IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-009829
[2020] NZDC 12235

OVERSEAS INVESTMENT AGENCY
Prosecutor

v

JAEHO CHOI
Defendant

Hearing: 25 June 2020

Appearances: S Lowery for the Prosecutor
H Waalkens QC for the Defendant

Judgment: 25 June 2020

NOTES OF JUDGE A-M J BOUCHIER ON SENTENCING

---

[1] The defendant, Dr Choi, faces a prosecution pursuant to the Overseas Investment Office (OIO) as prosecutor. He has pleaded guilty to one charge of obstructing the exercise of power under s 44(1) Overseas Investment Act 2005 (OIA). This is clearly a matter which Parliament intends to be taken seriously given that the maximum penalty available to the Court is a period of imprisonment of up to 12 months or a fine not exceeding $300,000.

[2] The offending arises, as is set out, from the efforts of Dr Choi, a solicitor, and his client, Dr Hur, to obstruct the Office during its investigation into the acquisition of sensitive land in breach of the Overseas Investment Act. What that involved as set is:

1. Lying to the Overseas Investment Office in a letter saying that Dr Hur was not the beneficial owner of the property when he was; an

2. Creating false loan documentation to support the untruthful version of events and providing it to the OIO.

[3] Dr Hur, the co-offender, has pleaded guilty to his role in the conduct of this and has been sentenced. A $100,000 fine was imposed on 7 February.

[4] What the prosecutor submits is that Dr Choi's culpability is higher and the breach of his obligations as a solicitor is a significant aggravating factor. They then set out a suggested starting point, around six months' imprisonment or a fine of between $180,000 to $200,000, combined with a community-based sentence.

[5] Discounts then are discussed. It is submitted by the prosecutor that 15 percent to 20 percent may be available for mitigating factors personal to the defendant and the standard early guilty plea discount of 25 percent. A community-based sentence may be the least restrictive outcome plus a robust fine. If there were to be a community-based sentence a fine of between $110,000 and $130,000 should be imposed.

[6] The facts are then expanded in the prosecutor's submissions and the full facts have been annexed to the prosecutor's submissions as tab 1. What is clear from that is that Dr Choi, a Korean citizen with New Zealand permanent residence, is a lawyer and practices here. He was approached by Dr Hur whom he has acted for in the past. Dr Hur found difficulty trying to buy a lifestyle block in Helensville and sought Dr Choi's assistance. Dr Hur had entered into an unconditional sale and purchase agreement. He had agreed to buy this property for some $3 million. It was sensitive land and he required consent which he did not have.

[7] His lawyer at that time referred him for specialist legal advice. He got advice and his only option to avoid further breaches was to cancel the sale. Instead of doing that he went to Dr Choi. Then what has been described briefly, earlier, occurred, with the lying to the Overseas Investment Office in a letter and creating the false loan documentation.

[8] Therefore, what the prosecution submit is in coming to a starting point what the Court needs to do, as per usual, is looking at the aggravating and mitigating features of the offending and then the aggravating and mitigating features of the offender.

[9] The prosecutor submits that firstly the aggravating features of the offending are a degree of wilfulness because it was a deliberate attempt to deceive and conceal the unlawful property transaction. Secondly, an abuse of his position as a solicitor, knowing of course that lying to a regulator was wrong. Next, the element of premeditation. The prosecutor submits that that was reasonably significant.

[10] I paraphrase there because they have set out (a) to (f) in their submission what amounts to the premeditation. When they began to investigate Dr Choi started using a gmail account to avoid scrutiny by the OIO and advised Dr Hur to delete their email correspondence. They exchanged multiple drafts of the false loan agreement providing comments and revised versions by email. Amendments were made to the draft by hand and returned by mail. A suggestion that the loan agreement was amended to insert a provision that Mrs Choi was required to re-pay at least 20 percent of the principal within three months to make it seem credible. The final version of the loan was transcribed by Dr Hur by hand and sent to Auckland by mail for counter-signing. Dr Choi prepared a covering letter to OIO along with the false document which contained the false narrative that Dr Hur was not the beneficial owner of the property.

[11] The next aggravate feature which the prosecution submit is that there is some degree of sophistication although they do agree that it was relatively unsophisticated. It involved fabrication of a single document and lies in a letter. Then the case of *Overseas Investment Office v Hur*, the co-defendant, they say is the most helpful and that is the only other case sentence under s 44 Overseas Investment Act.

[12] There Judge David Sharp sentenced Dr Hur to a fine of $100,000 following a sentence indication acceptance. That was part of a starting point of three months' imprisonment together with a financial penalty of $150,000. However, the prospect of imprisonment was set aside, there was a $150,000 start point, there was discount

for mitigating features and then upped again to reflect that community work would not be ordered, coming out at $100,000.

[13] Then authorities relating to obstruction under other statutes are referred to. In the case of *R v Churchward* that referred to Crimes Act 1961 obstruction and although it is submitted that Crimes Act offences carry a significantly higher maximum sentence the sentiment which is set out in that particular case by the Court of Appeal is readily applicable to other such cases.[1]

[14] There is then the case of *WorkSafe v Gerritson*[2] which is referred to. That is a situation where WorkSafe was investigating the collapse of an inflatable slide at an A & P Show. The investigation was thwarted by Mr Gerritson who failed to provide information requested by them and ignored numerous attempts by the inspector. The Court adopted a starting point of $115,000. That was the end fine because no discounts were available. Then a further case of *Maritime New Zealand v Balomaga*.[3] This related to the well known case of the vessel Rena which grounded off Tauranga. There was a charge there of attempting to defeat the course of justice and there an end sentence was one of imprisonment.

[15] Then there is the case of *R v Briggs*[4] which is a Serious Fraud Office investigation in to a kick-back scheme where at trial a person was convicted of obstruction but acquitted of being part of the kick-back conspiracy. Community detention and community work was imposed. Then there were a number of cases regarding dishonesty by lawyers. As I have noted to counsel I know quite a few of them, Mr Hustler, who was at university at the same time as I was, was referred to, where it is stated a barrister and solicitor is under a special responsibility of the public to conduct himself is to promote respect for the law and confidence in the integrity of the justice system, all of which is the case.

---

[1] *R v Churchward* CA439/05, 2 March 2006.
[2] *WorkSafe v Gerritson* [2015] NZDC 25825.
[3] *Maritime New Zealand v Balomaga* DC Tauranga CRI-2011-070-7734, 25 May 2012.
[4] *R v Briggs* DC Auckland CRI-2008-004-19028, 26 August 2011.

[16] Then the prosecution have gone through a number of other cases where very similar points were enunciated by the sentencing Judges and of course what they have said are important and principles that this Court needs to take account of.

[17] Then looking at an appropriate starting point the Overseas Investment Office has submitted that approximately six months' imprisonment or a fine, as they say, of between $180,000 and $200,000 combined with a community-based sanction. They have included home detention, community detention or community work. I say at the start, so I will not have to deal with it any further, that the factors in this particular case do not, in my view, mean that any sentence of imprisonment is going to be contemplated by this Court.

[18] The prosecution then go on to their submissions regarding the start point here and submit that the start point for the fine needs to be sterner than those adopted for Dr Hur due to the fact Dr Choi's culpability is higher than Dr Hur's and arising through his role as a solicitor. They submit also that the start point of a $150,000 fine adopted for Dr Hur was lenient and they submit that in Dr Choi's case that a fine only approach would adequately address the need for denunciation and deterrence.

[19] Looking at factors personal to the defendant they acknowledge mitigating factors being present as the impact on his career and standing in the community, his previous good character and co-operation with the investigation and guilty plea. They submit that discounts of 15 percent to 20 percent are available to the Court and appropriate to reflect the first three factors and 25 percent for the guilty plea.

[20] Therefore, looking at the conclusion of the submissions and the fine start point together with the community-based sentence, they note that Dr Hur received a discount of some 20 percent in the fine levied on him due to his coming back to New Zealand to face the charges. The Court, they acknowledge, needs to consider the person's ability to pay.

[21] The submissions of the defence differ somewhat to those of the prosecution, they note that first of all Dr Choi is a first-time offender. They then refer to the summary of facts noting as it does at paragraph 36 of the summary of facts that

Dr Choi was out of his depth, lacked the requisite expertise in Overseas Investment Act matters and a matter which they emphasised significantly was a complete lack of benefit or ulterior gain for Dr Choi and unlike the client he has nothing whatsoever to gain from his offending and much to lose. His fee of $3000 was minimal and what he was doing at all times, as has been accepted, was simply attempting to assist the client.

[22] What he did in obstructing the Overseas Investment Office from the outset, after his conduct, he has accepted his errors and fully co-operated with the investigation, provided two voluntary interviews, was candid and co-operative, entered his guilty plea at the very earliest opportunity. It is completely out of character that he has offended in this way and then there are some 18 references supplied to the Court which clearly indicate, on reading them, that he has been a substantial contributor to his community and in particular the Korean community in Auckland, and has built a reputation as a man of high integrity and honour and that as a lawyer he has otherwise served the community diligently, competently and honestly.

[23] The defence submit that the offending is somewhat of a paradox because on the one hand Dr Choi did gain nothing but this has also then brought about for him a substantial fall from grace. The client was a bona fide client, not a personal friend of Dr Choi and the defence highlight the acceptance that it was not a particularly sophisticated form of offending here. Then the defence look at what he has suffered to date and submit that he has already suffered immeasurably as a direct consequence of his conduct, humiliation of appearance in Court and prior publicity.

[24] He has never sought name suppression and some of the cases which have been referred to by the prosecution regarding lawyers, unlike some of them he had nothing to gain. He will have a further blaze, the defence say, of publicity to face and he is to be the subject of disciplinary action by the Law Society. Presently it is before the Standards Committee and it may go higher up. The reputational harm is significant in the defence submission. Also, there are further civil proceedings in the High Court and the civil proceedings are seeking a penalty well in excess of $100,000 plus a contribution towards enforcement costs.

[25] His financial means have been set out clearly in the submissions and those financial means incorporate both his personal income and his wife's. He has incurred significant legal costs in this matter and all of this has had a crippling effect on his financial situation.

[26] The defence submit that the cases which have been cited to the Court for other obstruction offences are significantly more serious than this particular case before this Court now and the case of *Churchward* had more serious obstruction with attempts to pervert the course of justice. Then looking at other regulatory offences, at paragraph 29 the defence has set out what the maximum penalty for individuals is under anti-money laundering, Serious Fraud Office and FMA prosecutions.

[27] The case of *WorkSafe v Gerritson* is also distinguished by the defence in that this involved a situation where a fall on a slide caused the people who were on the slide, being children, to be injured, that Gerritson had some 22 previous convictions, many of them for non-co-operation, and exhibited no remorse. The case of *Briggs*, that in the defence submission was also more serious offending than that of Dr Choi's.

[28] Regarding the cases of lawyers again it has been mentioned by the defence, many of them undertook criminal activity for personal gain or advancement. The Courts should properly consider, in the defence submission, as mitigating factors the distinguished career and fall from grace, for example *R v Davidson*.[5]

[29] Coming to the discussion of where an appropriate sentence might fall the defence submit that Dr Choi's offending is not more serious than Dr Hur's because he had no benefit to gain and the utilising of third party nominee was that of Dr Hur and his wife, not Dr Choi himself. The features of the false loan agreement and steps to avoid detection, the defence submit are not really aggravating factors but ingredients of the offence in the first instance.

[30] So they submit that Dr Choi's offending was substantially less serious than the other cases quoted, not for personal gain, he is still facing disciplinary action, Dr Hur faced no financial challenges but Dr Choi does and therefore the appropriate sentence

[5] *R v Davidson* HC Auckland CRI-2008-004-29179, 7 October 2011.

must be calculated with reference to those points. The defence do not accept that $150,000, being the start point for Dr Hur, was lenient and given that in their submission this defendant's conduct is less serious therefore the start point should be less. They submit $100,000 would be appropriate and a then guilty plea discount and then personal factors discount.

[31] For personal factors the defence submit that at least 30 percent is appropriate given that he has undertaken a very substantial fall from grace, prior good character, co-operation so that this renders 30 percent to be appropriate and not what is submitted by the prosecution. His financial circumstances mean that he will have to borrow. It has been emphasised in oral submissions that he will be doing that.

[32] So in terms of aggravating features of the offending, because there are no mitigating features, what I accept as being aggravating features are that there is a deliberate attempt to deceive Overseas Investment Office, it was an abuse of his position as a solicitor, it did have premeditation and it was not particularly sophisticated.

[33] In terms of mitigating factors for the defendant I again accept these as being the mitigating factors, the substantial fall from grace and good character, co-operation and I have to take into account his financial circumstances, so I then have considered the fines which have been submitted by both the prosecutor and the defence. I do not necessarily consider that Dr Hur and Dr Choi can be treated equally although there needs to be some comparison between them and some congruence between their fines.

[34] However, having accepted that Dr Choi was not going to be the one who benefited from this, but Dr Hur was, I am of the view that I can differentiate between the two of them in particular because of that factor. Therefore, I do not accept the prosecution submission that the $150,000 start for Dr Hur was lenient. First of all, as I have already said, I do not consider imprisonment is appropriate at all here and I have put that to one side already. I have considered whether there ought to be a fine plus a community-based sentence.

[35] One of the reasons that I have put that in particular to defence counsel was whether the defendant's personal financial circumstances would have meant that a combination of two sentences may be more workable in his situation recognising also the factors in the Sentencing Act 2006 that the Court must take into account denunciation and deterrence and taking these offences seriously as I have already commented upon earlier in these remarks. The least restrictive outcome and rehabilitation and reintegration are also factors that the Court must of course take into account.

[36] Therefore, I am of the view that balancing out all those factors a start point of $140,000 fine only is appropriate. I do not consider, having received the submissions of the defence, that the addition of a community-based penalty is appropriate. I then apply the following discounts, first of all the 25 percent which is the standard early guilty plea discount, then considering the factors the Court has agreed as being the mitigating features of the defendant. I am satisfied that a 30 percent discount can be added to that which takes us down to $60,250 by way of fine. That is the fine which is so imposed and Court costs of $130.

A-M J Bouchier
District Court Judge