquisition and development of the properties the penalty would have been significantly higher than the maximum penalty available under s 48(2)(a) of the Act.

(e) Given the size, scope and nature of the development proposed BCH should have undertaken explicit enquiries as to its obligations under the Act.

(f) The present case is quite different to earlier cases under the Act.

Specific factors

[11] Both parties have identified a number of specific matters, both positive and negative, including the fact that some of those involved on behalf of BCH in this case were also involved in *Tang*; the size and resources of BCH; the level of cooperation provided by BCH; and the failure of BCH's legal advisors to alert BCH of its

obligations under the Act. Counsel are however agreed that none of these factors warrant either an uplift or reduction of the penalty. On the contrary, and in particular, counsel submit that in this case BCH has already received a tangible benefit for the cooperation provided. This benefit is demonstrated by LINZ allowing the development to be completed and not insisting upon the immediate disposal of the properties when the breach of the Act became apparent. Having had the opportunity to consider this I concur with that analysis and agree that there is no basis for adjusting the starting point for personal circumstances in this case.

Decision

[12] For the reasons set out above I therefore make the following orders as sought by the parties:

(a) BCH is to pay to LINZ within 20 working days of this judgment:

(i) a civil penalty of $300,000.00;

(ii) the account taker's costs of $260,282.68; and

(iii) scale costs on this proceeding on a 2B basis of $27,763.50.

(b) BCH is to divest to independent third parties its entire interest in the Albany Properties within two years of this judgment, with leave reserved to LINZ to seek further orders under s 47 of the Act if divestment has not occurred within that time.

Powell J