IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2023-404-653
[2024] NZHC 3010

BETWEEN	THE CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND Plaintiff
AND	ANDREW JAMES JARVIS First Defendant
	HEIDI MITCHELL SUSTAINABLE LTD Second Defendant
	WILLIAM DAVID MITCHELL Third Defendant
	AJN LAND LIMITED Fourth Defendant
	MARZIO KEILING Fifth Defendant

Hearing:	15 October 2024
Appearances:	K Mills and J T Lowyim for the plaintiff D Horton for the second and third defendants A Simkiss and J de Jongh for the fourth defendant
Judgment:	16 October 2024

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 16 October 2024 at 10.00 am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The second, third and fourth defendants (Heidi Mitchell Sustainable Ltd (**HMSL**), William Mitchell and AJN Land Ltd (**AJN**)) were involved in transactions that resulted in overseas investments in sensitive land without the consent required by the Overseas Investment Act 2005 (**the Act**). HMSL, with which Mr Mitchell was associated, acquired eight forestry blocks in the Gisborne area (**HMSL Properties**). AJN acquired one forestry block in Rodney, Auckland (**AJN Property**). The defendants have since sold some of the land at a profit.

[2] The Chief Executive of Land Information New Zealand is the regulator of the Act (**Regulator**). The Regulator sought orders that the remaining land be sold and that civil penalties be imposed on the defendants for their breaches of the Act.

[3] The defendants have accepted liability for their breaches and have engaged with the Regulator to reach an appropriate resolution. The parties seek orders that:

(a) HMSL pays a civil penalty in the sum of $972,805.99 in respect of its purchase and on-sale of two properties.

(b) HMSL disposes of the remaining HMSL Properties and pays a civil penalty in respect of those properties.

(c) Mr Mitchell pays a civil penalty of $82,500.

(d) Mr Mitchell and HMSL each pay $10,000 towards the Regulator's costs.

(e) AJN pays a civil penalty of $630,459.46 in respect of its acquisition of the AJN Property.

(f) AJN pays $15,000 towards the Regulator's costs.

Agreed facts

HMSL and Mr Mitchell

[4] Mr Mitchell is a businessperson and British citizen who is resident in Singapore. At all relevant times, he was an overseas person under s 7(2)(a) of the Act.

[5] In or around March 2011, Mr Mitchell expressed an interest in investing in forestry in New Zealand. He became aware that there were restrictions on overseas persons owning certain land in New Zealand, that those restrictions could be overcome by obtaining consent and that the consent process could take time and come at a cost to the applicant.

[6] In April 2021, Mr Mitchell had discussions with a real estate agent in New Zealand about potentially acquiring blocks of New Zealand forestry land. They discussed that consent under the Act could probably be "gotten around to some degree" and that if Mr Mitchell bought land through a New Zealand company he would look to take ownership of that company at a later stage.

[7] Mr Mitchell then contacted the first defendant, Andrew Jarvis, who is a partner at a law firm in Auckland.[1] Mr Mitchell sought Mr Jarvis's assistance with the proposed acquisitions of New Zealand forestry land.

[8] During the initial conversations with Mr Mitchell, Mr Jarvis discovered that Mr Mitchell was a resident of Singapore and was aiming to obtain a number of forestry blocks in New Zealand. They then discussed a potential acquisition structure whereby Mr Mitchell's ownership of the properties would be less than 20 per cent. There was also a discussion around how expensive it would be to obtain Overseas Investment Office (**OIO**) consent for each block.

[9] In April and May 2011, Mr Mitchell and Mr Jarvis discussed a structure in which a company would be incorporated in New Zealand to invest in forestry blocks. Mr Mitchell would own a minority of the shares, with a New Zealand citizen owning the majority. Mr Mitchell would lend money to the company to buy the

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1 The Regulator's claim against Mr Jarvis is the subject of a separate hearing.

forestry blocks, with the option to buy back the remaining shares at a nominal price at any time. Mr Mitchell would then "do a transfer of the whole lot" with a single application to the Regulator.

[10] Mr Mitchell procured the involvement of Kathryn Sanderson to act as the New Zealand shareholder. Ms Sanderson was a New Zealand citizen and was married to a friend of Mr Mitchell.

[11] Mr Jarvis determined that the share buy-back could be effected by way of a bare trust. He did not provide written advice in relation to the application of the Act to the forestry block purchases proposed by Mr Mitchell.

[12] HMSL was incorporated on 27 May 2011 with Mr Mitchell as its sole shareholder and director. On 30 May 2011, Mr Mitchell, on behalf of HMSL, entered into sale and purchase agreements for four forestry blocks in the Gisborne area (**the May 2011 Properties**). The blocks ranged from 6.2 hectares to 22.2 hectares. The May 2011 Properties were sensitive land under the Act.

[13] The sale and purchase agreements for the May 2011 Properties were not conditional on HMSL obtaining consent under the Act. HMSL therefore obtained an equitable interest in the May 2011 Properties upon the execution of the agreements.

[14] Mr Mitchell told Mr Jarvis that he had agreed with a New Zealand national to transfer 80 per cent of his shares in HMSL into her name prior to final settlement and that an agreement would be put in place so that Mr Mitchell could buy back 76 per cent of the shares "subject to government approval". Mr Mitchell instructed Mr Jarvis to draft an agreement to give effect to the buy-back right.

[15] On 22 June 2011, Mr Jarvis sent Mr Mitchell a draft document which purported to establish a bare trust (**Draft HMSL Deed**). This provided that Ms Sanderson would hold the shares in HMSL on trust for Mr Mitchell, transfer them to him at his request and vote in accordance with his instructions.

[16] On 27 June 2011, Mr Mitchell transferred 80 per cent of the shares in HMSL to Ms Sanderson and authorised a payment of $212,966 to complete the purchase of the May 2011 Properties. He sent an email to Ms Sanderson saying that he intended to purchase more forestry blocks and that once he had done so he would apply to the "government" for approval in order for Ms Sanderson's shares to be transferred back to him.

[17] In early July 2011, the legal title to the May 2011 Properties was transferred to HMSL. On 4 July 2011, on Mr Mitchell's instructions, Mr Jarvis sent the Draft HMSL Deed to Ms Sanderson. On 23 July 2011, Ms Sanderson executed the Draft HMSL Deed and the sale and purchase agreement for the shares in HMSL.

[18] Between August and November 2011, Mr Mitchell, on behalf of HMSL, entered into sale and purchase agreements for four forestry blocks in the Gisborne area (**the Further 2011 Properties**). The blocks ranged from 7.5 hectares to 24.3 hectares. The Further 2011 Properties were sensitive land under the Act.

[19] The sale and purchase agreements for the Further 2011 Properties were not conditional on HMSL obtaining consent under the Act. HMSL therefore obtained an equitable interest in the Further 2011 Properties upon the execution of the agreements.

[20] Mr Mitchell transferred funds from a personal account to apply to the purchase price of each of the Further 2011 Properties. The legal title to those properties was transferred to HMSL between 13 September 2011 and 5 December 2011.

[21] HMSL and Mr Mitchell did not, prior to acquiring legal or equitable interests in the HMSL Properties, obtain consent from the Regulator under the Act to make any overseas investment transaction in respect of any of the properties.

AJN

[22] Marzio Keiling is a businessperson and German citizen who is resident in Singapore. At all relevant times, he was an overseas person under the Act.

[23] On 20 June 2014, Mr Keiling emailed Mr Jarvis, saying he was a colleague of Mr Mitchell. Mr Keiling said he was interested in purchasing a New Zealand forestry property and wanted to "duplicate" Mr Mitchell's structure. Mr Keiling proposed that a company would buy the forestry property, with 80 per cent of the shares to be held by a New Zealander. Mr Keiling said he would lend the company the money to purchase the properties and once the purchase was complete, he would ask for "foreign land purchase approval" and convert the loan to shares, removing the New Zealand shareholder. Mr Keiling asked Mr Jarvis for legal advice about whether his proposal would work.

[24] On 24 June 2014, Mr Jarvis responded to Mr Keiling's email. He copied in an accountant and advised that the proposed structure be reviewed by an accountant to consider any tax issues.

[25] On 1 July 2024, Mr Keiling emailed Mr Jarvis. Among other things, he said he would need a legal opinion for the New Zealand shareholder stating that the structure and his role in it was not illegal. On 20 August 2014, Mr Keiling asked Mr Jarvis for advice on approval under the Act. At no time did Mr Jarvis say that the transaction was in breach of the Act or that there was any risk of breach.

[26] On 21 August 2014, Mr Keiling confirmed to Mr Jarvis that Dean Fergusson would be the New Zealand shareholder. On 28 August 2014, AJN was incorporated, with Mr Fergusson as the sole shareholder.

[27] On 6 October 2014, AJN entered into a sale and purchase agreement to purchase the AJN Property. The AJN Property was about 160.6 hectares and was sensitive land under the Act. The agreement was not contingent on the purchaser obtaining consent under the Act. Consequently, AJN acquired an equitable interest in the AJN Property upon execution of the sale and purchase agreement.

[28] On 14 October 2014, Mr Keiling and Mr Fergusson executed a deed of acknowledgement of trust and indemnity (**AJN Deed**). The AJN Deed provided that Mr Fergusson would hold all shares in AJN on trust for Mr Keiling and would act on any instructions from him.

[29] On 14 October 2014, Mr Keiling entered into a term loan agreement with AJN for $1,400,000 (**Loan Agreement**) as an advance for the purchase of the AJN Property. On 27 November 2014, the legal title to the AJN Property was transferred to AJN.

[30] AJN did not, prior to acquiring equitable or legal interests in the AJN Property, obtain consent from the Regulator to make any overseas investment transaction in respect of the AJN Property.

Statutory framework and the parties' admissions

[31] The Act regulates investment by overseas persons in New Zealand. Section 3 provides:

> **3 Purpose**
>
> (1) 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—
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> (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
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> (b) imposing conditions on those overseas investments.

[32] Under s 7(2), an "overseas person" is broadly defined. There is no dispute that the three defendants meet the definition.

[33] Section 10 provides that consent is required if a transaction will result in an overseas investment in sensitive land under s 12. There is no dispute that the properties acquired by the defendants met the definition of sensitive land and that consent was required. It is accepted that none of the defendants complied with that requirement.

[34] Section 42 provides that it is an offence for an overseas person to give effect to an overseas investment without the consent required by the Act. HMSL and AJN, having acquired the properties without the consent, admit that they breached s 42.

[35] Under s 43, it is an offence to knowingly or recklessly enter into a transaction that defeats, evades or circumvents the operation of the Act. Mr Mitchell admits liability for breach of s 43.

Orders sought by the Regulator and agreed to by the parties

[36] Under s 47, the Court may, if satisfied a person has contravened the Act, order the disposal of property. HMSL has already sold some of the properties that it acquired. HMSL agrees to an order that it dispose of its remaining properties. AJN has already disposed of the property that it acquired.

[37] Under s 48 of the Act, the Court may order a person in breach of the Act to pay a civil penalty. The parties agree that HMSL, Mr Mitchell and AJN should pay civil penalties under s 48. They have agreed on the amount of the civil penalties, except that the amount of the penalty in respect of the properties that HMSL has not yet disposed of will have to be determined once those properties are sold.

Approach to fixing penalties

[38] Deterrence is the primary purpose of penalties imposed under the Act.[2]

[39] Where parties have agreed on the proposed penalties, the Court is not required to embark on its own enquiry as to an appropriate penalty figure. Rather, the Court need only consider whether the proposed penalties are within the proper range.[3]

[40] In order to determine whether the proposed penalty is appropriate under s 48 of the Act, the Courts have adopted the method for determining the quantum of pecuniary penalties imposed under s 80 of the Commerce Act 1986. In particular, it has followed the criminal sentencing approach, which involves:[4]

(a) identifying the maximum penalty available;

(b) identifying the aggravating or mitigating factors of the contravening conduct to determine an appropriate starting point; and

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2 *Chief Executive of Land Information New Zealand v Trinity Green Estate Partnership* [2023] NZHC 2330 at [11].

3 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [19].

4 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [26]–[27]; *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [14]–[16]; *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561 at [19].

(c) adjusting the starting point in light of those factors specific to the defendant that warrant an uplift or reduction from the starting point.

[41] The cases determined under s 48 also recognize that there is a considerable public benefit in defendants admitting to their wrongdoing, which helps to prevent lengthy and expensive litigation. The Court also plays a key role in encouraging resolutions by accepting penalties that fall within a proper range. This approach is important because if the Court insists that the proposed penalty must coincide precisely with the penalty that it would have imposed, the Court might risk discouraging defendants from pursuing negotiated settlements.[5]

[42] In *Chief Executive of Land Information New Zealand v Carbon Conscious NZ Ltd,* Edwards J identified the following factors that may provide guidance in setting the starting point:[6]

(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, negligent, or inadvertent;

(e) the level of civil pecuniary penalties that have been imposed in previous similar situations; and

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

[43] In respect of the features specific to the offender, Edwards J drew on factors said to be relevant in the Commerce Act context:[7]

(a) any previous misconduct of a similar nature by the defendant;

(b) the size of the defendant;

(c) any co-operation with the authorities;

(d) any admission of liability; and

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5 *Chief Executive of Land Information New Zealand v Clevedon-Kawakawa Road Ltd* [2021] NZHC 1831 at [28].

6 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558 at [31].

7 At [47].

(e) any compliance programmes put in place by the defendant.

Maximum penalties

[44] Under s 48(2) of the Act (as it stood at the time of the defendants' breaches of the Act), the relevant maximum civil penalty that may be imposed must not exceed the higher of:

(a) $300,000;

(b) the amount of any quantifiable gain;

(c) the cost of remedying the breach of condition; or

(d) the loss suffered by a person in relation to a breach of condition.

HMSL

Maximum penalty

[45] The parties accept that HMSL has made a net quantifiable gain of $1,144,477.63 in respect of two of the properties (which are together known as Pine Farm 25). This amount is the difference between the purchase price paid by HMSL and the sale price HMSL received, plus the value of emissions trading scheme credits that were earned, less tax and actual and reasonable costs.

[46] The parties have also agreed that HMSL will dispose of the remaining HMSL Properties and disgorge the as-yet unknown quantifiable gain through the imposition of a civil penalty. They have also agreed a formula for how that civil penalty should be calculated, and have agreed to adjourn determination of that penalty.

Starting point: Pine Farm 25

[47] HMSL made a net quantifiable gain of $1,144,477.63 on the sale of Pine Farm 25. The parties suggest that the appropriate starting point is the full disgorgement of HMSL's gain.

[48] In *Chief Executive of Land Information New Zealand v Tang*, an overseas investment was made without consent under the Act. The second to fourth defendants made a net quantifiable gain on the resale of the property of about $269,000 each. Lang J adopted a starting point of $270,000.[8]

[49] Similarly, in *Chief Executive of Land Information New Zealand v Hong*, one of the defendants made a quantifiable gain of $2,747,360 on the resale of the farm. Woolford J held that the importance of deterrence meant that an appropriate starting point was the full disgorgement of the defendant's net quantifiable gain.[9]

[50] In *Chief Executive of Land Information New Zealand v Lee*, the defendant made a quantifiable gain of $350,000 for one property and $750,000 for the other property. Starting points of $350,000 and $750,000 were considered appropriate.[10]

[51] Considering the importance of deterrence and in line with the previous cases decided under the provision, I consider the appropriate starting point is the full disgorgement of the net quantifiable gain.

Adjustment to reflect factors personal to HMSL

[52] The Regulator does not seek any uplift for any aggravating factors personal to HMSL.

[53] The parties suggest a 15 per cent reduction is appropriate for mitigating factors personal to HMSL. They say that HMSL was poorly served by its former legal advisor, though it is accepted that HMSL acted recklessly. I consider that these are not mitigating factors personal to HMSL. Rather, they are factors that go to the seriousness of the breach and therefore the starting point.

[54] The parties do, however, identify other mitigating factors. HMSL co-operated with the Regulator and has admitted liability and agreed to pay a penalty. These warrant the proposed 15 per cent reduction.

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8 *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 at [31].
9 *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561 at [34].
10 *Chief Executive of Land Information New Zealand v Lee* [2021] NZHC 1214 at [45].

End penalty: Pine Farm 25

[55] Applying a 15 per cent reduction to HMSL's net gain of $1,144,477.63 results in a final penalty of $972,805.99.

Penalty in respect of other properties

[56] The parties have agreed a formula for how the civil penalty should be calculated in respect of HMSL's breaches relating to the properties that have yet to be sold. They propose this formula:

(a) The sale prices for the properties (land and trees).

(b) Plus the value of any emission trading scheme credits earned through ownership of the land and/or trees.

(c) Less the net income tax owed on the sale price of the land and trees, if any, which is to be paid directly to Inland Revenue.

(d) Less the actual and reasonable costs associated with the trees and costs claimed in relation to the land.

(e) Less the purchase price for the land and trees.

(f) Less 15 per cent for all mitigating factors personal to HMSL.

[57] They also agree that in the event this formula produces no quantifiable gain, or one less than the maximum penalty of $300,000, the Regulator should have leave to bring the matter back before the Court for HMSL to instead pay a penalty of up to $300,000.

[58] In their written submissions the parties proposed that the Court make orders for a civil penalty in accordance with the above formula, subject to leave being granted to the Regulator as stated. At the hearing I suggested that the Court could not impose a civil penalty by reference to a formula. The parties agreed, therefore, that determination of the civil penalty for HMSL's breaches in respect of the remaining

properties be adjourned for twelve months (it being anticipated that the sale process could take some time).

Mr Mitchell

Maximum penalty

[59] Mr Mitchell has not personally received any quantifiable gain in respect of the HMSL properties. The maximum penalty available for Mr Mitchell is therefore $300,000.

Starting point

[60] The parties agree that the nature and extent of Mr Mitchell's breach of the Act was moderately serious. About 111 hectares of sensitive land were alienated. While the purchase prices of the HMSL Properties were comparatively modest (totalling $626,350), the properties were obtained for commercial purposes. Mr Mitchell's conduct enabled HMSL to gain both quantifiable and non-quantifiable benefit by acquiring an interest in the properties without obtaining consent, and without being subject to any conditions that might have been enforced under such consent.

[61] The Regulator accepts that Mr Mitchell was poorly served by his lawyer and was not advised of the need to obtain consent under the Act before giving effect to the overseas investment. On the other hand, Mr Mitchell accepts he acted recklessly by acquiring the properties through HMSL in circumstances where he knew he was not permitted to buy them in his personal capacity.

[62] In *Chief Executive of Land Information New Zealand v Hong*, Woolford J adopted a starting point range of $200,000–220,000 for the defendants' deliberate breach of the Act. The defendants had proceeded with a transaction without obtaining consent after they had become aware of their obligations under the Act.[11] In *Chief Executive of Land Information New Zealand v HK Search Ltd*, a starting point range of $120,000–150,000 was adopted as the defendant's conduct was reckless rather than

[11] *Chief Executive of Land Information New Zealand v Hong* [2019] NZHC 1561 at [28].

deliberate. Fitzgerald J also noted there was no gain on the defendant's part and the value of the property was not as significant or valuable as in other comparative cases.[12]

[63] The parties agree, as do I, that the starting point for Mr Mitchell should be less than in both *Hong* and *HK Search* as his breach was less serious than that of the defendants in those two cases. Mr Mitchell's breach was reckless rather than deliberate as in *Hong*. His breach was also less serious than in *HK Search*, where the defendant had received legal advice confirming that his scheme was unlawful.

[64] The parties propose a starting point of $100,000–120,000. Given that Mr Mitchell's breach was moderately serious, and in light of the comparison cases, I consider that starting point is within the proper range.

Adjustment to reflect factors personal to Mr Mitchell

[65] The Regulator does not seek an uplift for aggravating factors personal to Mr Mitchell.

[66] Mr Mitchell has cooperated with the Regulator, admitted liability and agreed to pay a penalty. He has agreed to arrange for HMSL to dispose of the remaining properties. The parties submit that a reduction of 25 per cent is appropriate. I am satisfied that the extent of Mr Mitchell's cooperation is such that a 25 per cent reduction is appropriate.

End penalty

[67] Adopting a 25 per cent reduction to the middle of the starting point range results in a penalty of $82,500 for Mr Mitchell.

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12 *Chief Executive of Land Information New Zealand v HK Search Ltd* [2022] NZHC 444 at [94].

AJN

Maximum penalty

[68] AJN has already disposed of the AJN Property. The parties agree that AJN made a net quantifiable gain of $630,459.46 on the AJN Property. That is the maximum penalty available.

Starting point

[69] The parties suggest that the appropriate starting point is the full disgorgement of AJN's net quantifiable gain. In light of the cases highlighted above for HMSL's starting point, and given the importance of deterrence, I consider this to be appropriate.

Adjustment to reflect factors personal to AJN

[70] The Regulator does not seek an uplift for any aggravating factors personal to AJN. Despite AJN's evident cooperation with the Regulator, AJN does not seek any reduction for mitigating factors personal to AJN.

End penalty

[71] The parties agree that an end penalty of $630,459.46 should be imposed. In the circumstances I consider that is within the proper range.

Costs orders

[72] HMSL and Mr Mitchell have agreed to pay $10,000 each to the Regulator as a contribution to its costs. AJN has also agreed to pay $15,000 to the Regulator as a contribution to its costs. Accordingly, I make costs orders in these amounts below, but no other costs orders. I was told that the defendants have satisfied these costs obligations already.

Result

[73] I order:

(a) HMSL to pay a civil penalty of $972,805.99 for its breaches in respect of Pine Farm 25.

(b) HMSL to dispose of the remaining HMSL Properties.

(c) Mr Mitchell to pay a civil penalty of $82,500.

(d) Mr Mitchell and HMSL to each pay $10,000 towards the Regulator's costs.

(e) AJN to pay a civil penalty of $630,459.46.

(f) AJN to pay $15,000 towards the Regulator's costs.

[74] I adjourn determination of the civil penalty for HMSL's breaches in respect of the remaining HMSL properties to the Duty Judge List at 10 am on 16 October 2025.

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Campbell J