IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI 2017-004-10259
[2019] NZHC 773

THE QUEEN

v

MARK STEPHEN TALBOT

Hearing:	9 April 2019
Appearances:	N R Williams for the Crown A F Pilditch and DCS Morris for the defendant
Judgment:	9 April 2019

SENTENCING REMARKS OF JAGOSE J

Solicitors/Counsel:
Meredith Connell, Auckland
Alan Pilditch, Barrister, Auckland
Cook Morris Quinn, Auckland

[1] Mr Talbot, you pleaded guilty to a representative charge of failing to disclose a relevant interest contrary to s 19ZD of the Securities Markets Act 1988 (the Act). The charge carries a maximum penalty of a $30,000 fine. Although the Act now has been repealed, comparable contravention of the Financial Markets Conduct Act 2013 would expose you to civil liability, including a maximum pecuniary penalty of $200,000.[1] Such is "quasi-criminal" offending,[2] on a par with criminal offending here.

[2] The single charge you now face is representative of eight such charges, which have since been withdrawn. A charge of insider trading is also sought to be withdrawn. Those withdrawals are in exchange for your guilty plea to the representative charge, and your provision of an enforceable undertaking to the Financial Markets Authority (the FMA). You undertook not to be involved in the management of a public issuer for a period of five years, and to pay the FMA $150,000 over a period of six months. You also made various admissions, as we have heard.

[3] The Crown recommends you receive an end sentence of an $8,000 fine. Your counsel, Fletcher Pilditch, recommends you be convicted and discharged. I am not bound by their recommendations, but I exercise my own judgement in accordance with sentencing's purposes and principles.

Background

[4] You are a chartered accountant. You were a partner at a large accounting firm. You operated a "virtual" Chief Financial Officer (CFO) service through your company, Diablo Management Limited (Diablo).

[5] On 1 November 2011, you were appointed "virtual CFO" of VMob Limited (VMob). VMob became a listed company on the NZAX through a "reverse listing" transaction in 2012. Velo Capital Limited (Velo) was a shell company listed on the NZAX. Velo purchased VMob's share capital in August 2012. On 29 August, you – along with other directors and officers of the company – filed the required disclosure notices with NZX.

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1 Financial Markets Conduct Act 2013, s 385.

2 *Commerce Commission v North Albany Motors Ltd* (1997) 7 TCLR 575 (HC) at 580-581.

[6] You remained VMob's CFO – working at least one day a week, and being considered an officer of the company – until 7 July 2014. From then until 30 September 2014, you assisted with the transition of your CFO responsibilities to a new fulltime CFO. As a company listed on the NZAX, VMob had a trading policy in place, with application to all directors, officers, employees and contractors of the company. Part of your role as CFO included administration of the Trading Policy, which included the following:

> This policy applies to all Directors, Officers, Employees and Contractors of the Company and its subsidiaries who intend to trade in the Company's listed securities. In this policy 'trade' includes buying or selling listed securities, or agreeing to do so, whether a principal or agent.
>
> …
>
> The policy adopted by the company is that if you wish to trade in the Company's shares or other listed securities, you must not do so if you hold this confidential information, and in addition:
>
> > There is an absolute prohibition from trading in the [C]ompany's shares or other securities in certain specified periods; and
> >
> > At those times when it is permissible to trade, you must first apply to the Company for written consent to do so.
>
> …
>
> If you do not understand any part of this policy, or how it applies to you, you should raise the matter with the Chief Financial Officer before dealing with any securities covered by this policy.

[7] With other company officers, you were responsible for ensuring new staff and contractors were aware of the policy and its application. The policy identified you as having ultimate understanding of the policy's application. You drew VMob staff and directors' attention to the policy in an email on 23 September 2014, reiterating the importance of ensuring "all relevant securities laws are adhered to".

[8] You also are director and shareholder of two companies: Blumau Finance Limited (Blumau) and MST Holdings Limited (MST Holdings). You used both as investment vehicles, Blumau particularly to purchase shares in NZX-listed companies for your father's benefit. You are Blumau's sole director, and hold 1 per cent of its shares. The other 99 per cent is held by your father.

Securities Markets Act

[9] Blumau held VMob shares for your father's benefit. Blumau's acquisition (and disposal) of those shares gave rise to the representative charge here of failing to disclose a relevant interest.

[10] Section 19T of the Act relevantly requires directors or officers of public issuers to disclose any relevant interest they have, acquire, or dispose of in a security of that issuer, within five working days of the transaction. "Relevant interest" is broadly defined in s 5, relevantly as including "the power to acquire or dispose of, or to control the acquisition or disposition of, the security". The balance of s 5 emphasises the focus is on substance over form.

[11] Section 19ZD then provides:

> **19ZD Offence for failure to comply with directors' and officers' disclosure obligation**
>
> (1) Every person who is aware or ought reasonably to be aware of information that the person is required to disclose under section 19T, and who fails to disclose that information in accordance with a directors' and officers' disclosure obligation, commits an offence ….

Offending

[12] You disclosed VMob shares you held through MST Holdings. But you did not disclose VMob shares acquired and disposed of by Blumau. There were eight such transactions, with an initial acquisition of 1 million shares on 14 June 2013, and a final acquisition of 1 million shares on 24 July 2014, for a total of 4 million shares. After becoming aware of the FMA's inquiry, you disclosed that interest on 29 October 2014. Two days later, Blumau transferred all its VMob shares to your father, and you disclosed that disposal also.

[13] You admit, when the last transaction was done, you knew of VMob's likely success in securing a substantial contract. You also admit that was material information, not generally available to the public. And you admit such was in breach

of the 1988 Act's prohibition on insider trading, which has maximum penalties of five years' imprisonment and a $300,000 fine.[3]

Conviction and discharge

[14] Counsel agree the usual approach to sentencing could be followed here. But Mr Pilditch submits your conviction and discharge is sufficient to meet the relevant purposes and principles of sentencing.[4] Before entering a conviction and imposing a sentence, I am bound to consider whether you would be more appropriately dealt with by the alternative.[5] I may not make the order unless I am satisfied "a conviction is sufficient penalty in itself".[6]

[15] Mr Pilditch submits, while market integrity is important, not every breach of market regulation harms it. He says your offending has not caused any actual harm. You did not profit from your offending, and investors were not misled by your failure to disclose your interests. And he observes the prospect of any harm is at odds with the "glacial pace" by which the regulator did not bring this matter to court for some three years.

[16] The question is whether your conviction is a sufficient penalty in itself. So far as I can tell, or have been told, there are no prior prosecutions under s 43A(1). Mr Pilditch says this indicates sentencing's principles of general denunciation and deterrence are "moot" as this is not "a crime of any prevalence."

[17] The purpose of directors' and officers' disclosure obligations is clearly articulated in the Act:

> **19SA Purpose of subpart**
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> The purpose of this subpart is to promote good corporate governance, and to deter and assist in the monitoring of insider conduct and market manipulation by—

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3 Securities Markets Act 1988, s 8C.
4 Sentencing Act 2002, s 108.
5 Section 11.
6 Section 109.

(a) ensuring that information about directors' and officers' trading activities in public issuers is available to participants in New Zealand's securities markets; and

(b) enabling the dates of trades to be checked against the dates at which material information became generally available to the market.

All that is to promote good corporate governance and to deter and assist in monitoring of insider conduct and market manipulation.

[18] Section 19SA is echoed in substance by s 296 of the Financial Markets Conduct Act 2013. It is trite disclosure is fundamental to the 2013 Act's main purpose to facilitate "the development of fair, efficient, and *transparent* financial markets" (emphasis added).[7] A similar objective underpins the 1988 Act's continuous disclosure regime,[8] and has been recognised as foundational:[9]

> [T]he premise underlying the Securities Act, as with much commercial law, is that the best protection of the public lies in full disclosure of the company's affairs and of the security it is offering. That then allows the investor to make an informed investment decision, which in turn facilitates the functioning of financial markets.
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> It is, I think, for reasons of that kind that the Act places such emphasis on clear and accurate disclosure ….

From that perspective, all sentencing's principles thoroughly are engaged. The 'harm' that we seek to address here is structural, in avoiding required disclosure.

[19] I acknowledge your personal and professional life was detrimentally affected by the charges brought against you. On the other hand, the wealth of personal support for you from people at all levels of the financial market, some referring to your conduct as nothing more than a "mistake", suggests no harm is recognised by them.

[20] Your enforceable undertaking presents a real and significant discipline. It is not something available on sentencing under the 1988 Act for breach of disclosure requirements. But it may well reflect an available outcome of breach of insider trading prohibitions. That conduct is not before me. I do not have the information I would

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7 Financial Markets Conduct Act 2013, s 3.

8 Securities Markets Act 1988, s 19A.

9 *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 (CA) at 392, cited in *Securities Commission v Kiwi Co-operative Dairies Ltd* [1995] 3 NZLR 26 (CA) at 31, that being cited in *Cox v Green Gecko Ltd* [2014] NZCA 404 at [38].

require to assess its impact. There may be some significance in the admitted conduct being the last of the impugned transactions.

[21] As should now be notorious:[10]

> It is contrary to the public interest and unlawful for an arrangement to be made that a prosecution will not be brought or maintained on the condition that a sum of money is paid.

I do not know if that is a characterisation open to being made of the insider trading resolution. But, given your admissions and the negotiated consequence, I prefer to disregard those outcomes in addressing the adequacy of conviction alone for sentencing on the present charge. Conviction alone does not address your accountability for, or promote your responsibility for or acknowledgment of, the harm caused. That means your conviction alone is not a sufficient penalty. I therefore move to the more orthodox sentencing approach.

Approach

[22] Sentencing involves a three-step process.[11] First, I decide the starting point your offending attracts. Second, I adjust that up or down to take into account your personal circumstances. Third, a discount applies to reflect your guilty plea.

[23] I must consider the usual purposes and principles of sentencing.[12] In particular, you are to be held accountable for the harm done by your offending. Your sentence is to promote in you a sense of responsibility for and acknowledgement of that harm. It is to denounce your conduct and to deter you and others from similar offending. I am to take into account the gravity and seriousness of your offending, and the need for consistency with appropriate sentencing levels, taking into account any restorative justice processes that have occurred. I include in that last the enforceable undertaking.

Starting point

[24] Mr Williams contends for a starting point of about $10,000.

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10 *Osborne v WorkSafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [1].
11 *R v Taueki* [2005] 3 NZLR 372 (CA); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
12 Sentencing Act 2002, ss 7 and 8.

[25] As there have been no prosecutions under the relevant sections of either the 1988 Act, or the 2013 Act, Mr Williams refers me to offending in other regulatory non-disclosure settings. He points to the disciplines asserted essentially contractually under the NZX Listing Rules, or imposed in a disciplinary way under the Real Estate Agents Act. More closely, he points to non-disclosure penalties under consumer protection legislation, with starting points of between $12,000 and $20,000 under a maximum $30,000 fine.[13] While broad analogy can be made, none provides any true comparator for this criminal offending under the 1988 Act, which is informed by the importance afforded transparency in financial markets.

[26] Mr Williams identifies three aggravating factors of your offending: your abuse of a position of trust or authority; the extent of your offending; and the period over which the offending occurred. I accept all three.

[27] While Mr Pilditch is right abuse of authority is inherent in the charge itself, being brought against a public issuer's officer, your authority went beyond that, to your particular responsibility for disclosure compliance at VMob, which required company approval for trading in the company's shares. The non-incidental timing of your last failures, at the very point you knew of VMob's commercial opportunity, exacerbates the harm caused. So too does your failure to respond to the company's immediately subsequent expression trading should not occur during that period.

[28] Your understanding disclosure was not required if the shares were held non-beneficially is not exculpatory. I appreciate you came to that view from a discussion with VMob's board chair and chief executive, and perhaps confused that with the company's trading policy requirement for written approval. I accept that it is an understanding reflected in your disclosure of trading through your other investment vehicle, in which you are the beneficiary. But that suggests your singular lack of comprehension for the role of disclosure in the market, which is hard to credit. In any event, ignorance of the law offers no excuse, and certainly not for eight separate incidents over the course of more than twelve months, only redressed after becoming aware of the FMA's inquiry.

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[13] *R v Love Springs Ltd* DC Auckland CRI-2012-004-11695, 11 December 2013; *R v Smart Shop* [2016] NZDC 19377.

[29] In my view, such is consistent with a starting point approximately halfway through the range, at $15,000. Especially against your application for conviction and discharge, such a fine would hold you accountable and promote in you a sense of responsibility for and acknowledgment of the harm you have caused. It gives full voice to sentencing's objectives here, while acknowledging also your guilty plea to the particular charge comes as part of a larger package, resolving more serious issues to the regulator's satisfaction. I also have regard for s 43A(1)(a)'s place in the 1988 Act's penalties, which provide for maximum fines against individuals of $1,000, $5,000, $10,000, $30,000, $100,000, and $300,000 for various proscribed conduct. In that range, non-disclosure's $30,000 maximum fine indicates such offending is of material seriousness.

Adjustment for personal factors

[30] An absence of previous convictions usually warrants recognition, as it is evidence of prior good character.

[31] You have no prior convictions. You also have good character in spades. I previously have acknowledged the support and respect you have in financial markets. Your contributions to reliable and constructive operation of financial markets in New Zealand are highlights. You are represented as someone who conducts himself with integrity and honesty. Your charitable involvements attest to this. Your offending is an uncharacteristic lapse of judgement, albeit over an extended period.

[32] I would give a ten per cent discount in that respect, bringing the fine to $13,500.

Guilty plea

[33] A discount also is available for your guilty plea. The largest discount is available for a plea made as soon as you reasonably had opportunity to be informed of all its implications. You were charged on 9 October 2017. Your counsel offered a potential resolution in June 2018, and negotiations continued thereafter. Your guilty plea to the amended charge was entered on 13 March 2019.

[34] I am bound to take into account all the circumstances in which the plea is entered.[14] I do not see any magic in the amended representative charge. The reality is you could reasonably have pleaded guilty to the non-disclosure charges well in advance of the actual resolution, in which the prize was avoidance of the insider trading charge. The non-disclosure charges were a bargaining chip. While the Crown says a 20 per cent discount is available, I take the view only a ten per cent discount is justified.

[35] That brings your sentence to $12,150. I round that down to $12,000, which coincidentally gives the same effect as combining the two sequential discounts. There is no suggestion such is a sum you are unable to pay.

Result

[36] Mr Talbot, please stand. I enter conviction against you on the representative non-disclosure charge, and order you to pay a fine of $12,000. You may stand down.

—Jagose J

[14] *Hessell v R*, above n 11, at [70], cited in *R v R* [2018] NZCA 565 at [45].