IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-002446
[2017] NZDC 12793

FINANCIAL MARKETS AUTHORITY
Prosecutor

v

JEFFREY PETER HONEY
Defendant

Hearing: 13 June 2017

Appearances: N Williams for the Prosecutor
P Wicks QC for the Defendant

Judgment: 13 June 2017

NOTES OF JUDGE H M TAUMAUNU ON SENTENCING

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[1] Jeffrey Honey you appear for sentence now on one charge of insider conduct under ss 243(1)(a) and 244 Financial Markets Conduct Act 2013. You have pleaded guilty to a charge and you accept that as an information insider of a listed issuer, namely Eroad, you advised or encouraged Mr Y (name suppression) to trade Eroad shares, knowing that the information was material information that was not generally available to the market. The offence is described as a tipping offence as opposed to the act of insider trading. The maximum penalty for this offence is five years' imprisonment and/or a $500,000 fine or both.

[2] You have applied through counsel, Mr Wicks, for a discharge without conviction pursuant to s 106 Sentencing Act 2002. A sentencing Judge has a discretion under s 106(1) of that Act to discharge without conviction a person who has been found guilty or has pleaded guilty to an offence. This discretion must be exercised on a principled basis under a two staged enquiry. The first stage of the

enquiry concerns the jurisdictional test on disproportionality set out in s 107. It is an evaluative stage requiring the Judge to consider the gravity of the offence, the direct and indirect consequences of a conviction and whether those consequences are out of all proportion to the gravity of the offence. The second stage of the enquiry is engaged only if the Judge is satisfied that the jurisdictional threshold in s 107 has been met. Only then may the Judge consider exercising the residual discretion to discharge without conviction under s 106.

[3] A far as the first step in the first stage is concerned, the Court must first assess the gravity of the offending. When considering the gravity of the offending under this step, a fact specific assessment of the particular circumstances is required. The Court assesses the gravity of the offending by considering the nature and circumstances of the offending, the aggravating and mitigating factors relevant to the offending and in this regard the injuries suffered by the identified victim is relevant, whether the offending was an isolated incident, the age and maturity of the offender. As well as that, aggravating and mitigating circumstances that are personal to the offender are considered at this stage. This also requires consideration as to whether or not there are prior or indeed subsequent convictions and also consideration of relevant matters that have occurred after the offending and prior to sentencing can be taken into account. This can include consideration of guilty pleas, expressions of remorse and the Court's assessment of how likely it is that the offender will re-offend.

[4] For the purposes of sentencing today, an amended summary of facts has been filed. It is a lengthy summary, however there is no real way of avoiding going through this summary in detail because of the way that the test has to be applied as I have described. Eroad is a New Zealand limited liability company operating a transport technology business in New Zealand, Australia and the United States. It provides an electronic solution to manage and pay road user charges and it offers web based value added services. Eroad listed on the NZX through an initial public offering on 15 August 2014. At the relevant time, the defendant Jeffrey Honey was employed as an insights and analytics manager at Eroad. He began working at Eroad on 13 October 2014 [redacted]

[redacted]

[redacted] Mr Honey is no longer employed at Eroad.

[5] Mr Honey faces one charge of insider conduct by advising or encouraging another person to trade quoted financial products of a listed issuer. [redacted]

[redacted] Mr Y faces one charge of insider conduct by trading in quoted financial products of a listed issuer but to be clear, Mr Y is not appearing before this Court today for sentence, only Mr Honey is.

[6] Eroad's investment strategy for its IPO indicated funds raised were to be applied to support Eroad's growth strategy which involved growing existing markets and expanding its US operations from Oregon into the wider North American market. At the time of listing, Eroad advised that it entered the US market by establishing presence in Oregon in April 2014 and that the Oregon market was approximately six times the size of the New Zealand market.

[7] The investment statement made a number of comments indicating the importance of the US market to Eroad's expansion plans and advised that it intended to grow its US sales from 166 units as at 30 June 2014 to 2957 units as at 31 March 2015 and then to 12,440 as at 31 March 2016. The investment statement also advised that Eroad's ability to attract new customers and retain current customers was a key revenue driver for the company and that failure to achieve meaningful market position in Oregon could adversely affect Eroad's ability to successfully expand into other markets.

[8] Page 41 of the investment statement under the heading "What are my risks" recorded:

> "Expansion into North America and other jurisdictions. Eroad believes its expansion into Oregon and to other jurisdictions represents a significant risk

> to the business. Eroad began commercial operations in Oregon in April 2014 after a successful pilot period and whilst initial indications had been positive, take up of Eroad's products and services could be materially lower than we expect. Failure to achieve a meaningful market position in Oregon may also adversely affect Eroad's ability to successfully expand into other jurisdictions."

[9] In his role at Eroad, Mr Honey had access to internal dashboard reports that were created to show operational metrics for the company such as the number of sales in the various markets in which Eroad operated. Dashboards were prepared by Eroad for internal management purposes only. The dashboard's purpose was to extract data from the customer relationship and management system used by Eroad to track sales made to customers to graphically present Eroad's sales based information consistently. Dashboards were emailed to senior staff at Eroad on a weekly basis or on request to Mr Honey. Dashboards were also made available to selected staff at Eroad via web browser with the user name and password. Mr Honey provided the access details to those selected Eroad staff. At the relevant time the log in and password details for senior management were changed every two months. Mr Honey knew that these protections were in place to keep the information confidential and to stop people from accessing it.

[10] In particular, around September 2015, Mr Honey created a dashboard entitled "US sales executive summary." The information in the dashboard concerned Eroad's US operations, particularly its performance in the US market. The dashboard was confidential and was not generally available to the market. Prior to Eroad's IPO, Eroad held a training session for all staff providing them with information on its securities trading policy and guidelines. A video of the training session was supplied to both defendants, including Mr Honey.

[11] Mr Y attended an executive team strategy meeting on 8 July 2014 where its external solicitors explained the proposed securities trading policy. In late July 2015, each Eroad employee was provided with an Eroad handbook. The handbook expressly referred to Eroad's code of ethics and securities trading policy and requested staff to familiarise themselves with them. During induction an HR representative of Eroad also showed staff where to access Eroad's policies on the Eroad intranet. A copy of the handbook was attached to the summary. Eroad's

securities trading policy and guidelines was also attached to the summary, that document states that insider trading is not only contrary to Eroad company policy but also that it is illegal. It is stated as a fundamental rule that if you possess material information you must not advise or encourage others to trade or pass on material information to others including colleagues and friends. It also explained what amounted to material information including Eroad's financial performance.

[12] Eroad also required all staff to complete an online training module. The module included a test for each employee on their understanding of the restrictions applying to trading Eroad shares.

[13] On 14 September 2015 the CEO of Eroad sent an all staff email including to Mr Honey entitled "Important notice. Eroad's next share trade blackout period and consent to trade." The email included an instruction for all staff to refamiliarise themselves with Eroad's securities trading policy with a PDF version of the policy attached. The email outlined that there would be a blackout period for trading Eroad shares from 30 September 2015 to 26 November 2015 and that if any employee wished to trade Eroad shares at any time they must obtain CEO approval first.

[14] The email stated:

> "Blackout periods apply at these times because there is a heightened risk that Eroaders will be in possession of material information that is likely to affect Eroad's share price once released. If you trade in a blackout period and the share price subsequently moves, the perception is that you traded on the basis of information which you had as an Eroader but which was not yet public."

[15] The email attached a legal pack prepared by Eroad's solicitors that included information on Eroad's securities trading policy, blackout periods and continuous disclosure and directed Eroad staff to refamiliarise themselves with the contents of the legal pack and securities trading policy.

[16] The legal pack was in the form of a PowerPoint document entitled "Eroad is a listed business, the legal bits" and included a slide on continuous disclosure that stated:

> "Key message, Eroaders need to manage the internal flow of information and make sure Eroad releases information which could affect the price of Eroad shares through NZX first and then to customers, suppliers and key stake holders second."

[17] The email and its attachments are also annexed to the summary of facts. Eroad then displayed posters around the office during the blackout period, warning staff not to trade.

[18] On 22 September 2015 at 9.57 am Mr Honey sent Mr Y, by text message, a photograph of the internal and confident Eroad dashboard showing the financial performance in the US market, accompanied by a text message which read, "US sales not doing too well," spelled W-'-L-L. "Time to sell up, confidential obviously." Mr Y replied at 9.59 am, "You're a bad boy but thanks." A minute later Mr Y texted Mr Honey and stated, "Was going to sell down significantly anyway." Two days later at 10.53 am, Mr Y sold 15,000 Eroad shares at $3.41 in a single on market trade under his personal common shareholder number for a total consideration of $51,150.

[19] On Monday 28 September 2015 Eroad released an announcement via the NZX titled "Eroad signals lower FY16 results from accelerated US expansion." The announcement is also annexed to the summary of facts. The NZX flagged the announcement as price sensitive. In the announcement, Eroad advised that due to a decision to expand more quickly in states beyond Oregon, there would be lower sales in the short term and higher costs. Therefore net profit before tax was forecast to be 0.5 million for the year end 31 March 2016 compared to the previous forecast of 5.3 million. The information contained within the dashboard was released as part of the announcement. On the day of the announcement Eroad shares ended the day at $2.98, a fall of 10.2 percent from the share price prior to the announcement. The price continued to fall over the remainder of the trading week, closing on Friday 2 October 2015 at 2$2.60. This represented at 21.7 percent decrease since the 28 September announcement. On 1 October 2015 at 10.19 am Mr Honey sent a picture to Mr Y of Eroad's share price following the announcement, then a text stating, "I hope you sold." At 10.22 am Mr Y replied, "Yep, I sold as much as I could but still have lots left. Not many buyers out there." On 19 November 2015

the FMA received a referral from NZX market surveillance under s 358 Financial Markets Conduct Act regarding Mr Y's trading on 22 September 2015.

[20] On 5 May 2016 the FMA made a confidentiality order under s 44 Financial Markets Authority Act in relation to its investigation into trading in Eroad shares. The order stated:

> "This order prohibits the publication, communication, disclosure or sharing by anyone of any information, document or evidence that is provided or obtained by the FMA in connection with the investigation. This prohibition shall have effect from the date of this order until the end of the FMAs investigation into trading in ERD shares."

[21] A key purpose of a confidentiality order is to preserve the integrity of an FMA investigation and in particular the integrity of the interview process so that the evidence of interviewees is not contaminated from prior discussions with other potential witnesses.

[22] A key purpose of a confidentiality order is to preserve the integrity of an FMA investigation and in particular the integrity of the interview process so that the evidence of interviewees is not contaminated from prior discussions with other potential witnesses. On 6 May 2016 the FMA investigator Matthew Keats telephoned Mr Honey to inform him that the FMA was investigating certain share trading in Eroad and that FMA had made a confidentiality order. When Mr Honey asked Mr Keats if he could discuss the matter with others Mr Keats:

(a) Advised that a confidentiality order had been made by the FMA that applied to the investigation; and

(b) Explained the effect of the order in particular that Mr Honey could not speak to anyone about the FMAs investigation except a lawyer. Mr Keats advised Mr Honey that a letter would be sent to him shortly regarding arranging an interview with him and told him that he was not to talk to others until he had read the letter.

[23] On 6 May 2016 the FMA sent a letter to Mr Honey enclosing:

(a) A notice issued under s 25 FMAA requiring Mr Honey to attend the offices of the FMA to give evidence on 26 May 2016. The notice outlined that Mr Honey was required to give evidence relating to Eroad Limited, including but not limited to his role at Eroad, Eroad's NZX announcement on 28 September 2015 and Mr Honey's relationship with Mr Y. The notice was accompanied with an information sheet regarding the relevant sections of the FMAA and advised that Mr Honey could be accompanied by a lawyer; and

(b) A copy of the order made under s 44 of the FMAA prohibiting the publication or communication of any information, document or evidence provided or obtained in connection with any enquiry of FMA.

[24] On 6 May 2016 approximately 10 minutes after speaking with the FMA investigator Mr Keats and being advised of the confidentiality order, Mr Honey telephoned Mr Y and spoke to him for five minutes and discussed the FMA's investigation with them.

[25] I need to point out that although there is no charge related to that particular breach of the confidentiality order before the Court for sentence today, I have considered it appropriate to read this part of the summary really for the purposes of informing the public of this type of order and the need for it to be complied with.

[26] At his interview with the FMA on 26 May 2016 Mr Honey denied that he ever discussed the performance of Eroad with Mr Y, and I need to add there that there are no charges again before the Court relating to that discussion. At his second interview with FMA on 23 June 2016 Mr Honey stated he sent his text messages on 22 September 2015 as a joke but accepted that it was wrong for him to send such information to Mr Y and that it does not look very good at all. Mr Honey then admitted that he had called Mr Y after speaking with the FMA.

[27] Mr Honey has never previously appeared before the Court.

[28] The defence submission in this particular case is that the gravity of the offending is at the lowest level possible in terms of the applicable spectrum for this type of offending and when the mitigating factors that are relevant to both the offending and the mitigating factors relevant to the defendant personally are taken into account, then that reduces the gravity of the offending to the lowest possible end of the scale.

[29] The mitigating factors that are submitted by the defence are these: in respect of the mitigating factors relevant to the offending itself, it is submitted that this offending was one off. There was no financial benefit or reward to be gained by the defendant. There was no premeditation on his part. There was no mutual planning between the defendant and the recipient of the information and, in essence, this was simply the biggest mistake that the defendant has made in his working life which he hugely regrets. He did not think of the consequences when he sent the emails to the recipient of the information at the time that he sent the emails. He did not realise how seriously it would be regarded by the FMA and how serious the consequences actually would be. He simply made a bad decision without giving the matter serious thought beforehand.

[30] It has been pointed out very clearly in the submissions and in the supporting documentation that there have in fact been only downsides arising from this incident as far as the defendant and his family are concerned.

[31] Turning to those mitigating factors that are relevant to the defendant personally, it is submitted that in all other respects the defendant is an honest person who is loved and well respected by his family, friends, colleagues and members of his community. The character references, and I have to say there are many attached to Mr Wicks' submissions and I also need to acknowledge the fact that there are many supporters of the defendant in Court today, those character references attest to Mr Honey's otherwise excellent character. Apart from this serious lapse in judgement on his part he is described in glowing terms by the many people who have written in support of him. He is a family man, a person who is always willing to help others, a person who is interested in his community and is will to volunteer his time and effort for the benefit of his community. The general theme of the letters of

support is that this offending has come as a shock to those who know the defendant well, that it is totally out of character, that it represents a tragic fall from grace, and there is a general plea to this Court for a merciful sentence to be imposed to allow him and his family to rebuild their lives.

[32] There is also evidence that has been provided by Mr Wicks, attached to his submissions, that describes the mental health issues that the defendant Mr Honey has experienced, both prior to and during the time of the offending, and those issues that he continues to experience currently. It has been submitted on the part of Mr Honey that those mental health issues probably contributed in part to the unfortunate decision that he made when he sent the information and those mental health issues that have been described have been exacerbated subsequent to the offending by the events that have followed on as a result. Mr Honey lost his job. He is currently unemployed. The loss of employment has caused significant financial hardship for himself, his wife and their children. His personal finances and that of his immediate family have been exhausted to the point where they have had to rely on extended family members for financial support. This has caused increase stress and anxiety not only for the defendant but also particularly for his wife and children and there has been a flow-on effect whereby Mr Honey's wider extended family have also been seriously affected by these proceedings. This position has been described in detail by both Mr Honey, his wife, Mr Honey's parents and also the observations described in the other letters of support and affidavits that have been filed.

[33] I have to say this; with the greatest respect to the argument advanced by Mr Wicks on behalf of the defendant Mr Honey, in my assessment the gravity of the offending in this case is correctly placed at the high end of the scale of seriousness. As far as offence-related aggravating or mitigating features are concerned in relation to the assessment of gravity pursuant to the first step in the test pursuant to s 106 I note that the charge itself carries a maximum prison term of five years' imprisonment or a $500,000 fine or both. For this type of offending I accept the informant's submissions that any form of insider conduct seriously undermines the integrity of New Zealand's listed markets. It affects the interest of investors and thus has a flow-on effect in terms of the confidence that the public has and particularly the investing community has in New Zealand's financial markets. Where offending is

committed of this type and enforcement is lacking or unduly lenient it will tend to have a detrimental effect on market integrity.

[34] The aggravating features that are relevant to this offending are clearly the gross breach of trust that is involved on the part of Mr Honey when he committed this offence and also the detrimental effect on the integrity of New Zealand's financial markets. Because there are no New Zealand authorities that apply in this are the informant has referred the Court to the relevant Australian, U.K. and Canadian authorities. As far as the principle of general deterrence is concerned, the Australian cases of *R v Rivkin,*[1] *R v Doff,*[2] *R v MacKay,*[3] *R v Glynatsis,*[4] *Khoo v The Queen*[5] and *R v Dalzell*[6] have all been cited for the proposition which I accept, that is, that the principle of general deterrence is emphasised as the primary sentencing purpose. Those cases confirm the expectation that insider trading, insider conduct should normally lead to sentences of imprisonment.

[35] The viability of New Zealand's financial markets depends on public trust and confidence in the integrity of the market, and on that basis I accept that deterrence is a paramount consideration in sentencing of this time.

[36] Because this is the first New Zealand prosecution of insider conduct and because there's no tariff case for this type of offending, it is of assistance, in my view, to refer to the relevant Australian and U.K. cases, but particularly the Australian cases because the legislation is similar in many regards, to assess the appropriate starting point.

[37] And I make the point that we were considering the first step in the s 106 test. The starting point is obviously relevant to the assessment of gravity. In the case of *Khoo* that has been cited, the starting point of 15 months' imprisonment was upheld for a tipping offence, and it was confirmed by the Supreme Court of New South

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[1] *R v Rivkin* (2004) 59 NSWLR 284
[2] *R v Doff* (2005) 52 ACSR 200
[3] *R v McKay* (2007) 61 ACSR 470
[4] *R v Glynatsis* [2013] NSWCCA 131
[5] *Khoo v R* [2013] NSWCCA 323, (2013) 237 A Crim R 221
[6] *R v Dalzell* [2011] NSWSC 454

Wales that there should be no distinction between insider trading and tipping offences in the expectation that offenders should expect to go to jail.

[38] The Australian cases of *R v Joffe,*[7] *Hannes,*[8] *Dalzell*[9] *v O'Reilly*[10] all resulted in starting point sentences of imprisonment, ranging from 10 months to two years, two months. And after hearing further submissions today, it appears that a number of those cases were dealt with by way of a term of imprisonment as a starting point and then the sentences that were actually imposed were reduced from the starting point of imprisonment and resulted in community-based sentences.

[39] Likewise, the U.K. cases that were sighted also all resulted in starting point or actual sentences of imprisonment ranging from 19 months to four and a half years. The FMA made the submission today through Mr Williams that the more relevant cases appear to be the Australian authorities. However, the general point that is being emphasised, and which I accept, is that starting points of imprisonment have been adopted in all of those cases.

[40] I acknowledge, again, with respect to Mr Wicks' submission, that the cited cases are different in nature and scale and some of them are at the very upper end of the scale of seriousness in comparison with the offending committed by Mr Honey. But in saying that and acknowledging that submission, it is also clear to me that the Australian and U.K. cases illustrate the general point that anyone who engages in insider conduct, whether it be tipping or insider trading, should expect to go to prison or, at least, the starting point should be one of imprisonment.

[41] The rationale behind that view that I have expressed is so that the general message of deterrence can be reinforced with a view towards ensuring and promoting public trust and confidence in the integrity of New Zealand's financial markets.

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[7] *R v Joffe* [2015] NSWSC 741
[8] *R v Hannes* [2002] NSWSC 1182
[9] See footnote 6
[10] *R v O'Reilly* [2010] VSC 138

[42] Now after considering the Australian and U.K. examples that have been cited, I do consider that a lower starting point of imprisonment is justified for Mr Honey in this case, notwithstanding the conclusion I have reached that the starting point of imprisonment is nevertheless appropriate.

[43] It seems to me, again with respect, that the informant's submission of a starting point between 18 months for 24 months is arguably at the top of the available range for the offending before the Court and I assess the appropriate starting point at 12 months' imprisonment. This starting point leans more towards the lower end of the range that had been outlined, particularly in the Australian cases that have been cited.

[44] Mr Honey's personal circumstances are acknowledged. He has pleaded guilty. He does not seek to minimise involvement. He accepts he is responsible for the offending. He is remorseful. He has no previous convictions. He is at low risk of re offending. His behaviour was out of character. He had suffered negative consequences already; first of all he has attracted, and will continue to do so, significant media attention because this is the first insider trading case dealt with in this jurisdiction in New Zealand and in addition to those issues he has also suffered, and continues to do so, mental health complications throughout the course of the proceedings.

[45] I acknowledge that Mr Honey did not personally benefit from his disclosure of the information to the recipient. Obviously there was some sort of misguided sense of loyalty or some sort of irrational decision going on in the mind of Mr Honey at the time that he made this bad decision; however what is clear is that the offending did amount to a gross breach of trust. Mr Honey was entrusted with confidential knowledge because he was a person of good character. Ordinarily the culpability of an offender for offending that appears quite serious may be reduced by unusual or extenuating circumstances either of the offending or relevant to the offender; him or herself. However, this general principle is modified by the approach that must be taken in a case of this type dealing with this type of charge. As was observed in the Australian case of *Rivkin* the relevance of good character is of lesser significance for

white collar crimes because it is necessary to be of good character to be in a position to commit the crime in the first place.

[46] After taking into account relevant mitigating factors, concerning both the offending and the defendant personally, in my assessment the gravity of the offending is not significantly reduced and is correctly placed at the high end of the scale; although I must say it is not at the very upper end of the scale as some of the other cases perhaps were that were cited.

[47] In terms of the first stage of the test under s 106 the second step requires the Court to identify the direct and indirect consequences of a conviction. The judicial assessment of the direct and indirect consequences of conviction need not be determined to any legal standard of proof. The sentencing Judge does not have to be satisfied that the direct and indirect consequences will inevitably or probably occur. It is sufficient if he or she is satisfied there is a real and appreciable risk of such consequences.There is no onus on the offender to establish that the disproportionality test has been met; however submissions as to consequences will be insufficient to qualify as information for the purposes of a discharge.

[48] In most cases those who seek a discharge without conviction will need to provide some relevant material to the Court. This could be in the form of letters as has been provided in this case, affidavits or memoranda provided by persons in authority informing the Court of the consequences of conviction on the career of a defendant. There is scope for Judges to take judicial notice of facts and rely on their own direct knowledge however in this case that is not necessary given the material that is before the Court.

[49] The courts have long recognised that a criminal conviction is a black mark on a record, especially for someone with no previous history, and where the entering of a conviction may constitute a barrier to the continuation of a particular occupation this constitutes a matter that must be carefully considered by the Court. Where conviction will result in an absolute bar then this factor will carry extra weight.

[50] By way of affidavits sworn on 29 May 2017, Julia Jack has deposed that the defendant's employment prospects and customer insight roles will be severely impacted if he is convicted of the charge before the Court.

[51] The defence submission is that there is a real or appreciable risk that Mr Honey will not be able to continue on in his chosen field of employment if he is convicted. A conviction will act as a complete barrier or bar to his continued employment in a role that he is specialised in and has experience in.

[52] The informant has submitted that a conviction is unlikely to render the defendant forever unhireable in any industry, including the industry that the defendant has previously been employed in, due to the fact that the defendant's many admirable qualities had been amply demonstrated in the letters of support that have been provided and this makes him an attractive potential employee for potential employers, even if it is not in a customer insight role. And it is correct, in terms of the material before the Court, that at least two of the letters of support have indicated a willingness to employ Mr Honey notwithstanding the fact that he might be convicted of this offence or in the knowledge that he has committed this offence.

[53] Notwithstanding that submission that has been made by Mr Williams on behalf of the FMA, I accept that the direct and indirect consequences of a conviction in this case are as submitted by Mr Honey, because there is a real and appreciable risk that he is unlikely to be able to continue in his chosen and preferred customer insight role if a conviction is entered.

[54] He is likely to present to potential employers as an unattractive prospect, particularly in the competitive employment market. It is clear that a conviction for this type of offence for a person with no previous convictions will be a significant consequence per se. I accept the submission made by Mr Wicks in that regard. There is likely to be considerable stigma attached to this conviction if it is entered, given that this is the first New Zealand case involving this type of charge.

[55] In terms of my assessment of the seriousness of those identified consequences, I am satisfied that the consequences do amount to serious

consequences in the circumstances of this case. I am unable to go so far as to conclude that those identified consequences are at the top end of the scale of seriousness, or in fact amount to extremely serious consequences. This is because Mr Honey is qualified to work in a particularly specialised field of employment where high levels of trust and confidence are inherent in this particular type of role. There is a strong argument that prospective employers are entitled to be alerted to the fact that Mr Honey has in fact committed this offence. In a case such as this, I note the informant's submission and accept it. It is not for the Court to hide potentially relevant information from prospective employers, particularly when customer insight roles have access to some of the most sensitive market data and information relevant to the New Zealand financial market.

[56] As far as the first stage of the test under s 106 is concerned, the third step requires the Court to consider whether the identified consequences would be out of all proportion to the gravity of the offending. This requires the Court to assess the degree of likelihood in terms of the Court's assessment of whether the statutory test is satisfied in the circumstances. The higher the likelihood that the consequences of conviction are out of all proportion with the gravity of the offending and the more serious the consequences the more likely it is that the proportionality test can be satisfied. The courts have recognised that negative consequences ordinarily flow from convictions; usually something more than those ordinary consequences will be required to satisfy this test.

[57] The submission on behalf of Mr Honey is that the offending is at the very lowest end of the scale of seriousness, the identified consequences of a conviction are likely to be very serious or extremely serious for Mr Honey and would have significant and lasting adverse consequences and that therefore those identified consequences would be out of all proportion to the gravity of the offending. In essence the submission is that the entry of a conviction for a person of otherwise good character would be out of all proportion to offending that is relatively minor in the scheme of things; or certainly on the spectrum of this type of offending, at the lower end of the scale.

[58] Mr Wicks essentially submits to the Court that a discharge without conviction would be a proportionate and justified response to what is relatively low end offending. Again, with the greatest of respect, in my assessment the defence submission is unable to be upheld by this Court. The gravity of the offending has been assessed by me at the high end of the scale of seriousness albeit not at the very highest end. Informing that assessment, of course, is my determination that an appropriate starting point sentence would be 12 months' imprisonment. I am satisfied that the consequences of a conviction are also at the high end of the scale of seriousness but, for the reasons already given, it would be artificial and wrong for me to find that the consequences are at the extremely high end of the scale.

[59] The final step, or step 3 of the first stage of the test under s 106, involves a question of comparison. As I have mentioned already, there is no onus on Mr Honey to establish that the disproportionality test has been met. The Court is required to exercise its own judgement in determining this point. In this case I have reached the conclusion that the seriousness of the offending or the gravity of the offending and the seriousness of the consequences are, in fact, evenly balanced. Accordingly I find that the consequences of conviction would not be out of all proportion to the gravity of the offending. The test is not met for a discharge without conviction to be granted.

[60] As I mentioned earlier, the second stage of the test under s 106 requires the Court to exercise the residual discretion. For the sake of completeness, and if I am wrong in my assessment of the first stage factors that I have outlined already, I move on to consider whether or not the residual discretion would have been exercised in any event in favour of the defendant. Once the disproportionality test has been judicially assessed and if the balance is found in favour of the offender it remains for the sentencing Judge to then determine whether he or she should exercise their residual discretion to discharge without conviction under s 106. However the courts have noted that it will be a rare case where an offender who has satisfied the s 107 jurisdictional threshold or gateway is not then discharged under s 106(1).

[61] However in *Blythe* the Court of Appeal departed from that approach, holding that it is only when exercising its discretion to discharge under s 106(1) that the

purposes and principles of sentencing set out in ss 7 and 8 Sentencing Act should be taken into account. I have reached the view that this would be one of those rare cases where a discharge without conviction would still be inappropriate even if the s 107 jurisdictional threshold was satisfied. The Court at this stage would be perfectly entitled, following the reasoning in *Blythe*, to take into account the primary consideration, namely, general deterrence and for the reasons already outlined, I am satisfied that the gravity of the offending and the consequences I have identified are evenly balanced.

[62] I am satisfied that the consequences of conviction would not be out of all proportion to the gravity of the offending and I am also satisfied it would not be in the public interest to exercise the discretion in favour of Mr Honey and grant a discharge without conviction in the circumstances of this case.

[63] So in either approach, even if I am incorrect in terms of the first stage of the test, I would reach the same conclusion if I was required to exercise the residual discretion at the second stage of the test.

[64] I move on then to consider the sentence itself. I have already mentioned that it is abundantly clear a conviction for this type of offence for a person with no previous convictions would in itself be a significant consequence per say. I have already reached the starting point of 12 months' imprisonment, and I consider that when the Court takes into account the various mitigating issues that are personal to the defendant, a further discount is appropriate.

[65] Those issues are concerning the mental health issues that have been raised, the difficulties that have been experienced by Mr Honey and his family throughout the course of these proceedings and I note that although no criticism is intended of the FMA because of the obvious complications involved in a prosecution of this nature, the defendant Mr Honey and his family have spent a number of months waiting for a charge to be laid and then for these proceedings to come to the ultimate outcome today. Now, again I want to be clear, no criticism of the FMA is intended by mentioning this particular issue, but it does present in my view as a mitigating factor that can be taken into account.

[66] Two months reduction is justified in my view from the 12 month starting point for those mitigating factors I have outlined and that two month reduction also includes a discount for remorse. That has been, in my view at least, clearly established by the material before the Court.

[67] I have already described the decision that was made by Mr Honey when he made this particular disclosure of information to the recipient and I am of the view that the material before me clearly establishes that he is remorseful and regrets his decision. And that remorse is not just personal to Mr Honey in terms of the circumstances he now finds himself in, I accept that he is remorseful for the effect that his actions have had on the financial markets and, obviously, the effect that this decision he made has had on his family particularly.

[68] A further 25 percent discount is accorded to Mr Honey to give credit for the guilty plea that he entered at a relatively early opportunity, which would then equate to a provisional sentence of seven and a half months' imprisonment. Because the provisional sentence is within the threshold for the Court to consider home detention, the Court must then determine the least restrictive outcome appropriate in the circumstances.

[69] Ordinarily, and I make this point very clearly, a full-time custodial sentence would be the final outcome for offending of this type given that the primary purpose of sentence is to send a general message of deterrence to all people who hold similar positions of trust and confidence within New Zealand's financial market industry, and who may be tempted to commit this type of offence in the future. I have considered the option of imposing home detention as an alternative to imprisonment. The pre-sentence report recommendation is, in fact, in a recommendation of home detention.

[70] At this stage, the Court is required to make a principled choice between home detention and imprisonment. Both sentences have been described very clearly by the appellate authorities as serving the principles of both denunciation and deterrence, and it is a matter for the Court to determine which of those options better qualifies as the least restrictive outcome appropriate in the circumstances.

[71] I need to, at this stage, record the fact that Mr Wicks has submitted that if a s 106 discharge was not granted then Mr Honey would be in a position to pay a fine and a fine has been submitted as appropriate by Mr Wicks. I have reached the clear view, however, that because of the need for a general deterrent sentence to be imposed that the sentence should not be less than home detention in the circumstances of this case.

[72] Home detention is a stand alone sentence. The length of term must be determined by reference to the need to send that message of general deterrence that I have already mentioned, and in doing so it is not simply a mathematical calculation of taking the term of imprisonment and perhaps dividing that by half. That is not how home detention is imposed.

[73] I bear in mind that Mr Honey has already paid a rather hefty price for his one off mistake of judgment and in the circumstances it seems to me that a sentence of home detention of six months is justified in this case, and that is what I intend to impose.

[74] You are convicted and you are sentenced to six months' home detention on this one charge. As far as the other ancillary applications are concerned, there has been a name suppression application abandoned effectively in respect of Mr Honey. There is also an application for suppression in respect of the mental health details that have been referred to by myself and also in the submissions, and there is also an application for suppression of details relating to Mr Honey's family. The application does also include a report from a consultant psychiatrist.

[75] Just to be clear, I have mentioned Mr Y by name in the course of this decision. However I am told, and I have got no reason to have any doubt about this, there is apparently an order for suppression of the name of Mr Y in force at the moment. That will need to be observed by the media representatives who are here today.

[76] As far as the application for suppression is concerned in respect of Mr Honey, it is not in respect of Mr Honey's name, it is in respect of the medical issues

themselves that have been raised in mitigation and it is also in respect of the family details of Mr Honey.

[77] The principles of suppression need to be referred to when dealing with this application. The grounds under s 200(2) that appear to me to be applicable are that suppression can be ordered if the Court is satisfied that publication would cause extreme hardship to the person charged with or convicted of or acquitted of the offence or any person connected with that person and so obviously those matters that have been raised are covered by that particular provision. Section 200(2) constitutes a closed list. There is no catch-all and they are stand-alone grounds. The onus is on the applicant to establish one of the specified consequences and the Court may only make an order if satisfied that publication would be likely result in one of the grounds relied on for suppression; likely means that there must be a real risk.

[78] The starting point in any application such as this is the principle of open justice. That is the overriding principle and the basis upon which open justice should yield is restricted by the provisions that I have referred to, and the principle of open justice is only to be displaced if that ground that is relied on is actually made out. If the courts had consistently emphasised upon (inaudible 17:27:16) presumption in favour of openness and reporting and publication of proceedings and in the Court of Appeal case of *R v Liddell*[11] that Court stated:

> "The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings and the right of the media to report the latter fairly and accurately as surrogates of the public."

And the obvious reason for publication or in favour of publication in this case is the media's right to freedom of expression and the public's right to receive information. The public interest in open justice is to be emphasised.

[79] In terms of the claimed ground of extreme hardship, that creates a higher threshold than the law that was enforced prior to the coming into force of the Criminal Procedure Act. Extreme hardship is a very high level of hardship, significantly greater than the previous test and should be interpreted as a compelling

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[11] *R v Liddell* [1995] 1 NZLR 538, (1994) 12 CRNZ 458

reason or a very special circumstance causing exception hardship to the defendant; or in this case to his family, and the necessary extremity is contextual and under the previous regime the Court of Appeal said:

> "As it usual for distress, embarrassment and adverse personal and financial consequences to attend criminal proceedings, some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting. Extreme hardship requires a level of hardship that is excessive, devastating even in light of the policy considerations and out of all proportion to the public interest in the application of the open justice principle. Cases in which extreme hardship is found to be established often involve consequences beyond those which would normally have been contemplated as flowing from the offending and even a suicide risk does not give rise to automatic name suppression unless it is extreme and obvious."

ADDENDUM:

[80] Let us go back a step. I have made something of a mistake here because I have begun to give a decision about name suppression when in fact I have not fully understood at the outset what this application actually relates to. I thought it was an application relating to a general suppression of name of the family of Mr Honey and also to do with the mental health issues that have been experienced by Mr Honey. It is in fact only to do with the mental health issues experienced by Mr Honey. There is no suppression order attaching at all to any of the comments I have made in sentencing. They are general comments about mental health issues that have afflicted Mr Honey throughout the course of these proceedings.

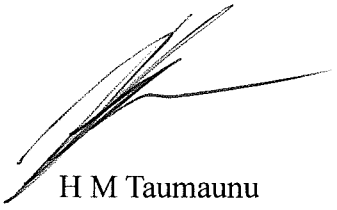
[81] The suppression order that is made, though, is one under s 205 of the Act where I suppress the publication of the report that was provided by Dr Daniels in support of the defendant outlining what those mental health issues actually were; that is the report dated 30 March 2017, and as far as the defence submissions are concerned a number of the documents that were filed in support of Mr Honey refer specifically to those mental health issues in some detail. Any reference to those particular mental health issues are also subject to a suppression order. That is because I am satisfied, after reading Dr Daniels' report, that the test actually is satisfied in terms of a likelihood of endangering the safety of Mr Honey. It is fairly clear from the report of Dr Daniels that in Dr Daniels' opinion it is probable that the

publication of Mr Honey's name will aggravate the natural course of his psychiatric condition and limit the possibility of a response to treatment.

[82] Although this is not about publication of his name the same principle applies; in terms of his recovery, detailing the specifics of his mental health issues will not assist in his recovery and the flipside of that is the endangerment of his safety in terms of mental health and wellbeing.

[83] So to be very clear, this suppression order under s 205 only relates to Dr Daniels' report which the press do not have anyway and it only relates to any reference in the supporting documents that were filed by Mr Wicks that refer to the mental health issue in some detail, and I have also confirmed that there is effectively no real public interest in the details of the mental health issue but it has been taken into account in giving the sentencing decision today.

[84] The terms of the home detention sentence; because, as I have already emphasised, the paramount consideration here is general deterrence and that is the primary justification for the sentence that has been imposed. I do not intend to impose and standard or special post detention conditions on Mr Honey, I simply impose the six months' home detention sentence commencing from tomorrow, 14 June 2017, at 9.00 am at the address set out in the pre sentence report.



H M Taumaunu
District Court Judge