NOTE: HIGH COURT ORDERS PROHIBITING PUBLICATION OF THE FAMILY CIRCUMSTANCES REFERRED TO AT [165], [167] AND [168] AND THE INFORMATION SET OUT AT [177] REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA658/2023
CA743/2023
[2025] NZCA 155

BETWEEN	PETER KARL CHRISTOPHER HULJICH Appellant
AND	THE KING Respondent

CA729/2023

BETWEEN	THE KING Appellant
AND	PETER KARL CHRISTOPHER HULJICH Respondent

Hearing:	23 and 24 April 2024 (further information received 30 May 2024)
Court:	Courtney, Mallon and Thomas JJ
Counsel:	J C L Dixon KC, H M Z Lanham and H S E Smith for Appellant in CA658/2023 and CA743/2023, and Respondent in CA729/2023 B H Dickey, A D Luck and C S A Jordan for Respondent in CA658/2023 and CA743/2023, and Appellant in CA729/2023
Judgment:	8 May 2025 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to adduce evidence in support of the conviction appeal is declined.

B The appeal against conviction is dismissed.

C The application for leave to adduce evidence in support of the opposition to the Crown's sentence appeal is granted.

D The Crown's appeal against sentence is allowed. The fine of $100,000 is set aside and replaced with a fine of $200,000. The appeal against sentence is otherwise dismissed.

E The appeal against the refusal to grant name suppression pending final disposition of the conviction appeal is dismissed.

F The existing interim name suppression order is continued for seven days from the date of this judgment.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] The appellant, Peter Huljich, was an executive of a company called Pushpay Holdings Ltd (Pushpay). Pushpay sells mobile payment software, primarily to process donations. At the relevant times it was listed on the New Zealand stock exchange (NZX) and the Australian Securities Exchange (ASX).[1] Eliot Crowther was one of the co-founders of Pushpay and was a key salesman for its product. He also held approximately nine per cent of Pushpay's shares.

[2] In April 2018 Mr Crowther told Mr Huljich he was thinking of leaving Pushpay and selling his shares. In June 2018 Mr Crowther's shares were sold at $4.04 per share via a process known as a bookbuild — a process that takes place during a trading halt in which invited investors may be allocated shares in a quantity and at a price determined by the bookbuild manager.

[3] In the period after Mr Crowther told Mr Huljich of his intentions, and before Mr Crowther's departure and share sale by bookbuild, a trust (the Trust) which held shares in Pushpay sold that shareholding on the NZX at an average price of $4.21 (for a net total of $[several tens of millions]).[2] The Crown alleged that Mr Huljich had

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1 Pushpay was delisted in May 2023 after a takeover.

2 Details of the Trust are subject to suppression as set out more fully under the name suppression section of this judgment (see below at [173] and following).

advised or encouraged the principal beneficiary of the Trust or its trustees to sell the Trust's Pushpay shares. It alleged that he did so as a person with knowledge that Mr Crowther's intended departure and share sale would be expected to have a material effect on the Pushpay share price if publicly announced.

[4] Mr Huljich was charged with insider conduct and stood trial in the High Court before Gault J and a jury.[3] Mr Huljich's defence was that he had not advised or encouraged the Trust's principal beneficiary or the trustees of the Trust (the Trustees) to sell the shares, rather he was passing on the principal beneficiary's instructions; and Mr Crowther's intended departure and share sale was not inside information because a reasonable investor would not expect this information to have a material effect on the Pushpay share price.

[5] The jury returned a guilty verdict. Mr Huljich was accordingly convicted on the charge. He was sentenced to six months' community detention and a fine of $100,000.[4] Mr Huljich appeals his conviction on the grounds that the jury verdict was unreasonable or that a miscarriage of justice arose. He also appeals the trial Judge's decision following his conviction declining to extend his interim name suppression (that applied up to and during his trial) pending final disposition of his conviction appeal.[5] The Crown appeals Mr Huljich's sentence on the ground that it was manifestly inadequate.

Insider conduct

[6] Insider conduct is an offence under the Financial Markets Conduct Act 2013.[6] As relevant for present purposes, an "*information insider* (**A**) … must not … advise or encourage another person (**B**) to trade or hold *quoted financial products* of the *listed issuer*".[7] This is an offence "if the person knows … that the information is *material information*" and "that the information is not *generally available to the market*".[8] An

3 Financial Markets Conduct Act 2013, ss 240, 243(1) and 244.
4 *R v Huljich* [citation omitted] [sentencing notes].
5 *R v Huljich* [citation omitted] [post-conviction High Court suppression judgment].
6 Section 240. We have italicised the relevant words of the offence that are defined.
7 Section 243(1).
8 Section 244(1).

individual who commits this offence is liable on conviction to imprisonment for a term not exceeding five years, a fine not exceeding $500,000, or both.[9]

[7] An "information insider" is a person who:[10]

> (a) has material information relating to the listed issuer that is not generally available to the market; and
>
> (b) knows or ought reasonably to know that the information is material information; and
>
> (c) knows or ought reasonably to know that the information is not generally available to the market.

[8] Information is "material information" if:[11]

> … a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial products of the listed issuer; …

[9] Information is "generally available to the market":[12]

> (a) if—
>
> (i) it is information that has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in financial products; and
>
> (ii) since it was made known, a reasonable period for it be disseminated among those persons has expired; or
>
> (b) it is likely that persons who commonly invest in relevant financial products can readily obtain the information (whether by observation, use of expertise, purchase from other persons, or any other means); or
>
> (c) if it is information that consists of deductions, conclusions, or inferences made or drawn from either or both of the kinds of information referred to in paragraphs (a) and (b).

[10] A "listed issuer" relevantly means "a person that is a party to a listing agreement with a licensed market operator in relation to a licensed market".[13]

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9 Section 244(2)(a).
10 Section 234(1).
11 Section 231(1)(a). A "financial product" includes an "equity security" in the "listed issuer": see the definitions of "financial product" and "issuer" in ss 7 and 11.
12 Section 232(1).
13 Section 6 definition of "listed issuer", para (a).

A "financial product" includes "an equity security".[14] And "quoted" in relation to financial products of a listed issuer means:[15]

> … financial products of the issuer that are approved for trading on a licensed market (and, to avoid doubt, financial products do not cease to be quoted merely because trading in those products is suspended): …

Charge

[11] The charge against Mr Huljich was as follows:[16]

> That **Peter Karl Christopher Huljich** between 2 May 2018 and 31 May 2018 at Auckland, being an information insider of a listed issuer, namely Pushpay Holdings Limited, knowing that the information is material information and that the information is not generally available to the market, did advise or encourage other persons, being trustees of [the Trust] and/or [the principal beneficiary of the Trust] to trade quoted financial products of the issuer, namely ordinary shares.
>
> **Particulars**:
>
> Advised and/or encouraged the sale of at least [several] million ordinary shares held by the Trust, which were so traded.
>
> Advice and/or encouragement: Mr Huljich gave the advice and/or encouragement by way of the following communications:
>
> (a) an email dated 3 May 2018 from Mr Huljich to [the trustees of the Trust], [a former trustee], [the principal beneficiary of the Trust] and Ms Sarah Elder; and/or
>
> (b) any preceding discussion with [the principal beneficiary of the Trust] which occurred on or prior to 3 May 2018.
>
> Material information: The material information was that Eliot Crowther, co-founder and director of Pushpay, intended to resign from his roles at Pushpay and would, in that event, sell shares in Pushpay Holdings Limited.

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14 Section 7(1)(b).

15 Section 6 definition of "quoted", para (a).

16 This was the charge as it was amended prior to closing submissions. At the start of the trial the date range was to 8 June 2018 (rather than 31 May 2018) and there was a further particular (c) which referred to Mr Huljich's communications with Blair Knight of Craigs Investment Partners referred to later at [27].

Background facts

Pushpay

[12] At the relevant time, Pushpay's directors were Bruce Gordon (the Chairman), Graham Shaw, Christopher Huljich (the father of Peter Huljich),[17] Christopher Heaslip, Eliot Crowther and Daniel Steinman (the Board). Mr Heaslip and Mr Crowther were co-founders and friends.

Mr Huljich

[13] Peter Huljich was Pushpay's New Zealand General Manager at the time relevant to the charge against him. He had previously been its Head of Corporate Development and an alternate director for his father. After the relevant events, he became a director.

[14] Peter Huljich's partner, Sarah Elder (now known as Sarah Huljich), was employed by Pushpay as its Head of Investor Relations at the relevant time.[18]

[15] As at 20 April 2018, there were three entities connected with Mr Huljich with shareholdings of approximately 19.9 per cent, 1.46 per cent and 0.392 per cent of all shares in Pushpay. These entities did not buy or sell shares during the period it is alleged that Mr Huljich held inside information.

[16] Mr Huljich was also involved in arranging changes to the Trust. These were replacing the original trustees with new trustees (the Trustees) and removing a secondary beneficiary of the Trust.[19] The appointment of one of the new Trustees and the secondary beneficiary change took effect on 20 April 2018. The appointment of the other new Trustee took effect on 8 May 2018.

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17 In this judgment we have used "Mr Huljich" or sometimes "Peter Huljich" to refer to Peter Huljich. In all cases we have used "Christopher Huljich" to refer to Peter Huljich's father.

18 This judgment refers to Sarah Huljich as Ms Elder for convenience because that is the name used in the relevant documents.

19 He contacted one of the new Trustees on 17 April 2018 to sign the deed for the changes. He also instructed Ms Elder to date these documents 20 April 2018.

Mr Crowther first raises his intentions

[17] It is not in dispute that on a date prior to 18 April 2018, Mr Crowther spoke to Mr Huljich about leaving Pushpay and selling some or his shares. Around the same time, Mr Crowther had also called Mr Shaw with this news.

[18] Mr Huljich informed Mr Gordon, Mr Heaslip and Christopher Huljich of Mr Crowther's conversation with him. Following this, Mr Huljich emailed Mr Crowther in the morning of 18 April 2018 advising him that Mr Gordon, Mr Heaslip and Christopher Huljich were "comfortable" with Mr Crowther selling his shareholding after the annual result "subject to the right process being followed". Mr Huljich asked Mr Crowther to instruct the Board of his plans as to his employment and directorship and the sale of his shares.

[19] Mr Crowther confirmed that he would send an email to the Board "to commence the conversation". He then sent an email to the Board on 19 April 2018, in advance of a scheduled Board meeting that day, which said:

> I have spoken with each of you over the last few weeks, so you're all aware that I have arrived at the decision to conclude my time at Pushpay soon.
>
> I will announce my decision to the company in the next couple of weeks, then commence a transition period, perhaps concluding about the time of the AGM in early July.
>
> Additionally, that seems like a logical time to conclude my time as a director.
>
> After consulting with my advisors, they have advised me to diversify my interests over time. I intend on commencing that process once we publish our results in mid May.
>
> I have investigated via a third party what my options would be for placing the stock in NZ, and have been offered some good options to consider there.
>
> Peter has surfaced that some overseas options [may be] more favourable, and I'm working with him to investigate that option as well.
>
> I'll keep you updated as I learn more.
>
> It's been an honour to work with you all.

[20] Mr Gordon and others were concerned that Mr Crowther was contemplating announcing his departure of his own initiative and that he had already been discussing his potential share sale with a third party. This concern was reflected, for example, in

Mr Gordon's reply email to Mr Crowther that there were "market rules and sensitivities to comply with around this" which would be discussed at the Board meeting.

[21] The Board minutes for the 19 April 2018 meeting did not record any reference to Mr Crowther's exit. It was, however, accepted by those present that it was discussed that day. Consistent with this, the minutes recorded a discussion on the Board's continuous disclosure obligations and "concluded that the company remains in compliance … based on the information presented by management". It was agreed that Pushpay would manage the sale of the shares and that Mr Huljich would have responsibility for this process.

[22] Mr Gordon emailed Mr Crowther in the afternoon of 19 April 2018 as to what had been agreed at the meeting:

> Good to discuss the next steps with you today. We agreed;
>
> 1. Any marketing of equity divestment or exploration thereof will be done via the company – Peter is your contact here and has been back in touch with you
>
> 2. This will be timed to follow a market update about any role change for you
>
> …
>
> 4. You will gently withdraw your advisors' activity in the marketplace to avoid speculation by brokers
>
> 5. Engaging the market in any form is the beginning of the sale process and therefore requires prior board approval.
>
> …

[23] There was nevertheless concern as to whether Mr Crowther would adhere to this process as reflected in later communications between Mr Huljich and Mr Heaslip on 20 April 2018. In these communications Mr Huljich said that if Mr Crowther did not cooperate "he will get a poor outcome, but it looks like that is exactly what he wants - ruin the company on the way out, even if it means he forgoes a higher price". Mr Heaslip said he was "trying to talk some sense into Eliot".

[24] Mr Crowther's response to Mr Gordon's 19 April 2018 email was sent on 21 April 2018 and said:

> Thank you for your email and the conversation yesterday. Apologies for my delay in response here.
>
> The position makes sense, especially considering what Sarah explained during the meeting about the optimal timing of the announcement being in conjunction with the notice of AGM etc. Duly noted.
>
> As I hope you're all aware, I would not wish to jeopardize or impede our company's growth or position in [any way] whatsoever.
>
> I think the best play based on your email, the board conversation, and our phone call i[s] for me to sit back for the time being, and connect with Peter about the Stateside options. In light of Sarah's explanation of optimal timing, that doesn't need to happen "tomorrow" so to speak.
>
> Additionally, with the irons currently in the fire, these conversations may be moot anyway.

[25] It was common ground that the "Stateside options" were the possibility of finding a private placement for Mr Crowther's shares in the United States. Mr Heaslip, Mr Crowther and Mr Gordon gave evidence that "irons currently in the fire" was a reference to discussions with two parties about a possible takeover of Pushpay, although Mr Crowther also suggested in re-examination that it could be a reference to plans for Pushpay to list publicly in the United States.[20]

Sale by the Trust

[26] The charge against Mr Huljich relied on an email dated 3 May 2018 from him to the Trustees, copied to the principal beneficiary, Christopher Huljich and Ms Elder, saying:

> I have spoken to [the principal beneficiary who] has provided the following priorities to me to forward to you.
>
> Can I suggest you speak with [the principal beneficiary] to confirm, …
>
> - Replace [the remaining existing trustee] with [one of the new Trustees]
> - Realise ~[several]m [Pushpay] shares at $4.00+, in order to do this brokerage accounts need to be set up (Craigs Investment Partners is

[20] Private placement and takeover possibilities are discussed below at [101]–[106] and [108]–[111]. The proposed United States listing is referred to below at [40].

responsible for the largest flows, followed by FNZC), Sarah can help with the administration

- Retire HWM debt (approximately $2.7m)

- Make a personal distribution to [the principal beneficiary] (approximately $6.5m to repay Peter Huljich ~4.0m, retire ANZ debt ~1.5m, home and car purchases ~$0.9m and sundry costs $0.1m)

- Make a distribution to [the principal beneficiary's sister] in a form to be discussed (approximately AU$8.5m)

- Make a series of low risk property investments through [a company] (approximately $3.5m)

- Seed the trust account in order to support distributions of $3,000 per week and other expenses such as school fees and travel (approximately $0.3m for one year)

…

[27] On 9 May 2018 Mr Huljich emailed one of the Trustees asking him to contact Blair Knight at Craigs Investment Partners Ltd (Craigs), an investment advisory firm and sharebroker for Pushpay shares, to open an account for the Trust. Mr Knight advised in an internal Craigs email on the same date that "they are keen to trade as soon as possible".

[28] The Trust sold all of its shares in Pushpay on dates between 15 May 2018 and 7 June 2018 through Craigs, for which it received a net total of $[several tens of millions] at an average price of $4.21 a share. Although the original instructions were to sell [several] million shares, once that point had been reached the Trustees decided to sell the balance of the Trust's Pushpay shares. It was not suggested that Mr Huljich was involved in the Trustees' decision to do so.

[29] At the point at which [several] million shares had been sold, Mr Huljich updated the principal beneficiary by email on 30 May 2018.

> [One of the Trustees] will provide an update … either today or tomorrow. [The Trustee] will also be organising a catch up with you face-to-face next week.

> The below information is the information I emailed you on 27 March.
>
> | | |
> |---|---|
> | Debt repayment | $1,460,000 |
> | House costs | $100,000 |
> | New cars costs | $625,000 |
> | Personal cash at bank | $100,000 |
> | Peter Huljich | $4,000,000 |
> | | $6,285,000 |
>
> …
>
> $6,500,000 has now been transferred to your personal account to cover the above leaving a larger personal cash balance of $315,000, which can be used to pay for the boat and any other personal expenditure.

Mr Crowther wishes to announce his departure

[30] On 25 May 2018, Mr Crowther sent a text message to Mr Gordon saying: "We're going to announce my departure next week, but for the board's comfort I'm happy to present my exit plan if that's something you'd like to see."

[31] Mr Gordon forwarded the text to Mr Heaslip and Mr Huljich on 25 May 2018 and said:

> As below from Eliot.
>
> I have replied to say the board set a timetable that is to be followed and that Eliot needs board approval to sell shares.
>
> Chris – get control of this – we announce at the Shareholder Meeting which is only a few weeks away. Eliot is out of control.
>
> Peter offered last night to ring Eliot to offer to facilitate a significant share sale for him to get underway now.
>
> This is completely unacceptable to me and frankly amateur, and selfish.
>
> …

[32] On the same day Mr Gordon replied to Mr Crowther as follows:

> Were you not listening to the board meeting and the IR advice? If you tell staff we have to tell the market and then it is the only news in the market without context. Review the email I sent you confirming the board approved plan and that you accepted. The "six weeks" was not literal and was to take it up to the shareholders meeting where we announce alongside Graham's message. You know this. Peter will ring you this morning as he has an approach to engage Craig's to sell parcels of shares for you in a controlled way which the board with approve. …

[33] Mr Crowther replied to Mr Gordon saying:

> … When we spoke about it at the board meeting 6 weeks ago, you asked me to [wait] 6 weeks. Which is now.
>
> So I'm unsure what the issue is between announcing it in a week vs. 2 weeks like you say?
>
> How does this not preserve control, and to that end, what type of control does the board want?
>
> …

[34] Mr Huljich advised Mr Gordon that he would call Mr Crowther to discuss this saying "I think it should be fine with him waiting a few weeks to announce alongside Graham".

[35] And later on 25 May 2018, Mr Gordon emailed Mr Huljich and Mr Heaslip saying:

> Speaking to Eliot now.
>
> Compromise appears to be bringing forward to the Notice of Meeting … as he understood it would be end May not early July.
>
> …
>
> If can't issue [Notice of Meeting] early then a market update needed (stupid) OR Chris you talk some sense into him to wait.
>
> …

[36] Mr Gordon then advised Mr Crowther that the Notice of Annual Meeting would be released on 18 June 2018, which Mr Gordon said would still meet NZX rules allowing then for it be announced to staff and for Mr Crowther to discuss his departure with his key clients. He also said that key managers could be pre-advised "on a strict 'need to know' and confidential basis".

Bookbuild

[37] On 28 May 2018 Deutsche Craigs (a company owned by Craigs) emailed Mr Huljich with a bookbuild proposal for the sale of Mr Crowther's shares. This proposal provided an "indicative discount" of six to eight per cent to market for both a 50 per cent and a 100 per cent sell down. The proposal stated: "There will not be a

material difference in pricing between the two options – we are very confident in executing a 100% sell down in one line". Craigs was engaged by letter dated 4 June 2018.

[38] Between 12 and 15 June 2018 briefings were given to selected investors who agreed to keep the information disclosed confidential and not to trade on the information. This is referred to as "wall crossing". Craigs wall crossed 27 potential investors. Pushpay wall crossed another 14 potential investors, including wall crossing the Trustees on the afternoon of 12 June 2018.

[39] The bookbuild was scheduled to launch at 10 am on 19 June 2018 with a trading halt (as is normal) put in place shortly before that launch. However, on 18 June 2018 Pushpay received a call from a third party which it understood to relate to the unannounced bookbuild. Out of concern that confidentiality of the proposal had been lost, Pushpay requested a trading halt earlier than planned.[21] The NZX placed a trading halt on Pushpay's shares at 1.37 pm on 18 June 2018 and the ASX placed a trading halt on them shortly afterwards.

[40] The NZX announcement stated that the trading halt had been put in place "pending the release of an announcement to be made by the company tomorrow". Pushpay issued a public announcement advising of Mr Crowther's resignation and the bookbuild to facilitate the sale of his shares. It advised that the trading halt had been granted to allow the bookbuild to be conducted and that a further announcement would be made to the market once the trading halt was lifted. It also advised that the plan announced in January 2018 to complete a United States listing by the end of the year was no longer proceeding because the primary objectives for that plan had largely been achieved.

[41] The bookbuild opened that afternoon and closed in the morning on 19 June 2018. The Trust initially made an indicative bid for $1 million worth of shares but later made a formal bid for $2.5 million worth of shares. The bookbuild was oversubscribed in that eligible bookbuild investors bid for more shares than the total

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[21] The NZX's later enquiries indicated that there had not in fact been a leak.

available. Mr Crowther's shares were all sold at the bookbuild price of $4.04 each. The Trust was not allocated any shares in the bookbuild.[22]

[42] Once the bookbuild closed, Pushpay issued a market announcement confirming that the bookbuild had been successfully completed. The bookbuild sale of Mr Crowther's approximately 25 million shares at $4.04 was entered as a trade on the NZX. The NZX trading halt was lifted at 3.03 pm that afternoon (with the ASX halt lifted shortly afterwards), and the first market trade at that time was at $4.20. Market trading closed two hours later at $4.13. In the course of trading, the Trust purchased further shares for an average price of $4.16.

[43] On 20 June 2018 market trading closed at $4.18. On 21 June 2018 market trading closed at $4.27.

Conviction appeal

Key issues at trial

[44] One of the key issues at trial was whether Mr Huljich had advised or encouraged the Trust's sale of the Pushpay shares or whether he was merely a conduit for a decision made by the principal beneficiary. Related to this was whether Mr Huljich had assisted with the changes made to the Trust to remove any connection he might be thought to have with that Trust when the Trust sold its Pushpay shares.

[45] The Crown relied on: the fact and terms of the 3 May 2018 email; the fact that Mr Huljich was at the centre of managing the sale of Mr Crowther's shares on behalf of Pushpay as well as in providing instructions for the changes to the Trust; the coincidence in timing of Mr Crowther's intended share sale with the Trust changes and the Trust's sale of its Pushpay shares; and Mr Huljich's experience in equities and that he was someone in whom the principal beneficiary trusted.

[46] The defence relied on evidence, from one of the two people who became the Trustees in April 2018, that the trustee changes were at the principal beneficiary's initiative and first raised by the principal beneficiary with that trustee some months

[22] An offshore institutional investor was the only other unsuccessful bidder in the bookbuild.

earlier. The defence also relied on the change in the principal beneficiary's personal circumstances since the Trust was established, the significant increase in value of the Pushpay shares since the Trust's purchase of them, and the purposes to which the proceeds of the Pushpay shares had been utilised. It was said that these circumstances supported the conclusion that there were personal reasons why the principal beneficiary wished to sell the Pushpay shares independent of any input from Mr Huljich.

[47] The jury question trail on this issue was in these terms:

> 1. Are you sure that, by sending the email on or about 3 May 2018, Mr Huljich advised or encouraged [the Trustees] and/or [the principal beneficiary] to sell approximately [several] million Pushpay shares?
>
> *Note:*
>
> *(a) Advise means to offer advice or counsel, or to offer a recommendation.*
>
> *(b) Encourage means to give courage, confidence or to recommend, and includes to incite, counsel, or procure.*
>
> If no, find Mr Huljich not guilty.
>
> If yes, continue to question 2.
>
> 2. Are you sure that, by sending the email on or about 3 May 2018, Mr Huljich intended to advise or encourage [the Trustees] and/or [the principal beneficiary] to sell approximately [several] million Pushpay shares?
>
> If no, find Mr Huljich not guilty.
>
> If yes, continue to question 3.

[48] The jury's verdict meant that they were sure that Mr Huljich's email of 3 May 2018 was advice or encouragement to sell the Trust's Pushpay's shares and that Mr Huljich intended this.

[49] The second key issue was whether the information held by Mr Huljich as at 3 May 2018 was material information. Consistent with the way the charge was framed, the Crown case was that the inside information was that "Mr Crowther intended to resign from his roles at Pushpay and would in that event sell shares in

Pushpay" and that Mr Huljich held this information. The jury question trail required the jury to be sure of this. Their verdict means that they were sure of this.

[50] This framing did not require that the jury be certain that Mr Crowther would leave, nor that the jury be certain as to the manner in which Mr Crowther would sell his shares or the number of shares he would sell. These matters were contested. The Crown case was that Mr Huljich knew that Mr Crowther wanted to leave and sell his shares and Mr Huljich knew he could deliver that. The Crown case was also that as at 3 May 2018 a reasonable investor would regard the information as material because they would expect Mr Crowther's shares to sell at a discount in a bookbuild and this discount would be at a level that was material for Pushpay.

[51] The defence case was that whether Mr Crowther would leave was not certain and nor was the manner in which his shares would be sold if he did leave. It contended that the process the Board had put in place to manage the sale of his shares was conditional on Mr Crowther deciding to leave. It contended that, if Mr Crowther decided to leave, as well as a sale by bookbuild, other possibilities as at 3 May 2018 were a private placement for his shares or that a takeover offer of Pushpay would be made. The defence case was that a reasonable investor would take into account these possibilities and would not expect the information to have a material effect on the price of Pushpay's shares.

[52] The jury's assessment of these contested matters was relevant to the fifth and sixth questions in jury question trail, which were as follows:

> 5. Are you sure that, at the time of Mr Huljich's email on or about 3 May 2018, the information — that Mr Crowther intended to resign from his roles at Pushpay and would in that event sell shares in Pushpay — was material information relating to Pushpay?
>
> *Note:*
>
> *(a) Material information is information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of Pushpay shares.*
>
> *(b) A reasonable person in this context means a reasonable person who commonly invests in shares and holds them for a period of time based on their view of the inherent value of those shares.*

(c) Information is generally available to the market—

(i) *if—*

1. it is information that has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in relevant financial products; and

2. since it was made known, a reasonable period for it to be disseminated among those persons has expired; or

(ii) if it is likely that persons who commonly invest in relevant financial products can readily obtain the information (whether by observation, use of expertise, purchase from other persons, or any other means); or

(iii) if it is information that consists of deductions, conclusions, or inferences made or drawn from either or both of the kinds of information referred to in paragraphs (i) and (ii).

(d) Relevant financial products means financial products of a kind the price of which might reasonably be expected to be affected by the information.

If no, find Mr Huljich not guilty.

If yes, continue to question 6.

6. Are you sure that, at the time of Mr Huljich's email on or about 3 May 2018, Mr Huljich knew that the information — that Mr Crowther intended to resign from his roles at Pushpay and would in that event sell shares in Pushpay — was material information.

If no, find Mr Huljich not guilty.

If yes, continue to question 7.

[53] The jury's verdict means that they were sure that the information was material and that Mr Huljich knew it was. The conviction appeal focuses on this aspect of the jury's verdict.

Appeal issues

[54] On appeal Mr Huljich contends that the jury's verdict was unreasonable because:

(a) the Crown case depended on it being certain that Mr Crowther was leaving and selling his shares in a bookbuild process when

Mr Crowther's fellow directors gave uncontested evidence that this was not certain; and

(b) the Crown case was that Mr Crowther's departure and the sale of shares by bookbuild was material information but the Crown's expert, John McMahon, applied the wrong test and Mr Crowther's fellow directors gave uncontroverted evidence that it was not material information.

[55] Alternatively, Mr Huljich contends there was a miscarriage of justice because:

(a) the trial Judge erred by not directing Mr McMahon and the jury on the correct legal test during the cross-examination of Mr McMahon, and in not ruling inadmissible aspects of Mr McMahon's evidence nor directing the jury to disregard it;

(b) the Crown case and theory was different from that disclosed in Mr McMahon's brief of evidence and Mr McMahon altered his theory of materiality during cross-examination in a manner that was unfairly prejudicial to the defence; and

(c) the unreasonableness of the verdict and the above irregularities were exacerbated by an aggressive and misconceived theory of the case.

[56] We will address these grounds of appeal as follows:

(a) The legal issue of how "material information" is to be determined.

(b) The Crown case for why the information that "Mr Crowther intended to resign from his roles at Pushpay and would in that event sell shares in Pushpay" was material.

(c) Whether the jury's verdict was unreasonable on the basis of the evidence about whether Mr Crowther would leave and the ways in which his shares might be sold if he did leave.

(d) The challenges to the expert evidence of Mr McMahon, which concern whether he applied the correct test and whether the Judge appropriately assisted the jury about this.

(e) The prejudice that was said to arise from a change in the Crown's theory and the Crown's conduct of the case.

Material information

[57] The Judge's directions at question 5 of the jury trail correctly set out the statutory definition of "material information".[23] There are several components to this definition that require elaboration.

[58] First, the definition of "material information" asks what a "reasonable person" would expect if the information were generally available to the market. The Financial Markets Conduct Act does not further define the characteristics of a "reasonable person" in this context. No issue is taken with the direction provided by the trial Judge, which comes from the April 2017 version of the NZX Guidance Note on Continuous Disclosure:[24]

> [A] "reasonable person" is a person who commonly invests in securities, and holds such securities for a period of time, based on their view of the inherent value of the securities.

[59] Secondly, the test is forward looking, asking what the "reasonable person would expect, if [the information] were generally available to the market".[25]

[60] Thirdly, the Judge's directions correctly set out the three ways for determining when information is "generally available to the market".[26] This is relevant because an "information insider" is a person who has "material information … that is not generally available to the market" and the test for "material information" asks what a reasonable person would expect if the information were generally available.

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23 See above at [8] and note (a) of the jury question set out at [52].

24 NZX *Guidance Note – Continuous Disclosure* (April 2017) at 5. The submissions for Mr Huljich added to this with reference to the evidence about how markets absorb information and how information is assessed. We discuss this later at [149].

25 Financial Markets Conduct Act, s 231.

26 See above at [9] and note (c) of the jury question set out at [52].

[61] As discussed, the Crown case was that the material information was that "Mr Crowther intended to resign from his roles at Pushpay and would, in that event, sell shares in Pushpay". The defence contended that the way to assess what a reasonable investor would expect was to consider what they would expect if this information had been the subject of a Pushpay public release on the NZX on 3 May 2018 (that is, a hypothetical public release).

[62] A public release is one of the ways that information would be generally available to the market.[27] It is therefore a way of considering the effect on the price of Pushpay shares that a reasonable investor would expect the inside information to have. The "hypothetical public release" approach was considered appropriate in *Haylock v Patek* where this Court said:[28]

> [166] … Put simply, the statutory definition of inside information requires the Court to consider a counter-factual, namely whether [the company's] share price was likely to be materially affected if the inside information at issue were released. In other words, the Court must consider whether the hypothetical public release of the information would be likely to materially affect the market's perceptions of the value of [the company's] shares. …

[63] That case concerned a takeover by interests connected with a shareholder of a publicly listed oil and gas company. Some of the shareholders who accepted the offer contended that the Securities Markets Act 1988 had been breached because the gas prospects of interests held in the Mangahewa area by the company and the shareholder connected with the takeover offer had not been disclosed to them. Had this been disclosed, they said they would not have accepted the takeover at the price they did.

[64] In that context, this Court said that it was an integral part of considering the market's perceptions of the information to consider "how, by whom, and in what form the information would have been released in the specific circumstances" in the counterfactual (the hypothetical public release of the inside information).[29] This Court considered that the NZX disclosure rules could be taken into account as they were

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27 Financial Markets Conduct Act, s 232(1).

28 *Haylock v Patek* [2011] NZCA 674, [2012] 1 NZLR 665 at [166] in respect of the similar offence under the Securities Markets Act 1988.

29 At [166].

designed to ensure that fair and balanced information likely to materially affect share price was promptly provided to the market.[30]

[65] This Court went on to discuss what would have been included in any such public release had one been made at the relevant time. As it would have been misleading to disclose the Mangahewa area interests without relevant contextual information (economic and practical feasibility of the actual recovery of gas, the dismal results to date and other tempering factors), the hypothetical public release would include this contextual information.[31]

[66] In the present case, the defence contended that the hypothetical public release on 3 May 2018 would need all relevant contextual information. This would include not only that "Mr Crowther intended to resign from his roles at Pushpay and would in that event sell shares in Pushpay", but also that it was not certain that Mr Crowther would leave. It would need to include that, if he did leave, it was for good personal reasons and his departure would not impact on Pushpay's profit as Mr Crowther had not been performing that well. It would also need to include that Pushpay was in discussions about a takeover, that there was a possibility of a private placement for Mr Crowther's shares, and if that did not eventuate there would be a bookbuild for his shares.

[67] The Judge adopted this approach in his oral directions to the jury as to how they should approach question 5 in the jury trail, saying:

> [71] The legal test for assessing "material information" requires you to assume a hypothetical public (market) announcement of the information on or about 3 May 2018. The announcement should include all relevant contextual information that would allow the market to understand and assess the price implications of the information, including any uncertainty or unreliability.

[68] While this approach may be a helpful way to assess what a reasonable person would expect if the information "were generally available", it does not mean that Pushpay would or should have issued a public announcement on 3 May 2018. There is, for example, no obligation on a company to make a public announcement of

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30 At [168].
31 At [177]–[179].

preliminary takeover discussions. As Mr McMahon explained in his evidence at trial, material information may not be caught by a company's continuous disclosure obligation if the confidentiality of the information is maintained and an NZX "safe harbour" applies. A safe harbour includes where the information is insufficiently definite to warrant disclosure.

[69] Because the hypothetical public announcement is a fiction (a way to consider how a reasonable investor would view the inside information as impacting on the price, and therefore whether it is material information), the contextual information is relevant even though a public announcement of the kind posited by the defence in its hypothetical would not be the kind of public announcement a company would make. When positing a hypothetical public announcement, the contextual information cannot be misleading. The contextual information must include all the relevant information that the insider has — for example here, the exact status of the private placement option and the takeover discussions as at 3 May 2018. The hypothetical public announcement does not include "deductions, conclusions, or inferences made or drawn from" this contextual information because those are matters for the reasonable investor.[32] For example here, it would not include the expected discount on a bookbuild sale because that is information that the reasonable investor can deduce or obtain advice about.

[70] It is not a statutory requirement that a hypothetical public announcement counterfactual is used to consider whether the inside information is material. The important point is that the statutory test requires an assessment to be made of the inside information that was known to Mr Huljich as at 3 May 2018. That would include not only that Mr Crowther intended to leave and would in that event sell Pushpay shares, but also Mr Huljich's inside knowledge of whether Mr Crowther would in fact leave and the way in which those shares were likely to be sold or any other realistic possibilities for their sale. We consider the Crown accurately captured the essence of the test in its closing address when it said the jury was to ask "how would the reasonable person who routinely invests in shares … assess the market reaction if everyone had the same information as the insider".

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[32] See Financial Markets Conduct Act, s 232(1)(c).

[71] Fourthly, the statutory test requires that the reasonable person would expect the information to have "a material effect on the price" of quoted financial products of the listed issuer. It was common ground that what was a "material effect" was context specific. The NZX Guidance Note offers the following commentary:[33]

> In monitoring issuers' compliance with continuous disclosure, NZXR will consider price movements in securities when determining whether information has had a material effect on the price of an issuer's quoted securities:
>
> - A price movement of 10% or more in a quoted security will generally be treated by NZXR as evidence that information has had a material effect on the price of those quoted securities.
>
> - A price movement of 5% or less in a quoted security will generally be treated by NZXR as evidence that information has not had a material effect on the price of those quoted securities.
>
> Whether price movements between 5% and 10% are evidence of a material effect will depend on the specific facts and circumstances. A price movement of 5% may not be considered a "material effect" in respect of an illiquid security, but for issuers with large market capitalisations and highly liquid securities, price movements of this magnitude may be considered evidence of a "material effect". NZXR will consider all available evidence when analysing a particular price movement, including price movements in the market generally or within a particular index or sector and any other information relevant to an issuer that could have contributed to a price movement.

[72] Expert evidence was called by both the Crown and the defence as to what would be a material effect on the price of Pushpay shares. Mr McMahon's evidence was that an effect on the price of Pushpay shares of seven to seven and a half per cent was material. He also said that Pushpay's materiality threshold was around six to seven per cent. Charles Cable, the expert called by the defence, considered an effect of eight to 10 per cent was material for Pushpay.

[73] Lastly, the statutory test requires that the reasonable person would expect the information to have a material effect "on the price of quoted financial products of the listed issuer".[34] Mr McMahon's evidence was that a reasonable investor would regard the information (that Mr Crowther intended to resign and would in that event sell his

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33 NZX, above n 24, at 5–6. NZXR refers to NZX Regulation, which performed the regulatory functions of the NZX. NZXR was replaced by NZX Regulation Ltd (trading as NZ RegCo) in December 2020.

34 Financial Markets Conduct Act, s 231(1)(a).

shares) as material because they would expect the shares to sell at a discount in a bookbuild at a level that would be material for Pushpay.

[74] This gave rise to an issue at trial as to whether the expected discount at the time of the bookbuild was relevant. It formed part of the grounds for Mr Huljich's (unsuccessful) application for a dismissal of the charge at the end of the Crown case.[35] It was also addressed by the Judge in a ruling before the jury question trail was finalised.[36] The defence submitted that the "effect on the price of quoted financial products of the listed issuer" was to be measured as the expected change in the listed issuer's share price on the exchange it is listed on. It viewed this as therefore excluding the bookbuild as this trade was not made though the exchange. The Crown submitted it was wrong to exclude transactions that occur off-market but are then quoted on-market.

[75] The Judge ruled:[37]

> [13] … Even if the public cannot participate in such transactions themselves and their price is publicly available only when quoted on-market, I do not consider that determines as a matter of law that they should be excluded when measuring the expected effect on the price. I consider that whether a bookbuild is a price on the exchange and the expected effect of a bookbuild on the price on the exchange (at the time of the hypothetical announcement) are questions of fact for the jury. I declined to direct the jury otherwise.

[76] We agree with the Judge that an anticipated bookbuild discount is not excluded from the "material information" test. A bookbuild sale is a trade of "quoted financial products of the listed issuer". That is reflected in the fact that the trade is in fact quoted on the NZX once it has completed. An anticipated discount in a bookbuild can therefore be "material information". Whether it was material information in this case depended on the jury's assessment of: the relevant inside information held by Mr Huljich as at 3 May 2018; and a reasonable investor's expectations as at 3 May 2018 as to the impact on the price of Pushpay's shares if that inside information was generally available.

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35 Criminal Procedure Act 2011, s 147.
36 Ruling No 5.
37 Ruling No 5. See Ruling No 6 at [20]–[21].

The Crown's case for "materiality"

[77] The Crown case relied in part on the evidence of Mr McMahon. He was the current chair of the NZX and a director of three other listed companies. He had over 20 years of experience in financial markets, predominantly as an analyst on the broking side. His experience included a role as head of equities (overseeing the sales desk and the research team and interacting with the investment banking team) and as a managing director for an online and retail broker.

[78] Mr McMahon described the statutory test he was addressing in examination-in-chief as follows:[38]

> Q. Can we move then please to the issue of materiality and can we start first as his Honour did, by reference to the Financial Markets Conduct Act 2013. And can you please just acknowledge from that what the definition there is, so that we're reminded, this is just what the jury's heard from his Honour.
>
> A. Yes. The material information in relation to a public issue is information that *a reasonable person would expect if it were generally available to the market to have a material effect on the price of listed securities of the public issuer*.

[79] Mr McMahon explained that the information need not "have a material effect when released". Instead, "simply that it must be expected to have a material effect":[39]

> Q. Right. Now, can you just please help us there with – of specific, a temporal sense then, as to when it would be expected to have that impact?
>
> A. Yeah. This does not appear to mean that it must necessarily have a material effect when released, when the information is released. It's simply that *it must be expected to have a material effect*. So in other words, you can know [something], it hasn't been released to the market but you expect that when it is, it may or may not have a material effect at that point once it becomes publicly known.

[80] Mr McMahon's evidence was that certainty was not the test for materiality. He explained that when a director is considering materiality for the purposes of the disclosure regime, the director makes this assessment with the knowledge that the director has of the company at the time. Mr McMahon explained that an example in

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38 Emphasis added.
39 Emphasis added.

the NZX Guidance Note on Continuous Disclosure of an event that may be material was a sell down of five or more per cent in a company, and here Mr Crowther held just over nine per cent. He said it was relevant to consider why Mr Crowther was leaving and, if it was for personal reasons, whether those reasons were fixed. He also said it was relevant whether the company had taken control of the process and whether the company endeavoured to keep the information from leaking. These would be indicators of certainty and materiality.

[81] If there was uncertainty about whether a sell down would go ahead then Mr McMahon said a "probability magnitude test" was helpful. He explained:

> A. Is the sell down [by] Mr Crowther of approximately 9% of the company, around about $100 million worth, is that of sufficient size to satisfy a materiality assessment and then secondly, is the probability that Mr Crowther is going to sell down sufficiently high enough, it doesn't have to be certain, it just has to be sufficiently high enough, to also satisfy a materiality test. So you need something of reasonable size and something of reasonable probability.

[82] Mr McMahon said a bookbuild is quite common and mechanistic and a person involved in markets would understand it. He said it would be difficult to sell all of Mr Crowther's shares other than by way of a bookbuild. He said although "you could get lucky and a takeover bid happens to roll up [a]t exactly the same time", "the accepted and general market mechanism that you would expect on an ex ante basis to be used would be a bookbuild".

[83] He explained:

> Q. And how does that make material in terms of pricing?
>
> A. Because to run a bookbuild for that level of stock you're going to have to have a discount on the transaction, on that share transaction a discount which is likely to be material, materially below the current share price of Pushpay in the market.
>
> Q. And how much below the current price would you be anticipating on an ex ante basis?
>
> A. Well, it would definitely be more than 5%. It would be unlikely to be more than 10%. Now, this is assuming there's no other news or no other information coming out. It's just a clean bookbuild process. So, somewhere around 7½ % plus or minus a bit on an ex ante basis would

be roughly what I would be expecting, maybe 7/7½% or somewhere around there.

Q. And you would consider that material in terms of the test?

A. In conjunction with a little bit of negative news that Mr Crowther was going as well and him being a co-founder, then yes I would.

[84] Mr McMahon confirmed that a reasonable investor would have these expectations:

Q. Can I just move you to sort of that reasonable person that we heard discussed earlier today. [I]s this view being expressed by you one of an expert, or can you just help us with how widely you would expect this to be understood by people, ordinary people?

Q. Well, again, I put it into simple economic terms. If you know there's an awful lot of stuff for sale that needs to be cleared quickly, you would expect to see some sort of a discount. It's the general principle of if you're going to sell in bulk, you want a deal. And the deal in this case is the degree of discount coming into the transaction. So I think, yes, a reasonable person would expect that if there was a fit for the most part, if there was a large block of shares to be traded and wanted to change hands, then they're most likely to go at some level of discount.

Q. And the sort of discount in this particular case of seven, 8%?

A. It would vary again depending on the company and the circumstances, yeah. An institutional seller that was block trading out or bookbuilding out might get away with a smaller discount because the other buyers don't perceive the institution to have knowledge or be a contributor to the company; but, on the other hand, if it's an insider selling out, there's always a degree of scepticism about insiders selling out and investors ask why so there's probably a bit more of a discount in that circumstance. So, it is very facts and circumstance driven as to what you might expect.

[85] He further explained that confidentiality in relation to Mr Crowther's departure and share sale ahead of a bookbuild was "critical" because:

… If you've got information about a bookbuild coming up, you're going to change your behaviour. If you were planning on buying the stock, or you were buying the stock at the time, you'd immediately stop because you know there's a bookbuild transaction coming up and you would be hopeful that you could participate in it and get stock at a discount. So why would you pay full price now, if you think you can get it at a discount in a very short period of time later. The second thing is, if you owned the shares you might be tempted to try and quickly sell some, because you know you'll be able to buy them back in the bookbuild at a lower price. …

[86] In addition to Mr McMahon's evidence, the Crown relied on other indicators that the information was material. In closing to the jury, the Crown referred to: the information barriers that Craigs had put in place for the bookbuild process as evidence of the price sensitivity of the information; Pushpay's reaction to a perceived leak of the information by bringing forward the trading halt following an urgent directors' meeting as also reflecting the price sensitivity of the information; the concern about the negative price effects in the event of an "overhang" as explained by Mr Huljich to Mr Crowther;[40] and Mr Huljich's email to Mr Heaslip on 20 April 2018 with his concern about a poor outcome if Mr Crowther did not cooperate as indicating Mr Huljich's knowledge that this amount of shares coming on to the market would affect the share price.

Certainty that Mr Crowther would leave and sell his shares by bookbuild

[87] Mr Huljich submits that the Crown case depended on it being certain as at 3 May 2018 that Mr Crowther would leave Pushpay and sell his shares and that this sale was to be by way of a bookbuild. This was because Mr McMahon's evidence of an expected discount in a bookbuild of around seven to seven and a half per cent was at or close to the materiality threshold for Pushpay. Therefore, any uncertainty about whether Mr Crowther would leave and the way in which he would sell his shares would be factored into a reasonable investor's expectations and reduce their view of the expected price impact of the information to below the threshold of materiality.

[88] The defence closed to the jury on the basis that if they accepted that it was not clear or sufficiently certain or reliable that Mr Crowther was going to leave and sell his shares, then both experts said the information was not material. If, however, they accepted that as at 3 May 2018 Mr Crowther was intending to leave, then it was still necessary to consider that his shares might be sold by private placement, or via a takeover or a bookbuild, as well as the possibility that he might change his mind about leaving and selling his shares. The defence submitted that these were all realistic possibilities and these uncertainties would be part of a 3 May 2018 hypothetical public announcement and would influence market behaviour.

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[40] That is, the concern that if a co-founder sold half of his shares, it might create fear in the market as to when he would sell the rest of the shares and that might negatively impact the share price. A "lock up" is a mechanism used to counter this.

[89] This submission was supported by Mr Cable's evidence. He was asked to express an opinion on how a reasonable investor would expect the market to respond in light of four considerations. These were that:

(a) Mr Crowther might not necessarily convert his intention to leave into action, in which case his shares would not be sold.

(b) Mr Crowther was or may have been sitting back and waiting to explore the possibility of a placement of "say $20 to $30 million worth of his shares with a US institutional investor" which would generally be accompanied by a lock up of the rest of his shares for "shall we say 18 months".

(c) There were "two pending potential takeover options under consideration, albeit at an early stage".

(d) The possibility that none of (a) to (c) would happen "but instead Mr Crowther would go forward with a Bookbuild involving some or all of his shares".

[90] Mr Cable's evidence was that, if this information was announced to the market, a reasonable person would look at the price effects that could be expected from each of these options and assign them a probability weighting adding up to 100 per cent. For example, a takeover would be given a low probability of happening but a high price effect. A bookbuild would be given a higher probability of happening but a negative price effect. These were the only two of the four considerations that would have a price effect. Mr Cable's evidence was that, even if very low probabilities were attributed to everything other than the bookbuild, a reasonable investor would not get to a price effect on 3 May 2018 of six or seven per cent. It would be lower than this.

[91] On appeal, we were provided with the following illustrative table of how the effects of the relevant possibilities could influence the price impact calculation based on the evidence of Mr Cable:[41]

	No sale	**Private placement**	**Takeover**	**Book build**	**TOTAL**
Probability of option	30%	30%	5%	25%	100%
Magnitude of price effect	0%	0%	+30%	-8%	
Probability weighted price effect	**0%**	**0%**	**+1.5%**	**-2.8%**	**-1.3%**

[92] The jury did not need to accept that a reasonable investor would take this kind of mathematical exercise. Without accepting Mr Cable's mathematical approach, it would have been open to the jury to accept that a reasonable investor might factor in the prospects that the sale of Mr Crowther's shares might not proceed and might occur in a way other than a bookbuild. This would depend on the jury's assessment of the inside information about this that was available as at 3 May 2018. Mr McMahon accepted that, while certainty was not the test for whether information was material, an assessment of materiality was to be made with the information that was available at the time.

[93] The first consideration that Mr Cable was asked to factor in was that Mr Crowther might not leave (and therefore would not sell his shares). Mr Huljich submits there was extensive uncontroverted evidence that it was uncertain that Mr Crowther would leave. He refers to:

(a) Mr Shaw's evidence: Mr Shaw recalled that the call from Mr Crowther in the early part of April was to the effect that he was "trying to work out where to go from here, do I stay, do I go, do I stay as a director, do I quit my job but stay on as a director, do I sell some shares, do I sell all my shares". Mr Shaw's perspective from mid-April until the end of

[41] We understand the jury were given a schedule in similar form (but with different numbers) to illustrate Mr Cable's evidence. We understand that this schedule was not included in the casebook for the appeal.

May was that Mr Crowther was still trying to work out whether he was going to leave his role as a salesman, whether he was going to leave as a director and whether he would sell any of his shares and how many of them. Mr Shaw considered the information was not material for the purposes of continuous disclosure obligations because Mr Crowther had not made up his mind about what he was going to do.

(b) Mr Gordon's evidence: Mr Gordon said that the Board had put in place a process for if Mr Crowther made up his mind to resign and sell his shares. He accepted that, at the time of the April 2018 emails, Mr Crowther might have decided not to resign as a director, or not to sell his shares or not to sell all of them. Mr Gordon also accepted that he was not confident about what Mr Crowther was going to do. He also accepted that there was then a gap in the email communications until about 25 May 2018, and that during this time there was no material information to disclose as he might not have heard from Mr Crowther again.

(c) Mr Heaslip's evidence: Mr Heaslip said that in mid-April Mr Crowther was starting the conversation about the prospect of leaving and selling his shares but it was not certain what he would do. Mr Heaslip's own view was that it would be better for everyone if he returned to work and went back to making lots of sales and he was talking to Mr Crowther about that. Mr Heaslip said it was clear that Mr Crowther wanted to sell some stock, but how and when and if that would occur was uncertain. He accepted that, if there was certainty, then that would give rise to a disclosure obligation.

[94] Mr Huljich says this evidence was consistent with his Financial Markets Authority (FMA) interview. In that interview, Mr Huljich said that Mr Crowther was known for changing his mind and that Mr Huljich regarded Mr Crowther's departure as very uncertain up until the point he had to actually make a decision.

[95] Mr Huljich says this evidence was also consistent with Mr Crowther's evidence. Mr Crowther described having "conflicted feelings" about leaving and if the Board had wanted him stay then he would have, but it "seem[ed] like the right thing for my children and it seem[ed] like the right thing for me" and he wanted to "go about doing that in a way that [was] not harmful to anybody else". He described those conflicted feelings as "almost like pouring concrete" and "when you make your decision, you know, the concrete solidifies over time and I guess that's what was happening". He was not fixed in his view from the outset about whether to sell any, some or all of his shares in Pushpay if he did leave.

[96] We do not accept that this evidence meant that a reasonable investor would discount the expected price impact of Mr Crowther's intended departure and sale of his shares because of the possibility that he would change his mind. As the Judge said in his ruling on Mr Huljich's application for a dismissal of the charge, "it [was] for the jury – rather than the experts – to decide … the underlying facts".[42] For example, the Crown closed to the jury on the basis that the evidence from the Board members was a "touch self-serving" since it was clear from the record that they wished to avoid the information becoming publicly known and to stay within the safe harbours under the continuous disclosure regime. Similarly, it was for the jury to assess the credibility and reliability of Mr Huljich's statements in the FMA interview. And it was for the jury to assess what they made of Mr Crowther's conflicted feelings, his description of the concrete solidifying over time, and the compelling personal reasons that had motivated his intended departure and share sale.

[97] The jury also had the benefit of the email communications that were made at the time. One of the important email communications relied on by the Crown was the email of 19 April 2018 to the Board set out above.[43] In that email Mr Crowther said "I have arrived at the decision to conclude my time at Pushpay soon". As the Crown submitted in closing to the jury, they could view this email as indicating that Mr Crowther was "pretty clear" about his intentions. Additionally, the jury had the email communications between Mr Crowther, members of the Board and Mr Huljich

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42 Ruling No 6 at [28].
43 Above at [19].

on 25 May 2018 about Mr Crowther wanting to announce his departure and Mr Gordon and Mr Huljich's reaction to that set out above.[44]

[98] These communications were a basis on which it would have been open to the jury to conclude that Mr Crowther had been told at the 19 April 2018 Board meeting that the announcement of his departure would take place around six weeks later and that, in the meantime, Mr Huljich was exploring the options for the sale of Mr Crowther's shares. In turn, it would have been open to the jury to consider that this explained the quiet period between 19 April 2018 and late May 2018 from the perspective of Mr Shaw and Mr Gordon.

[99] In closing to the jury, the Crown also asked the jury to think about whether there was uncertainty from Mr Huljich's perspective. He was the person who the Board put in charge of the process for selling the shares which Mr Crowther accepted. It was open to the jury to form the view that Mr Crowther's conflicted feelings were understandable but, unless the Board asked him to stay (which they did not), then his intentions were as per his 19 April 2018 email. While Mr Crowther's own initial enquiries suggested it might be best to retain some of his shares, his evidence was that Mr Huljich explained to him that "selling all of the shares would be better for the company" and he took this to "heart".

[100] It was open to the jury to accept the Crown's submission that, from the Board and Mr Huljich's perspective, it was all about "when" not "if" and controlling the sale process. If they accepted this, then the inside information did not involve uncertainty about Mr Crowther's departure. If this inside information was generally available, uncertainty about whether Mr Crowther would leave (and therefore sell his shares) would not then be a factor that a reasonable investor would take into account in assessing the materiality of Mr Crowther's intention to leave and to sell his shares.

[101] The next consideration Mr Cable was asked to factor in was that Mr Crowther might wish to explore the possibility of a placement of $20 to $30 million worth of his shares with a United States institutional investor. The evidence about a possible private placement was, however, light in detail. The mention of it in the documents

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[44] Above at [30]–[36].

was limited and non-specific. Mr Crowther 's email to the Board dated 19 April 2018 said "Peter [Huljich] has surfaced that some overseas options [may be] more favourable, and I'm working with him to investigate that option as well".[45] Mr Crowther's email to Mr Gordon and others on 21 April 2018 said "I think the best play … i[s] for me to sit back for the time being, and connect with Peter [Huljich] about the Stateside options".[46]

[102] No detail about this was elicited from the witnesses in their evidence at trial. The cross-examination of Mr Crowther by Mr Huljich's counsel about this was:

> Q. "And connecting with Pete[r] about State side options" is a reference to an off market private placement for sale in the US. Correct?
>
> A. Correct.
>
> Q. And in the proposal there is that you would sell 20 or $30 million of your stock in one, in one big go to one big investor. Is that right?
>
> A. I think that would have been the idea although I don't have the exact reference to that, but I think that's largely the concept, is that someone would take a position and, would take part of my position, yeah.

[103] In examination-in-chief, Mr Heaslip said:

> Q. … Were you aware of what [S]tateside options might be, or was that something you didn't have insight to?
>
> A. Yeah, I don't recall what they were specifically but I know there were some US investment banks that we had worked with who had potential buyers for, you know, larger stakes in the company.

[104] The cross-examination of Mr Heaslip on this topic was simply this:

> Q. And Mr Crowther has told us that the Stateside options were private placement, and I think you mentioned institutions, is that right?
>
> A. Yes.

[105] The cross-examination of Mr Shaw on this topic included only this:

> Q. "And connect with Peter about Stateside options,"?
>
> A. Yes.

---

45 See above at [19].
46 See above at [24].

Q. Mr Crowther has told us that maybe he would look at placing 20 or $30 million of shares in the US. Does that ring a bell with you?

A. No.

[106] When pressed at the appeal hearing for any more detail in the evidence about this, counsel referred only to the evidence adduced from Mr Gordon in cross-examination. His recollection was that there was demand from very large United States investors, but because they had minimum shareholding requirements and Pushpay's shares were closely held, there was not enough shares for them to buy.

[107] There was a distinct absence of evidence of any steps Mr Huljich was taking to pursue a private placement with any such very large United States investors. To the extent United States investors were being pursued, this was in relation to a takeover of Pushpay rather than a private placement of Mr Crowther's shareholding. As the Crown put it in closing, there was not any evidence of "any big American funds beating down the door" at 3 May 2018. The jury was entitled to give the possibility of a private placement no weight in assessing what a reasonable investor would expect as to the effect from Mr Crowther's intended departure and share sale on the price of Pushpay shares.

[108] The third consideration Mr Cable was asked to take into account was the "two pending potential takeover options" under consideration, albeit at an early stage at 3 May 2018. One of those involved Vista, a United States-based equity firm specialising in tech companies, described by Mr Heaslip as "a buyout firm". In early April 2018 Mr Huljich met with Vista and on 9 April 2018 he forwarded a draft non-disclosure agreement (NDA). In emails on 17 and 18 April 2018, Mr Heaslip and Mr Huljich referred to a hypothetical sale price of $4.50 per share "[i]f [Vista] purchased [Pushpay] for say US$910m" but there is no evidence that Vista was contemplating an offer to buy out Pushpay at this price. On 18 April 2018 Mr Huljich advised Craigs that "[t]he lawyers have been slow to negotiate the NDA". As was acknowledged by Mr Huljich's counsel at the appeal hearing, Vista "went quiet" and there were "no active discussions" at 3 May 2018.

[109] The other possibility involved a United States company called Insight. The evidence was that Mr Huljich met with Insight on 27 April 2018 and then emailed them an "indicative timetable":

Step	**Timing**
Insight signs short-form NDA	Friday 27 April, 2018
PPH meets with Insight to provide initial financial information	Wednesday 2 May
Insight to confirm initial value expectations (subject to due diligence), and to advise whether it wishes to undertake more detailed due diligence	Monday 7 May
Detailed commercial, legal, financial and tax due diligence	Wednesday 9 May – Wednesday 6 June 4 weeks
Insight to confirm transaction value	By the end of due diligence
Assuming the transaction value proposed by Insight is acceptable to the board/independent committee, then the parties will negotiate a scheme implementation agreement	3 – 4 weeks (assuming reasonable approach to negotiation by both sides, and that no material issues arise during due diligence or document negotiation)

[110] Mr Huljich sent Insight a draft NDA. The meeting proposed for 2 May 2018 took place on 3 May 2018. On 16 May 2018 Insight advised Mr Huljich and Ms Elder that it was not proceeding.

[111] Therefore, the position on 3 May 2018 was that Insight had been provided with initial financial information for considering whether it wished to take the matter further. Taking the matter further would involve Insight confirming "initial value expectations", detailed due diligence, confirmation of transaction value and then consideration by Pushpay. In other words, Insight's possible interest in a takeover was at a very early and preliminary stage.

[112] In light of the status of the takeover discussions at 3 May 2018, we consider it was open to the jury to conclude that a reasonable investor would not view a takeover as having a sufficient level of probability so as to be relevant to their assessment of the expected price impact of Mr Crowther's intended departure and share sale. Rather, as Mr McMahon put it, although "you could get lucky and a takeover bid happens to roll up [a]t exactly the same time", "the accepted and general market mechanism that you would expect on an ex ante basis to be used would be a bookbuild".

[113] We therefore conclude that the jury's verdict was not unreasonable on this basis. It was not contrary to uncontroverted evidence that Mr Crowther's intended departure and share sale was too uncertain for the information (that he intended to leave and would in that event sell Pushpay shares) to be material information.

Did Mr McMahon apply the correct test?

[114] We have set out Mr McMahon's evidence-in-chief that supported the Crown's case that Mr Crowther's intended departure and share sale was material. Mr Huljich submits that it became clear in cross-examination that Mr McMahon had misunderstood the test.

[115] The beginning of the cross-examination about this was as follows:[47]

> Q. But that's off in six weeks' time. So we're talking about what happens to the price now being 3 May, you understand that?
>
> A. I'm not quite sure I follow you.
>
> Q. The question that we're asking ourselves is if the information that a sell down is coming by bookbuild in six weeks for 100% or 50% of his shares at a discount of 7% is made generally available to the public on 3 May, we have to assess how that's going to impact the price on 3 May, you understand that?
>
> A. I see the – sorry, I see the scenario you are painting, yes.
>
> Q. Well that's the legal scenario we have to address. You understand that?
>
> A. Yes.
>
> Q. And as I understand –
>
> A. Sorry, could I just – is it, and I may be wrong here, *but I had thought it was the impact that it would be expected to have at the time of the transaction? Or am I misunderstanding it*?
>
> Q. Well, you tell us, how have you approached it?
>
> A. *I've approached it on the basis that when the transaction occurs, it will have to occur at a discount to whatever the price is at that time.*
>
> Q. Okay. So the legal question that confronts us though is what's the impact on 3 May of that news, not the impact at the time of the

[47] Emphasis added.

bookbuild. So it seems to me you may have applied the wrong test. Do you understand that?

A. I understand the comment you're making, and I am not going to suggest that you are wrong on a matter of law, Mr Dixon.

Q. But if I'm right about that, then you with all your expertise have got the test wrong, from the beginning.

A. If you are right about that, then my expectation is that the test relates to the bookbuild transaction. The alternative counterfactual would be to say, what happens if the price leaks, well let's take your scenario for example. The price is leaked on the 3rd of May. What do investors in the market then do—

Q. Right and that's your two options that you've told us about, right? That's existing shareholders will sell their shares?

A. If they could, they would.

Q. Yes, and that's, so they'll sell their shares in order to buy in at a lower price in the bookbuild.

A. They may be able to – correct.

Q. That's one reason, the other one you have is that buyers are going to hold off on buying in anticipation of buying at the discounted price. That is your other piece of evidence?

A. That would be the other leg to it.

….

Q. So in all four of your briefs you approached this as looking at the price in June rather than in May?

A. *I've looked at the expected effect, yes.*

Q. *In June?*

A. *In June.*

[116] A few questions on in the cross-examination there was an exchange that provides what we regard to be one of the high points for the submission that Mr McMahon applied the wrong test:[48]

Q. Right, so we are just looking at what people would expect as of 3 May?

A. For an ex ante test, yes.

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[48] Emphasis added.

> Q. And so to do that we need to identify a set of information, you've done that for us, the set that you've identified. That would be made publicly available as of 3 May, and then we need to imagine what would happen if that information was made generally available to the public. That's the test, right?
>
> A. *Well that's the test you're applying. I'm not quite sure that's the test I've applied or I necessarily agree with. I understood this was an expectations test about what was expected to happen in the future. It's not what would happen in a hypothetical situation where the behaviour and the information release was different.* Because at that point, that does become the event. There are two events then. We have the 3rd of May and you have an actual bookbuild further down the track. It would require analysis of both of those events to try and wo[r]k out what happened.

[117] After this exchange, a chambers hearing took place at the request of counsel for Mr Huljich. The Judge's Bench Note records that defence counsel submitted the test was what would happen at 3 May 2018 whereas Mr McMahon was applying a test of what would happen at the bookbuild six weeks later.[49] Counsel asked that the Judge give a direction that the test was what would happen on 3 May 2018. The Crown did not accept that Mr McMahon was wrong and submitted that defence counsel and Mr McMahon might be at cross purposes. The Judge's view is recorded in the Bench Note as follows:

> [9] I considered there may be an element of cross-purposes. The test is whether the information is material if it were available — and that must be judged on 3 May 2018 — but whether the information has an effect immediately or subsequently is more of a factual question. Mr McMahon said that if the test is as Mr Dixon says, there might be a change to the market price in two stages — a movement on 3 May 2018 and another movement at the time of the book build. Leaving aside this is probably something Mr McMahon has not dealt with before, it is a factual assessment.
>
> [10] Mr Dixon was happy to continue the cross-examination without a direction but indicated he would ask for a direction to the jury at the end of the trial that that is the correct legal position. He said he would be saying that Mr McMahon has got the test wrong and he needed to know in advance of his closing how the jury would be directed on that.

[118] When the cross-examination resumed, defence counsel put to Mr McMahon the statutory test as follows:

> Q. And so here we have to – the jury has to find that on 3 May the information was material information and that Mr Huljich knew it was material information. Do you understand that?

---

[49] Bench Note No 6.

A. Yes.

Q. So that involves an assessment of has he turned his mind to it, has he assessed what a reasonable person would expect to happen to the market price. Do you understand that?

A. I understand that, yes.

Q. And that he knew it would move by [a] material amount? Do you understand that?

A. Yes.

[119] Counsel then asked Mr McMahon what he considered Pushpay's materiality threshold to be at 3 May 2018:

Q. … I mean you are saying this information that we have talked about is material, which means it has to be measured. It's a material movement in price, there's got to be a threshold from when it is or it isn't material. *And my question for you is, what's the number for Pushpay on 3 May.*

A. It would be between five and 10%. Now –

Q. You're going to have to do better than that.

A. Well, well I've said previously that the information about a bookbuild, a co-founder leaving, selling 9% of the company and my estimate is that on an expectations basis, you would expect that the bookbuild transactional price would be in the order of 7% below the prior close price in normal circumstances, there or thereabouts. *Now if you're asking me to disaggregate that and say, what would the share price move be on the day and what would the subsequent move be in a bookbuild discoun*t – because we are now talking two separate effects here, and you seem to be trying to isolate one on its own if I'm understanding you correctly – or have I misunderstood you?

Q. I think you have misunderstood me. …

[120] Counsel explained that he was asking for Mr McMahon's view of the materiality threshold for Pushpay as at 3 May 2018. He was not asking about the effect on 3 May or 18 June of Mr Crowther's departure and share sale. Mr McMahon said that the materiality threshold was likely to be the same as the bookbuild discount. He explained this further in the following exchange:

A. Let's work back from the NZX guidance note and the guidance note says more than 10% will typically be taken as fairly unambiguous evidence that something is material, on an ex post basis. Less than 5% will typically, but not always, be taken that's it not material. For a very large cap stable stock where the price doesn't fluctuate very

much a movement of less than 5% may be material. And then we have the zone in the middle of five to 10% where it will depend on the specific facts and circumstances, and so I would have said given the facts and circumstances of Pushpay, at six to 7% it probably becomes material somewhere around there.

Q. Well can you be more definite than "probably" because obviously we have to know in this case if it's material. So probably six to seven isn't going to help us.

A. All right, I'll go with six to seven then Mr Dixon.

Q. Six to seven. So can you be more specific than that? What do you say the reasonable investor would have understood the materiality threshold for Pushpay, as of 3 May?

A. I'll split the difference and go 6.5% but that's an approximate.

Q. Okay.

A. It's an approximation.

Q. This is not a number you've thought of before, this is a number you're giving today in your evidence for the first time, correct?

A. I haven't considered it in terms of a test as at 3rd of May, I've certainly considered it a test as at the bookbuild price.

Q. As at the bookbuild date?

A. Yeah.

[121] Mr McMahon was challenged on his materiality threshold but did not accept it was as high as Mr Cable's threshold.

[122] The cross-examination as to the effect on price of Mr Crowther's intended departure and share sale continued on the following day. It included the following:

Q. I'll call that the McMahon approach. Then we have this alternative approach, the new approach we might call it, that there would also be an immediate negative price impact as of 3 May if the news of the impending bookbuild became known on that day?

A. Yes, at that point you effectively have a split scenario because at the 3rd of May if there is a leak or an announcement, at that point you have a partial reaction and that can be measured obviously on an ex post basis at that time and then you still have an ex ante future reaction that will happen when the bookbuild occurs. So, effectively where I guess splitting, splitting a total, a total discount into two components, one that the market tries to price straightaway and the other then is priced subsequently when the bookbuild does occur. One becomes ex

post, one still remains ex ante, and I would emphasise that this is not a situation which would happen in practice.

Q. No, it's part of the hypothetical, the notional exercise that we go through, right?

A. Yes, I understand that.

…

Q. And as I understand your evidence, from yesterday, this immediate negative price impact is because existing shareholders are going to want to sell shares to position themselves to participate in the bookbuild at a discount?

A. There may be some element of that, yes.

Q. And prospective buyers are going to hold off on buying to wait to participate in the bookbuild at a discount?

A. Yes now not every buyer and not every seller, let's be clear, because not every participant in the market would have the ability to deal in the bookbuild, if they weren't clients of the broker or they were small retail clients, if they dealt through an online broking firm, they would not be able to participate. That may not stop them trading, they might think okay I can't trade the bookbuild, but I'll wait, if I'm buying I'll wait and see if there's any weakness around the bookbuild and I'll look to accumulate some stock then. So even on folk who aren't participating in the bookbuild and could not reasonably do so, their behaviour may be affected.

…

A. Because I'm trying to – you're trying to disaggregate two effects, in a hypothetical situation which does not happen in markets, and you're creating an artificial situation which just does not appear – so consequently I have no precedent and I cannot understand how individual – how quickly or otherwise individual buyers would respond. I can state, as in a general first principal basis, what I believe buyers would do but disaggregating that into a price impact is difficult. As I said, you're now trying to disaggregate one materiality number into two separate numbers, and I conceptually struggle with giving you a definitive answer about how you would break that into the two and one is likely to affect the other by the way.

Q. I can fully understand that, but just in terms of this situation, this is the test that the statute requires us to do, right, it requires us to say what would happen if this information became publicly known as of 3 May.

A. If it were generally available –

Q. Generally available –

A. – yes –

Q. – as at 3 May.

A. So if it was generally available at 3 May, there are going to be two effects, the first I would argue is there will be an immediate price – well very close to immediate price effect of some sort and yes that's obviously measurable on an ex post basis a day or two later, and the second effect, because we still have an ex ante effect here, the second effect comes from the bookbuild sell down which is yet to proceed and by the way, that bookbuild sell down is now a certainty because it has been announced. So investors now definitely know it's coming up. They definitely know they can preposition. What I can't assess is how quickly and how much that would affect the price in those first one or two days and to the extent that it affects the price to a greater extent, the bookbuild discount maybe lower. To the extent that it doesn't affect the price to such a greater extent, the bookbuild discount may be greater, but I'm still comfortable finishing up at a position where I think in aggregate across those two events, is going to be a level of discount or price change which at aggregate I would regard as material. I just can't disaggregate it for you, if I can explain it that way.

[123] In re-examination, Mr McMahon explained why the two effects should not be disaggregated:

Q. I can assure you I don't want to spend [any more] time with Mr Dixon's hypotheticals, but I want to understand in principle why you say the aggregate effect is what you look for and why you say also that you can't disaggregate the effects?

A. Well, what do you want to understand is, is what is the impact that the information is going to have and if you disaggregate them then you have to look at the two separate impacts, one what might be the impact if there was this hypothetical announcement and, secondly, then subsequently what is the level of discount that is required in a sell down transaction such as a bookbuild. So, to disaggregate them would risk having neither of them be material in their own right when in fact they stem from the same source of information and therefore should be aggregated when assessing the impact of that information.

Q. When you're talking about it stemming for the same piece of information, just explain to us why that's important in your view?

A. Well, it's the piece of information that drives materiality, in this case the circumstances around Mr Crowther, so you have a number of facts and circumstances around Mr Crowther and then depending on whether we adopt Mr Dixon's hypothetical structure or just move straight into a bookbuild at some point, there is going to be an impact. In one scenario the impact is split across probably two separate areas, and the second one it's all focused into the bookbuild.

[124] We accept that there are aspects of the cross-examination that might be thought to indicate that Mr McMahon was applying the wrong test. The Crown in closing addressed this as follows:

> … he may have got things wrong. I think actually what happened was that Mr McMahon at least got what somewhat confused about what was being suggested to him and he had to give an answer as to what the price was on one day, 3 May. You don't have to give an answer as to what the price is on 3 May. You have to give an answer to what your expectation is of the impact of the information and what it will be on the listed price of the security.

[125] The Crown invited the jury to review the notes of evidence to assess whether this confusion had occurred. The Crown also referred to Mr McMahon's evidence that the assessment had to be made as a whole. If a reasonable investor assessed the effect as seven per cent, it did not matter if that was derived from an effect of three per cent on the first day, two per cent the next day and so on, adding up to seven per cent in a week. Legitimate different views could be taken of how efficient trading on the NZX would be in building in the information.

[126] The closing address for Mr Huljich covered this topic at some length. It was repeatedly submitted that Mr McMahon had applied the wrong test because he was considering the bookbuild price and not the market price. The defence went through in detail the cross examination of Mr McMahon about this, including where Mr McMahon said "[w]ell that's the test you're applying". The submissions included, for example:

> So, it's very clear that Mr McMahon's original approach – the one that was in his brief from August of 2002 – through to trial, said as of 3 May is a material effect because when the book build event happens in June that will impact the price by the book build discount. He did not consider what happened on the market when the notional announcement is made on 3 May and what that – would happen to the market. And that's a critical error on his part. It's an error by him; it's an error by the Crown; it's an error by the FMA because they've allowed that opinion. And the first time we saw this new theory of the what would happen was on a Wednesday of the second week of trial. We got his revised brief and I took him through that and you guys saw all the track changes. And he said, yeah, that is the first time that I've mentioned any of that stuff. And there's two things about that. One, it's pretty clear that he's got the test wrong. And two, where does that leave us with the reliability of what the Crown is asking you to do? Where does it leave us with having any confidence that we can be sure that Mr Huljich knew this was material upon – to a materiality test that – that the chair of the NZX can't get right. Just – it's just staggering. Right. Staggering that he could get it that wrong. But he has. He's measuring the effect of the transaction not the effect of the news.

> So the test is what happens with the news. What happens when it becomes available?

[127] When summing up, in addition to giving the usual general direction about expert evidence, the Judge dealt with the matter this way:

> [75] There was disagreement between Mr McMahon and Mr Cable about the approach to material information. It is for you to decide how much weight or importance you give to any of their opinions. But to the extent that Mr McMahon's first approach assessed whether the bookbuild would have a material effect when it occurred in mid-June 2018, and to the extent that he did not apply the hypothetical announcement test that I have described, he did not address the correct legal test. As I have said, the correct legal test is whether a reasonable person (as described) would expect the hypothetical public announcement on 3 May 2018 to have a material effect on the price of Pushpay shares on the NZX. To the extent that not all of Mr McMahon's evidence addressed the correct legal test as I have explained it, you need to consider his evidence in light of that correct legal test.

[128] The jury were therefore fully aware of the defence's concerns with Mr McMahon's evidence. They were correctly directed as to the legal test and the fact that, at times, Mr McMahon seemed to disavow the hypothetical public announcement as the appropriate test of whether the inside information held by Mr Huljich was material. The jury also had the opportunity to consider Mr McMahon's evidence in its full context.

[129] That full context included his evidence-in-chief in which he explained that the test was "ex ante". It asked whether a reasonable investor would expect the information to have a material effect on the price of Pushpay's shares. His simple point was that a bookbuild at a discount of around seven per cent could be anticipated and this was material. He explained that institutional investors with knowledge of the information, for example, could hold off purchasing shares anticipating being able to purchase the shares at a discount. Investors with knowledge of the information might also sell off shares in advance of the bookbuild with a view to repurchasing shares once the trading halt was lifted, in anticipation of the share price not recovering immediately. Confidentiality was critical.

[130] Our assessment, and one that was available to the jury, was that the confusion in the cross-examination arose because Mr McMahon thought he was being asked to say what immediate price impact there would be on 3 May 2018 in anticipation of the

upcoming bookbuild that would be expected to occur at a discount, and with this impact having been experienced, what price impact would then occur at the time of the bookbuild. He did not regard this as the right approach. There was one source of information and this one source drove its materiality — an anticipated discount of around seven to seven and a half per cent when the anticipated bookbuild occurred meant that the information was material as at 3 May 2018.

[131] We are not satisfied that the jury's verdict was unreasonable on the basis that Mr McMahon applied the wrong test.

Was the jury properly assisted with this evidence?

[132] Mr Huljich submits that the abstract and conceptual discussion as to the correct test to apply, which occupied much of the cross-examination, would likely to have been difficult for the jury to follow and the Judge's direction to the jury was inadequate as being "too little and too late". He says the Judge ought to have given a direction on the correct legal test when this was sought by his counsel in the chambers discussion during the cross-examination.

[133] We do not agree. At the request of defence counsel, the Judge had already directed the jury on the legal meaning of "material information" in advance of Mr McMahon's evidence being led. When a further direction was sought during the cross-examination, the Judge formed the view that there was an element of cross purposes. As is recorded in the Judge's Bench Note, counsel was happy to continue the cross-examination without a direction but indicated he would ask for a direction to the jury at the end of the trial as to the correct legal position. That direction was duly given.

[134] No miscarriage of justice arises on this basis.

Should Mr McMahon's evidence have been excluded?

[135] Mr Huljich submits that Mr McMahon's evidence ought to have been excluded as not substantially helpful. This was because it was premised on a flawed approach to materiality that did not conform to the legal test. He submits that Mr McMahon got

the timing of the test wrong (by assessing the bookbuild discount when it occurred), excluded the evidence of uncertainty (as to whether Mr Crowther would leave, would sell all his shares, and would do so by bookbuild) and by using the bookbuild price which he submits is not the market price.[50]

[136] As we have discussed, we do not accept that Mr McMahon, when his evidence is viewed overall, got the test wrong. We also do not accept that Mr McMahon's approach was wrong because it failed to account for the uncertainty of whether Mr Crowther would sell his shares or whether the sale would proceed other than by way of bookbuild. As the Judge said in his ruling about this, it was for the jury to decide the underlying facts and also ultimately whether a reasonable person (with the relevant characteristics) would expect the information if generally available to have a material effect on the price of Pushpay shares.[51] Nor do we accept that the bookbuild price is an irrelevant effect for the purposes of the statutory test. It is a price effect on the "quoted financial products of the listed issuer".[52]

[137] There was no miscarriage of justice on this basis.

Change in Crown theory

[138] Mr Huljich submits that he was prejudiced by a late change in the Crown's theory of the case as a result of late changes made to Mr McMahon's brief of evidence (and the evidence elicited at trial on the basis of that brief). He says that, had he known the theory the Crown was going to advance, he would have sought expert evidence to respond to it.

[139] Mr Huljich submits that Mr McMahon's pre-trial brief of evidence contended that the most likely outcome was that Mr Crowther would leave and sell all his shares by bookbuild, and this was material information because when the sale happened by bookbuild it would be at a discount to market price and at that time be material. That is, he assessed the effect of the information on the price of the shares when the

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50 These matters formed the basis for Mr Huljich's application to dismiss the charge at the end of the Crown case which the Judge declined: Ruling No 6.

51 Ruling No 6 at [28].

52 Above at [6] and [10].

bookbuild happened rather than the effect on the price of the shares of the (hypothetical) release of the information. He also took no account of uncertainty.

[140] Mr Huljich submits that the Crown stepped away from this thesis in its opening address by submitting that Mr Crowther's departure was material due to the anticipated excess supply of shares. Specifically, the Crown submitted:

> So start with the information itself that Mr Crowther's leaving and selling [his] shares. Mr Huljich knows that. The inevitable consequence of it is that Mr Crowther's shareholding would be sold. Of itself that's going to push the share price down because the supply's gone up, price goes down, someone who invests in shares would anticipate that a sale of that amount would have to be done at a discount to the market price. If they knew the sale was coming they wouldn't want to buy shares at today's prices knowing that maybe tomorrow you can get them for 8% off. Maybe they could sell now, buy at a discount, and try their luck, and so it follows from all that that the information was material. The fact that Mr Crowther was selling and the likelihood that the sale would be at a discount to market would be expected to cause Pushpay's share price to be materially lower then it otherwise would've been absent those circumstances.

[141] Mr Huljich submits that it was only just before the completion of the non-fact witnesses for the prosecution that it received an amended brief of evidence which provided support for the Crown's new theory. Specifically, the amended brief of evidence included:

> Holding non-public knowledge of the sell down confers the ability to trade at a price likely higher than the expected discount price that is likely to occur when the sell down transaction eventuates, or alternatively to refrain from any buying intention until the book build. Assuming the sell down circumstances are likely to result in the expected discount price required to clear the shares being materially lower than the price prior to the sell down, then I cannot draw any other conclusion than that knowledge of the sell down is material information. That the price subsequently recovered from the sell down trade does not have relevance to the sell down trade itself.

[142] Having reviewed Mr McMahon's original brief we note that he correctly set out the statutory test for "material information" under a discussion of "materiality generally". He emphasised that the test did not mean that it must have a material effect when released "simply that it must be *expected to have* a material effect".[53] He discussed the factors an investor would consider when they had information that a co-founder, director and substantial shareholder was departing and divesting his or her

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[53] Emphasis in the original.

shareholding. This included "the impact on the share price of the discount required to clear any shareholding sale, or ongoing price pressure if the shares are sold over time, especially when the stake is around 5% or more of the company's capital".

[143] We agree with Mr Huljich that the brief of evidence discussed the bookbuild discount in his "ex post facto" materiality assessment rather than when discussing his "ex ante" assessment of materiality. This approach was consistent with the NZX Guidance Note as to how the NZX would monitor compliance with the disclosure regime. The brief did not clearly explain that a reasonable person would expect the information (that Mr Crowther intended to resign and in that event would sell his shares) to be material because they would expect the shares to be sold at a discount in bookbuild process.

[144] The amended brief of evidence more clearly supported the Crown's opening address that a reasonable investor would anticipate that a sale of a stake in Pushpay of that size would be at a discount to market price and that this could affect their buying and selling decisions. So we accept that there was a change in the brief of evidence on which Mr Huljich's counsel preparation would have proceeded.

[145] However, we are not satisfied that this gave rise to unfair prejudice. We consider the best evidence that it did not do so is that trial counsel did not seek an adjournment on this basis. The possibility of an adjournment was not raised after the Crown's opening, nor when an amended brief of evidence from Mr McMahon was signalled. Rather, the Judge's Bench Note records that when Mr McMahon's amended brief was signalled, it was anticipated and accepted by the Judge that there would be a break before Mr McMahon gave evidence to enable the defence to digest the updated brief.[54] Additionally, Mr Huljich's counsel advised that he was reserving his position in relation to a possible recall of Jeremy Williamson (the head of Private Wealth and Markets at Craigs) depending on whether anything arose from Mr McMahon's revised brief and the Crown did not oppose this.[55]

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54 Bench Note No 3 at [4].
55 At [5].

[146] Mr McMahon's updated brief of evidence had been provided by 9 August 2023.[56] On the morning of 11 August 2023, a chambers hearing was convened to address the objections to Mr McMahon's evidence.[57] Those objections were that Mr McMahon was giving his opinion on the legal test for material information (which was a matter for the Judge), that Mr McMahon opined on the probability of Mr Crowther resigning and selling shares (when that was a question of fact for the jury) and that Mr McMahon could not opine that Ms Elder's removal of references to the Trust in trading update emails was a deliberate concealment. There is no suggestion that counsel believed it was prejudiced by the updated brief.

[147] In addition to the possible recall of Mr Williamson referred to in the Bench Note, the Judge left open the possibility of Mr Huljich recalling Mr Knight after the experts had given evidence as to the market implications of the bookbuild. This followed an objection by the Crown to an attempt by Mr Huljich's counsel to qualify Mr Knight as an expert and to give evidence about this. In a voir dire that followed this objection, Mr Knight confirmed that he had conferred with defence counsel prior to trial and had the time to consider the points he had been asked. Subsequently no attempt to recall Mr Knight was made.

[148] This all suggests that there was no need for an adjournment as the defence was not prejudiced by the amended brief, nor the evidence that Mr McMahon in fact gave which was consistent with his brief. Rather, the trial strategy appears to have been to capitalise on Mr McMahon's approach in looking at the bookbuild price as the material effect on the price and that Mr McMahon appeared not to have understood that the material information test was assessed on the basis of the hypothetical public announcement counterfactual. In the event, however, and with the benefit of hearing all the evidence, counsel's submissions on the evidence and the Judge's directions as to the legal test, the jury were satisfied that the information was material.

[149] Lastly, on this appeal Mr Huljich sought to demonstrate that he was prejudiced by filing an affidavit from David Rattray, an Australian consultant with significant experience in stockbroking, mostly at Merrill Lynch (Australia). This affidavit

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56 Bench Note No 4 at [5].
57 Bench Note No 5.

responds to the disaggregation of the price effects of the hypothetical announcement. In essence Mr Rattray says that markets are very efficient and absorb new information and incorporate it into a company's share price very quickly. We agree with the Crown that this evidence does not assist us. The efficiency of markets was not in issue. Mr McMahon made it clear that he had a difficulty with attempting to disaggregate the price effects which stemmed from the same source of information. The question was whether that information if generally available would be expected to have a material impact on the price of Pushpay's shares. We decline leave to adduce Mr Rattray's evidence about this on the basis that it is not cogent.

[150] Mr Rattray goes on to give his views on Pushpay's materiality threshold (agreeing with Mr Cable that it is within the eight to ten per cent range), challenging Mr McMahon's apparent lack of experience in roles that actively monitor the market and how it reacts to announcements, and his view that the Crowther news (that is, that he intends to resign and in that event would sell shares in Pushpay) was too lacking in detail to be material. This evidence is not fresh. It does not arise out of an unanticipated Crown theory of the case. If Mr Huljich wished to call a second expert to give this evidence, he was always able to do so. We decline leave to adduce these aspects of Mr Rattray's evidence.

[151] To conclude, there was no unfair prejudice arising from the contended change in the Crown's theory of the case arising from amendments made to Mr McMahon's brief of evidence during the trial. A miscarriage of justice did not arise on this basis.

Crown's conduct

[152] Lastly on the conviction appeal, Mr Huljich submits that the Crown adopted an aggressive and misconceived theory of the case that was not made out nor accepted by the Judge when sentencing Mr Huljich. Specifically, the Crown relied on Mr Huljich's involvement in the Trust changes, that this involvement occurred with Mr Huljich's involvement in the Trust's decision to sell the Pushpay shares, and that he received $4 million from the proceeds of sale for his assistance.

[153] These matters do not give rise to a miscarriage of justice. Ultimately it was for the jury to decide what they made of the evidence as to the timing of the Trust changes,

the evidence from one of the Trustees about why the principal beneficiary wanted to make the Trust changes and the principal beneficiary's involvement in the decision to sell the shares, the benefit Mr Huljich did in fact receive from the Trust's sale of the shares and the manner in which the Trust's sale was reported to the Board. The fact that the Judge formed the view for the purposes of sentencing that these aspects were not proven beyond reasonable doubt does not mean that the essential elements of the charge were not proven beyond reasonable doubt (as the jury found). Nor does it mean that the Crown's theory was unfairly misconceived so as to give rise to a miscarriage of justice on its own or in combination with any of the other grounds we have discussed and rejected.

Conclusion

[154] We conclude that none of the grounds on which the conviction appeal was brought have been made out. This means that the conviction appeal must be dismissed.

Sentence appeal

Introduction

[155] Mr Huljich was sentenced to six months' community detention, with a curfew period from 9 pm to 6 am seven days a week at a specified address. A fine of $100,000 was also imposed. The Crown appeals this sentence on the basis that it is manifestly inadequate. It says it has brought the appeal because of the wider significance the judgment will have for the enforcement regime for financial markets conduct matters and in light of there having been only one other conviction for insider conduct in New Zealand's history.[58]

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58 That being *Financial Markets Authority v Honey* [2017] NZDC 12793.

Culpability

[156] In assessing the culpability of Mr Huljich's offending for sentencing purposes, the Judge made several findings:

(a) In sending the email dated 3 May 2018, Mr Huljich advised or encouraged the Trustees to sell [several] million shares and intended to do so. While the Judge doubted that Mr Huljich was "merely an administrative conduit" for the principal beneficiary's instructions, the Judge was "not satisfied beyond reasonable doubt that [Mr Huljich] advised or encouraged the trustees to sell because of the Information".[59]

(b) Mr Huljich understood that the sale of Mr Crowther's shares would be by way of a bookbuild at a six to seven per cent discount from the market price of the shares before the share price recovered to be at or near the original price. However, the Judge was "not satisfied beyond reasonable doubt that [Mr Huljich's] plan was to front-run, that is for the Trust to sell shares at the higher price before the Information became available to the market and then repurchase shares during the dip in the market price".[60]

(c) Mr Huljich knew the information was material.[61]

(d) The Judge was "not satisfied beyond reasonable doubt" that Mr Huljich had dishonestly concealed the Trust's connection to the sales that were reported to the Board with reference only to the Trustees' personal names.[62]

(e) The Judge was not satisfied beyond reasonable doubt that the $4 million Mr Huljich received from the sale proceeds, although variously

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59 Sentencing notes, above n 4, at [11].
60 At [13].
61 At [15].
62 At [18].

described as a loan and a gift, was properly characterised as a gain from Mr Huljich's insider conduct.[63]

[157] Overall the Judge assessed the culpability as being between low and moderate in light of the aggravating features and the factors that reduced culpability:

(a) The aggravating factors identified were Mr Huljich's breach of trust ("as a true insider of a substantial listed company" as a high-ranking and trusted officer of Pushpay who obtained the information directly through that role, and a professional in financial market matters),[64] and the "very substantial amount" of shares and price involved in the trading.[65] The harm to the reputation and integrity of the market was greater because of these aggravating factors.

(b) The factors identified as reducing culpability were that the offending involved a single act of advice or encouragement, the effect of the information "during the period of an anticipated bookbuild sale was likely within two per cent of the so-called materiality threshold" for Pushpay, Mr Huljich did not advise or encourage the Trustees to sell because of the information, and the $4 million that Mr Huljich received was not properly characterised as a gain from the insider conduct.[66]

[158] The Judge reviewed all the Australian cases the parties referred to as well as the one New Zealand case of insider trading (*Financial Markets Authority v Honey*).[67] The Judge identified difficulties with obtaining guidance from the Australian cases.[68]

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63 At [19].
64 At [29(a)].
65 At [29(b)].
66 At [31].
67 *Financial Markets Authority v Honey*, above n 58; *R v Hannes* [2002] NSWSC 1182, (2002) 173 FLR 1; *Director of Public Prosecutions v O'Reilly* [2010] VSC 138; *Khoo v The Queen* [2013] NSWCCA 323, (2013) 237 A Crim R 221; *R v Joffe* [2015] NSWSC 741, (2015) 106 ACSR 525; *Xiao v R* [2018] NSWCCA 4, (2018) 96 NSWLR 1; *R v Dalzell* [2011] NSWSC 454, (2011) 83 ACSR 407; *R v O'Brien* [2011] NSWSC 1553, (2011) 91 ACSR 374; *R v Glynatsis* [2013] NSWCCA 131, (2013) 230 A Crim R 99; and *Director of Public Prosecutions (Vic) v Lindskog* County Court of Victoria, 14 March 2013 per Judge Parsons.
68 The equivalent Australian offence was subject to a higher maximum penalty, the sentencing methodology did not involve identifying a discrete starting point, some of the cases involved a guilty plea and most of them involved more serious proved offending.

The Judge adopted a starting point of 18 months' imprisonment given the higher level of breach of trust and the higher amount involved than in *Honey* where a 12 months' imprisonment starting point was adopted.[69] This was less than the two to three years' imprisonment starting point that the Crown had proposed.

[159] The Crown submits that the Judge was wrong in relying on the factors he identified as reducing culpability. Specifically, the Crown says:

(a) The offence is committed by a single act of advice or encouragement, and if there were more than one act of advice or encouragement it would likely have led to further offences.

(b) The Judge's reference to a "materiality threshold" was arguably a misnomer and in any event Mr Huljich was well alive to the materiality of the inside information which increased his culpability.

(c) The Judge was wrong to find that the advice or encouragement was not because of the material information. This is because the time at which the Trust changes were made in advance of the advice or encouragement, and which avoided the need to disclose the sale to the Board, created the irresistible inference that the advice or encouragement was prompted by Mr Huljich coming into possession of the information.

(d) The Judge was wrong to decline to characterise the $4 million Mr Huljich received from the sale proceeds as a gain from the insider conduct.

[160] As to these points:

(a) While it is the case that the offence is completed by one act of advice or encouragement, the charge prior to its amendment during trial

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69 Sentencing notes, above n 4, at [38] and [42].

included a further particular.[70] The Judge was not in error in taking this into account in assessing culpability.

(b) We understand the Judge to have viewed the offending as less culpable because the information was at the lower end of materiality for Pushpay's share price. More relevant, however, is that the jury's verdict meant they were satisfied that the information was material and that Mr Huljich knew it was. Also more relevant is the financial scale of the share sale which followed Mr Huljich's advice or encouragement (but taking into account that the Judge found Mr Huljich did not provide advice or encouragement "because of" the material information).

(c) We are not persuaded that the timing of the Trust changes gave rise to an irresistible inference that Mr Huljich advised or encouraged the Trust to sell the Pushpay shares "because of" the material information. It is accepted that causation is not an element of the charge and the jury were accordingly not directed that they had to be sure of this. While Mr Huljich's involvement in the Trust changes was certainly evidence that the jury might have viewed as circumstantial evidence supporting the Crown's case, there was also evidence that the Trust changes were made at the principal beneficiary's instigation and reflecting the principal beneficiary's wishes, that the principal beneficiary wished to sell the Pushpay shares for reasons unconnected to the material information, and that the Trust changes and share sale had been in contemplation before Mr Huljich had material information. Depending on the jury's assessment of this evidence, it would have been reasonably possible for them to accept that Mr Huljich's role in relation to the Trust changes was confined to arranging those changes to be effected. It was also reasonably possible that the timing of Mr Huljich's involvement in making the Trust changes had nothing to do with the advice or encouragement of the share sale he provided through his 3 May 2018 email and was simply coincidental. While that may be a generous view

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[70] See above n 16.

of the evidence, even if the timing of those Trust changes reflected a concern by Mr Huljich to distance himself from the Trust's share sale because by this time he had material information, it does not inevitably follow that he provided the advice or encouragement to sell the shares "because of" the material information if the principal beneficiary had independently decided to sell the shares.

(d) We consider that the fact Mr Huljich received $4 million from the share sale was not irrelevant. Mr Huljich was aware he was to receive this from the proceeds when he conveyed the instructions to the Trustees to sell the shares. Its weight as an aggravating factor was, however, reduced because the Judge found that Mr Huljich did not advise or encourage the share sale "because of" the material information.

[161] The Judge identified the relevant principles and purposes of sentencing to be holding Mr Huljich accountable for the harm done to the integrity of the market; promoting a sense of responsibility for an acknowledgment of that harm; and denouncing and deterring Mr Huljich and others from committing this kind of offending given the detrimental effect it has on the market and the difficulty in detecting it. The Judge saw these purposes as aligned with the main purposes of the Financial Markets Conduct Act, namely: to promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and to promote and facilitate the development of fair, efficient, and transparent financial markets.[71]

[162] We agree with the Judge, but also agree with the Crown that of these principles and purposes, deterrence is to the fore for insider conduct. This has been repeatedly recognised in the overseas authority to which we were referred.[72] These authorities emphasise that it is a form of fraud, and that the public confidence in the integrity of the stock market, essential to its proper functioning, is undermined by insider conduct.

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71 Sentencing notes, above n 4, at [22]–[23]; and Financial Markets Conduct Act, s 3.

72 *R v McQuoid* [2009] EWCA Crim 1301, [2009] 4 All ER 388 at [8]; *R v Glynatsis*, above n 67, at [79]; *Xiao v R*, above n 67, at [354]; *R v Rivkin* [2003] NSWSC 447, (2003) 198 ALR 400 at [44]; and *R v Doff* [2005] NSWCCA 119, (2005) 54 ACSR 200 at [56].

Reflecting the seriousness of the offending and the need for deterrence, the starting point will generally be imprisonment.

[163] We also agree with the Crown that this was a materially more serious case than that in *Honey.* Although that involved deliberate inside conduct, the breach of trust involved in this case was greater as a result of Mr Huljich's senior position within Pushpay and its scale was considerably greater.

[164] Overall, we consider the Judge understated the culpability of the offending. If we were assessing the matter afresh on the factual basis on which the Judge's sentencing proceeded, we consider the starting point should have been not less than two years' imprisonment to properly reflect the culpability of the offending. A starting point of three years' imprisonment would only have been appropriate if the Judge had found Mr Huljich provided the advice or encouragement because of the material inside information.

Personal circumstances

[165] The Judge considered there were no personal aggravating factors warranting an uplift to the sentence. The Judge considered the only personal mitigating factor was family circumstances (the details of which are subject to a High Court suppression order), in respect of which a reduction of approximately 20 per cent was appropriate. On the Judge's approach this meant an end sentence of 14 months' imprisonment before consideration of whether this should be commuted to a community-based sentence.[73] On our approach, the discount would mean an end sentence of a little over 19 months' imprisonment before considering whether a community-based sentence should be imposed.

[166] The only challenge to the Judge's approach on these matters was that the circumstances that led to the discount were also taken into account in determining whether a community-based sentence was appropriate. There is, however, no error in this respect. Personal mitigating factors may be relevant to both the length of sentence and the nature of the sentence imposed.

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[73] Sentencing notes, above n 4, at [56]–[57].

Home or community detention

[167] Whether on the Judge's end sentence or the end sentence that we consider to have been appropriate, home detention was available for consideration. As the Judge correctly observed, home detention can serve the need for deterrence.[74] Taking into account the above mentioned family circumstances, the Judge considered a sentence other than imprisonment was appropriate. Those circumstances included the need, on compassionate grounds, for Mr Huljich to be away from the detention address. The Judge concluded that community detention with a curfew period, which would better enable Mr Huljich's absences from the address "to be customised to fit [the] unique circumstances on humanitarian grounds", to be the less restrictive sentence.[75] The Judge therefore imposed six months' community detention being the maximum period for which that sentence can be imposed.[76]

[168] The Crown submits this was manifestly inadequate and that a term of home detention (as well as a substantial fine) would have been appropriate. Ordinarily we would agree. A sentence of six months' community detention does not adequately serve deterrent aims when compared with eight months' home detention (assuming an end sentence of 19 months' imprisonment before consideration of community-based sentences). That said, on a Crown appeal, we do not consider it appropriate to interfere with the compassionate response the Judge felt compelled to take in the unique circumstances to which the Judge referred. We grant leave on an unopposed basis in respect of an updating affidavit relating to those circumstances. It confirms the circumstances on which the Judge's response was based continued to apply at the time of the hearing before us.

Fine

[169] The Judge imposed a fine of $100,000. He did not give reasons for setting the fine at the level other than to note that Mr Huljich had the means to pay it.[77] However, it is clear that the Judge intended to impose an overall sentence that was the least restrictive but appropriate one.

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74 At [59].
75 At [62].
76 Sentencing Act 2002, s 69B(2).
77 Sentencing notes, above n 4, at [64].

[170] The Crown submits this was not a meaningful deterrent for a defendant of Mr Huljich's means. As it notes, there was ample evidence before the Court during the trial of Mr Huljich's very substantial wealth.

[171] The fine was set at one fifth of the maximum. We agree that together with the compassionate community detention sentence, it was manifestly inadequate. While a fine closer to the maximum was not appropriate given the finding of the Judge that Mr Huljich did not advise or encourage the sale of the shares because of the material inside information, a higher fine was necessary to provide some "sting", particularly in view of the compassionate approach the Judge took in imposing community detention rather than home detention. We consider the fine should be increased to $200,000 as the minimum appropriate level of the fine in the circumstances of the offending and the offender.

Conclusion

[172] The sentence appeal is allowed. The fine of $100,000 is set aside and replaced with a fine of $200,000. The sentence appeal is otherwise dismissed.

Name suppression appeal

Introduction

[173] Mr Huljich had the benefit of interim name suppression pending his trial. On conviction, the High Court declined his application for continued name suppression pending an appeal against his conviction.[78] He appeals this decision.

Background

[174] Pre-trial, Mr Huljich, the principal beneficiary and the Trustees applied for name suppression on various grounds pending Mr Huljich's trial. The High Court declined the application but did make a takedown order in respect of information relating to Mr Huljich's 2011 conviction under the Securities Act 1978.[79]

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78 Post-conviction High Court suppression judgment, above n 5.
79 *R v Huljich* [citation omitted] [pre-trial High Court suppression judgment].

[175] Mr Huljich, the principal beneficiary and the Trustees all appealed to this Court. This Court allowed the appeals.[80] This Court was satisfied that there was a real and appreciable risk that, despite takedown orders,[81] the jurors would recall or learn of Mr Huljich's previous conviction and form a view about Mr Huljich's honesty that would not be addressed by directions at trial. The threshold for interim name suppression was therefore made out. As a matter of discretion, the Court noted that the trial was only a few months away, and this potentially increased the risks to the fairness of the trial and also meant that the suppression would be required for a relatively short time (subject to orders made by the trial Judge).[82] This meant that the principle of open justice should yield to the fair trial risks.

[176] This Court was also satisfied that it was necessary to grant interim name suppression for the principal beneficiary and the trustees because, if they were not suppressed, they would be likely to lead to Mr Huljich's identity.[83] The Court was not satisfied that the principal beneficiary had made out a basis for interim suppression on the alternative ground of undue hardship but was satisfied that this ground was made out for the Trustees.

[177] Following trial, the Judge declined to continue suppression for Mr Huljich. He did so, rejecting the submission that it should continue because of the potential for a retrial if Mr Huljich was successful on his intended conviction appeal. However, he granted an interim order pending Mr Huljich's appeal from that decision.[84] The Judge granted the Trustees permanent name suppression. He also granted the principal beneficiary permanent name suppression, as well as suppression of details of the Trust, on the basis that publication of the principal beneficiary's name would be likely to identify the Trustees. These Trust details were the name and nature of the Trust, the

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80 *R v R* [citation omitted] [Court of Appeal suppression judgment].

81 The takedown orders provided insufficient protection because they could not remove "snippets" when searching on, for example, Twitter or Google which identified Mr Huljich and the previous offending.

82 Court of Appeal suppression judgment, above n 80, at [50].

83 At [59].

84 Criminal Procedure Act, s 286.

nature of associations between the Trustees, the Trust and its beneficiaries, and the specific dates and volumes of the Trustees' Pushpay share trades.[85]

Assessment

[178] As Mr Huljich's conviction appeal has been unsuccessful there is no basis for name suppression to continue up until a retrial. Mr Huljich accepts this to be the outcome if we dismiss his conviction appeal. We were, however, asked to extend the suppression for a period of time to enable an application to be made to seek leave to appeal to the Supreme Court from the dismissal of the conviction appeal.

[179] We decline to make that extension. It is premised on the basis that, if an application for leave to appeal is made, and if leave is granted, and if that appeal is successful, and if that results in an acquittal or a retrial order, it is appropriate to grant continued suppression. Mr Huljich has now had name suppression for a lengthy period. While it was appropriate for him to have that suppression pending his trial in 2023, as the Judge correctly held following that trial, different considerations apply for those seeking continued suppression following conviction.[86] The public interest in open justice must now take precedence given the significant public interest in the identity of the person who was convicted of insider conduct, the real prospect that any application for leave to appeal to the Supreme Court will not lead to an acquittal or retrial, and even if it did lead to a retrial at some time distant from now, the trial Judge would take steps to manage the concerns that had led to the original decision to grant Mr Huljich name suppression.

[180] We are, however, prepared to allow Mr Huljich interim name suppression for a period of seven days from the date of this judgment so that he may take any steps to notify family members or significant business interests in advance of name suppression lapsing.

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85 Post-conviction High Court suppression judgment, above n 5, at [38]. The addresses and occupations of the principal beneficiary and Trustees, and any other identifying particulars of the Trustees, are also suppressed.

86 *R v Burns (Travis)* [2002] 1 NZLR 387 (CA) at [16]; *R (CA340/2015) v R* [2015] NZCA 287 at [17]; and *Wilson v R* [2023] NZCA 213 at [19].

Conclusion

[181] The appeal against the refusal to grant Mr Huljich name suppression pending final disposition of his conviction appeal is dismissed. Name suppression will lapse seven days from the date of this judgment.

Result

[182] The application for leave to adduce evidence in support of the conviction appeal is declined.

[183] The appeal against conviction is dismissed.

[184] The application for leave to adduce evidence in support of the opposition to the Crown's sentence appeal is granted.

[185] The Crown's appeal against sentence is allowed. The fine of $100,000 is set aside and replaced with a fine of $200,000. The appeal against sentence is otherwise dismissed.

[186] The appeal against the refusal to grant name suppression pending final disposition of the conviction appeal is dismissed.

[187] The existing interim name suppression order is continued for seven days from the date of this judgment.

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