IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001727
[2017] NZHC 327

	UNDER	The Securities Markets Act 1988
	BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
	AND	MARK WARMINGER Defendant

Hearing:	26, 27, 28, 29, 30 September, 5, 6, 7, 10, 11, 12, 13, 14, 17, 19 & 20 October 2016
Appearances:	J B M Smith QC, N R Williams and K S Graham for Plaintiff M Heron QC, M A Corlett QC, D C S Morris and I Rosic for Defendant
Judgment:	3 March 2017

JUDGMENT OF VENNING J

This judgment was delivered by me on 3 March 2017 at 9.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors:	Meredith Connell, Auckland Cook Morris Quinn, Auckland
Copy to:	J B M Smith QC, Wellington M Heron QC, Auckland M A Corlett QC, Auckland Financial Markets Authority I Rosic, c/- Gilbert Walker, Auckland

Contents

The proceedings

[1] The Financial Markets Authority (FMA) says that between January 2014 and September 2014 Mark Warminger manipulated the trading of a number of stocks on the NZX Limited (NZX) exchange. It seeks declarations to that effect and a pecuniary penalty against Mr Warminger.

Parties

[2] The FMA was established under Part 2 of the Financial Markets Authority Act 2011. It has a statutory role under the Securities Markets Act 1988 (the Act) to

receive and investigate suspected contraventions of the NZX's Exchange Rules and of the Act. It must notify NZX of its decision on the investigation and may apply to the Court for declarations and a pecuniary penalty order under s 42R of the Act.

[3] Mr Warminger holds an Honours Degree in Economics from the University of London. He was employed by Milford Asset Management Limited (Milford) as a portfolio manager in May 2011. By 2014 he had accumulated 16 years' experience in equity markets.

[4] Milford manages investment funds and Kiwisaver funds for retail clients and also manages funds on behalf of wholesale clients. In total it manages approximately $3.5 billion in funds for approximately 20,000 clients.

[5] Mr Warminger managed the following funds (the funds) for Milford:

- a New Zealand active equities mandate for the New Zealand Superannuation Fund;
- the Milford NZ Equities Wholesale Fund;
- the Mercer Trans-Tasman Shares Trust;
- the Waikato Community Trust Inc Portfolio; and
- the Trust Investments – Sustainable NZ Share Fund.

[6] Mr Warminger also managed the New Zealand equities portion of the Milford Trans-Tasman Fund.

[7] As at 31 August 2014 the total value of assets under Mr Warminger's management was approximately $669 million.

NZX and the equities market in New Zealand

[8] NZX is the main equities market in New Zealand. NZX uses an automated screen trading and electronic registration system for trading, clearing, settling and registering securities transactions or transfers in connection with the market. The market is anonymous. Neither the broker nor the client details are visible to the market place on the day of trading. They are not disclosed in market data. The brokers but not their clients are identified in market data after two business days.

[9] NZX is self-regulating. To that end it has developed rules which it has promulgated to its trading participants, such as brokers (NZX Rules). The NZX Rules include a prohibition against trading that has the effect or is likely to have the effect of creating a false or misleading appearance.[1] NZX monitors and enforces the NZX Rules through a NZX regulation team with support from a market surveillance team. The rules are enforceable between NZX and each trading participant.

[10] The trading day on the NZX main board is broken down into a number of sessions:

Period	**Normal Trading**
Enquiry	**8.00 am – 9.00 am**
Pre-open	**9.00 am – 10.00 am**
Normal Trading	**10.00 am – 4.45 pm**
Pre-close	**4.45 pm – 5.00 pm**
Adjust	**5.00 pm – 5.30 pm**
Enquiry	**5.30 pm**

[11] During the enquiry sessions, no bids or offers can be entered, amended or withdrawn. It is an observation phase only.

[1] NZX Participant Rules, r 10.2.1.

[12] During the pre-opening session, bids and offers may be entered, amended or removed but trades will not be created even where prices/yields meet or overlap.

[13] During the normal trading session bids and offers may be entered and if opposing prices/yields match or overlap, a trade is automatically executed by the NZX systems.

[14] At the end of the trading day, the pre-close session operates. Bids and offers may be entered, amended or removed but trades are not created when prices/yields meet or overlap. At the end of the pre-close session, a closing market price is established based on the level of overlapping bids and offers.

[15] During the adjust session, NZX dealers may deal in securities and report those trades through the trading system.

[16] Orders are placed in a queue in the market and sorted on the basis of price then time. Orders are described as either bid or ask orders. A bid is an offer to buy. An ask is an offer to sell. A quotation or "the quotes" is the current best bid and ask in a particular stock. The "spread" or "bid-ask spread" is the difference between the best bid and ask for a given stock.

[17] Trading via NZX occurs in two ways: on-market via the central order book or off-market via crossings or deals negotiated directly between brokers. In a crossing the same trading participant acts as buyer and seller, either in an agency capacity for both parties or as agent for one side and principal on the other. The NZX Rules require the price and volume to be reported through the trading system immediately if executed during the normal trading session. The NZX Rules also require crossings during normal trading hours to be executed at a price within current quotes, with only limited exceptions.[2] One exception is a special crossing. A special crossing includes a crossing where the consideration is the lesser of $1,000,000 or five per cent of the market capitalisation of the issued securities.

---

[2] NZX Participant Rules, r 13.1.1(c).

[18] There are broadly two different types of orders an investor can submit to a trading platform such as NZX. The first is a passive order (sometimes described as a limit order), which rests on the order book waiting for other parties to trade against it. Such orders are liquidity-supplying. They provide other investors with the option to buy or sell shares. They do not execute immediately because they are not priced at the best ask/bid price in the market. The other type of order is a market order. A market order is structured to execute immediately against one or more orders on the opposite side of the order book. Market orders are referred to as liquidity-demanding orders and can, in some cases, be described as anxious or aggressive. The term aggressive is usually reserved for an order that breaks through three or more ask or bid price levels.

[19] Market participants and investors are able to access real time market data through software such as IRESS Market Technology (IRESS). At all material times Mr Warminger had access to real time market data for NZX through Milford's IRESS order system.

[20] NZX is a relatively small (particularly by volume) market. As a consequence it is less liquid than overseas markets. It also has a larger volume of crossings than overseas markets. The illiquidity of NZX makes it more susceptible to manipulation.

[21] NZX has institutional and retail investors. Milford is an institutional client of NZX. Milford's principal business is the investment of money. NZX also has retail clients, including "mum and dad" investors who place their orders through brokers. Normally, trading on the central order book is restricted to brokers.

[22] Institutional traders seldom place a single order into the market. More often they ask a broker to work the order to achieve a benchmark price such as the volume weighted average price (VWAP). If the broker beats the VWAP benchmark the broker earns the difference. Conversely if the broker fails to meet the benchmark, they pay the difference less brokerage.

[23] The main brokers and trading participants in New Zealand during 2014 were:

- Forsyth Barr Limited (Forsyth Barr);
- Goldman Sachs New Zealand Limited (Goldman Sachs);
- UBS New Zealand Limited (UBS);
- First NZ Capital Securities Limited (First NZ);
- Craigs Investments Partners Limited (Craigs);
- Macquarie Securities (NZ) Limited (Macquarie).

[24] Brokers, by virtue of their accreditation as trading participants, have direct access to the market. Brokers are also authorised to allow clients Direct Market Access (DMA). DMA-authorised persons can enter their orders directly into the trading system via their own connected order-entry system. The order need not be accepted or re-keyed by a broker.[3] An additional advantage of the DMA system is that trades using DMA cost less than trades using a broker, typically 10 basis points rather than 30. People authorised to use the DMA system in this way are still technically buying through the broker and are assigned an identifier code by the broker.

[25] Macquarie provided a DMA facility to Milford with the identifier 5CE. Mr Warminger operated that DMA facility within Milford. Mr Warminger's trades using DMA were anonymous in the market at the relevant times they were made but became identifiable two days later. Mr Warminger understood that Macquarie monitored the DMA use, but was not aware of the detail of the monitoring. In fact, as Mr Nimmo, Associate Director of Compliance at Macquarie confirmed, while Macquarie had certain filters on the Milford DMA account, it relied on Milford's agreement that its staff would comply with the relevant rules and laws relating to the market.

---

[3] See *Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch) at [10] and [11] for a discussion of DMA.

The investigation

[26] On 23 June 2014 the Market Surveillance Team of NZX observed an interruption to a declining price trend in the shares of Xero Limited. Inquiries disclosed that the Macquarie client code 5CE had been responsible for the interruption. The interruption involved the buying and selling of the same security in a matter of minutes through different brokers. As a result of that incident the NZX Market Surveillance Team reviewed Mr Warminger's conduct in relation to other trades. The investigation disclosed that on several occasions Mr Warminger had placed buy orders on-market using DMA which increased the last traded price of the stock, or moved the quotations; then shortly thereafter sold a larger volume of the same stock off-market at a higher price via a different broker. As a result of the investigation, NZX considered Mr Warminger's conduct might be in breach of the market manipulation provisions of the Act. On 12 August 2014 NZX made a referral to the FMA under s 36ZD of the Act.

[27] The FMA then commenced its investigation into Mr Warminger's conduct in relation to a number of trades. It interviewed Mr Warminger on three occasions.[4] The interviews covered a number of trades, not all of which are referred to in this proceeding. Mr Warminger was not interviewed in relation to the last three claims in the amended statement of claim. The FMA also interviewed some of the other trading participants involved in the trades.

[28] As a result of its investigation into the trades, the FMA came to the view that Mr Warminger had breached s 11B of the Act and that Milford had failed to ensure the requisite degree of monitoring of Mr Warminger's trading. Milford reached an agreement with the FMA under which it paid $1.1 million in lieu of penalty and $400,000 as a contribution to costs. The settlement did not include Mr Warminger.

[29] Ultimately the FMA brought these proceedings against Mr Warminger alleging that on 10 occasions he had manipulated the market in breach of s 11B of the Act.

---

[4] The dates of the interviews were 23 September 2014; 8 April 2015; and 23 April 2015.

[30] The FMA seeks a declaration that Mr Warminger has contravened s 11B. It also seeks a consequential pecuniary penalty.[5] Counsel are agreed that the issue of any pecuniary penalty can be determined at a later date if necessary.

Standard of proof

[31] The standard of proof for the FMA's claims in these proceedings is the balance of probabilities. Civil rules of evidence and procedure apply.[6]

[32] While accepting the standard of proof was the civil standard, Mr Heron QC submitted that given the nature of the allegations and the potential impact on Mr Warminger, strong evidence was required to satisfy the standard, as mandated by the majority decision of the Supreme Court in *Z v Dental Complaints Assessment Committee*:[7]

> [102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, *the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard*.
>
> (emphasis added) (footnotes omitted)

[33] I apply that approach to the present case. While the Court will require strong evidence to be satisfied the elements of s 11B are made out in relation to each trade in issue, the standard of proof remains the balance of probabilities.

The elements to be proved under s 11B

[34] Section 11B provides:

> **11B False or misleading appearance of trading, etc**
>
> A person must not do, or omit to do, anything if—

---

5 Securities Markets Act 1988, ss 42T and 42U–42W.
6 Section 42ZI.
7 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

(a) the act or omission will have, or is likely to have, the effect of creating, or causing the creation of, a false or misleading appearance—

(i) with respect to the extent of active trading in the securities of a public issuer; or

(ii) with respect to the supply of, demand for, price for trading in, or value of those securities; and

(b) the person knows or ought reasonably to know that the person's act or omission will, or is likely to have, that effect.

[35] Section 11B seeks to prevent trading which has the effect of creating or causing the creation of a false or misleading appearance of trading. A person who contravenes s 11B with actual knowledge of the relevant effect commits an offence.[8] The standard of proof for such an offence is beyond reasonable doubt. For civil liability under s 11B the FMA must prove either actual or construction knowledge of the relevant effect, but as noted is only required to do so on the balance of probabilities.

[36] Section 11B applies to trade-based market manipulation (as opposed to market manipulation by false or misleading statements or information, to which s 11 of the Act applies). Trade-based market manipulation can take many forms and includes a variety of features, including:

- matched order transactions: where there is no change in the underlying beneficial ownership of the security traded, giving an artificial impression regarding the level of trading;

- wash sales: where a trader directly or through an agent places contemporaneous buy and sell orders giving a false impression of the level of genuine trading interest;

- consistently altering orders;

- upticking: where a trader repeatedly buys stock at higher prices than the same trader paid in the last trade, which induces others to buy and

[8] Section 11D.

pushes up the price (or the alternative, sells at consecutively lower prices to push down the price);

- ramping: where purchases and sales are made at successively higher prices;

- marking the close: where purchases or sales are made near the end of the day's trading in order to affect the closing price (classically to avoid a margin call or perhaps to affect the valuation of a portfolio which is repriced based on the closing price of the security, referred to as window dressing);

- dominating the market.

[37] To establish a civil breach of s 11B in this case the FMA must prove, on the balance of probabilities and in relation to each of the claims:

(a) that Mr Warminger traded in a certain way; and

(b) that at the time they were made, the trades had or were likely to have the effect of creating or causing the creation of a false or misleading appearance:

(i) with respect to the extent of active trading in the securities; or

(ii) with respect to the supply of, demand for, price for trading in, or value of those securities; and

(c) that Mr Warminger knew or ought reasonably to have known that his trading was likely to have that effect.

"The act or omission…"

[38] The FMA's claim is based on a number of trades. The trades are a matter of record and are accepted by Mr Warminger. The fact of the trading is not in dispute.

"Will have, or is likely to have the effect"

[39] I accept Mr Heron's submission that "will have or is likely to have" requires the Court to determine the likely effect and intent of the defendant in the context of the circumstances at the time of the impugned trade. The Court should not be influenced by hindsight knowledge. That is consistent with the approach taken in Australia to similar wording in its legislation.[9]

[40] The concept of "likely" in this context has been discussed in cases dealing with similar legislation. In *Australian Securities Commission v Nomura International PLC* Sackville J suggested it meant "more probable than not".[10] But in *DPP v JM* the Victorian Court of Appeal approved Dowsett J's conclusion that "likely" in this context means that there is a real chance or possibility, but not necessarily that a particular outcome is more likely than not.[11] In *Universal Music v ACCC*, a case involving an alleged misuse of market power a Full Court of the Federal Court accepted that "likely" in a similar context did not mean more likely than not, but rather meant that there was a real chance or possibility of the outcome occurring.[12] In *Commerce Commission v Port Nelson* (in the context of the Commerce Act 1986), McGechan J held that 'likely' does not mean 'more likely than not'.[13] Having reviewed the authorities, I consider that "likely" in the context of s 11B envisages an effect that might well happen, in other words that the trade might well create or cause the creation of a false and misleading appearance in the market. But for the reasons that follow, the focus in this case is more on whether the trades had the effect alleged, rather than were likely to have that effect.

[41] Next, although the wording also appears in the equivalent Australian legislation[14] in the context of the section, "effect" appears to have a limited purpose. The section works without it, prohibiting an act that either creates or causes or is likely to create or cause the creation of a false or misleading appearance in the ways

---

9 *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2010] FCA 807; and *Australian Securities Commission v Nomura International PLC* (1998) 89 FCR 301, (1998) 160 ALR 246 at 305, per Sackville J.

10 *Australian Securities Commission v Nomura International PLC,* above n 9.

11 *Director of Public Prosecutions v JM* [2012] VSCA 21, (2012) 37 VR 1 at [349].

12 *Universal Music v ACCC* 201 ALR 636 at [247].

13 *Commerce Commission v Port Nelson* (1995) 6 TCLR 406 (HC) at 432.

14 Corporations Act 2001 (Cth), s 1041B.

described. I accept Mr Smith QC's submission that the purpose of the inclusion of "effect" may be to put beyond doubt that the section applies to trade-based manipulation which otherwise could arguably be said to arise from the trading platform's depiction of the price effect of the trade for example.

[42] Mr Heron submitted the FMA's case was based on actual effects as opposed to likely effects. Mr Smith's response was that the case was pleaded in the alternative and the FMA relies on both actual and likely effects. He argued that a breach of the section will be established if either is made out. While the case is strictly pleaded in the alternative in that reference is made to the statutory wording "had or were likely to have the effect", there is force in Mr Heron's point. In context, the particulars pleaded in relation to each claim allege actual effects. I deal with each claim on the basis of the pleadings.

[43] Mr Heron submitted that as the FMA relied on the actual effects of Mr Warminger's trading the FMA was required to prove that at the time of the relevant conduct, the market would have been misled or deceived by Mr Warminger's trading activity. On that basis, the defence argued, the key question was whether, at the time of Mr Warminger's trading, his trading would have misled the market participants as to price, active trading, supply, demand or value of shares. In defence counsel's opening for instance it was suggested that to do so the FMA had to establish that the trades constituted or induced a pattern of new trading in volumes or at prices that would not otherwise have occurred.

[44] Mr Smith submitted that the focus should be on Mr Warminger's purpose and that it was not necessary to prove actual effect, citing the following passage from *DPP (Cth) v JM*:[15]

> [73] Because s 1041A prohibits transactions which are likely to have that effect, it is not necessary to demonstrate, whether by some counterfactual analysis or otherwise, that the impugned transactions *did* create or maintain an artificial price. It is sufficient to show that the buyer or seller set the price with the sole or dominant purpose described.
>
> [74] Further, if a transaction is made for the sole or dominant purpose of setting or maintaining a price for listed shares, it is not necessary to proffer

[15] *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30, (2013) 250 CLR 135.

> some additional proof that the impugned transactions "went on to affect the behaviour of genuine buyers and sellers in the market" in order to demonstrate that the transactions had, or were likely to have, the effect of creating or maintaining an artificial price. On-market transactions on the ASX (like the impugned transactions in this case) are made openly. Participants in the market can be (and are) informed of the transactions which occur. Participants in the market are entitled to assume that the transactions which are made are made between genuine buyers and sellers and are *not* made for the purpose of setting or maintaining a particular price. Hence, as Mason J explained in *North v Marra*, "in the absence of revelation of their true character [as transactions to set or maintain a particular price] they are seen as transactions reflecting genuine supply and demand and having as such an impact on the market". They have, or at least are likely to have, the effect of setting or maintaining an artificial price for the shares in question.
>
> (emphasis added) (footnotes omitted)

[45] Little may practically turn on the different approaches in this case. Mr Warminger's case is that the trading did not have the actual effect alleged by the FMA. The FMA's case is that the purpose behind the trades was to achieve the actual effect alleged. Given Mr Warminger's experience and knowledge of the industry, if the FMA satisfies the Court Mr Warminger's purpose was to achieve a particular outcome by his trades, then it is likely the trades would have that effect.

[46] As distinct from the subjective purpose of the trades, whether Mr Warminger's trades are likely to have the effect alleged should be judged objectively, just as the test under the Fair Trading Act in relation to a misrepresentation. As Tipping J stated in *Marcol Manufacturers Ltd v Commerce Commission*:[16]

> … the question whether a representation is misleading is to be judged objectively. It is not a question whether someone has actually been misled, although proof of that may well be helpful for an informant. … It is not necessary to prove that the representee would undoubtedly be misled so long as the representation can be said beyond reasonable doubt to be such as might well mislead the representee. On an objective approach there is therefore no practical difference between the concepts of misleading (s 13(j)) and likely to mislead (s 9) and liable to mislead (s 10). Something which is objectively misleading for the purposes of s 13(j) is something which is likely to mislead the representee.

[47] The FMA is not required to prove that any particular market participant was actually affected. The section is drafted in objective terms and it would defeat the

---

16 *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 at 508.

purpose, or at least make it extremely burdensome to require the FMA to adduce evidence from individuals trading with Mr Warminger in order to prove the case.[17]

[48] There is no New Zealand authority on the application of s 11B. There are a number of helpful overseas authorities, particularly Australian authorities, directed at market manipulation. Section 11B is similar to but not identical to s 1041B of the Corporations Act 2001 (Cth):

> **False trading and market rigging--creating a false or misleading appearance of active trading etc.**
>
> (1) A person must not do, or omit to do, an act (whether in this jurisdiction or elsewhere) if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance:
>
> (a) of active trading in financial products on a financial market operated in this jurisdiction; or
>
> (b) with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.
>
> Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.
>
> Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.

[49] Section 1041B provides a civil penalty for market manipulation. Like s 11B, s 1041B can also support a criminal prosecution where the requisite knowledge is present. A party may be relieved from civil liability if, having regard to the circumstances of the case, they ought fairly to be excused from the contravention.[18]

[50] Sections 1041A[19] and 1041B replaced the former ss 997 and 998 of the Corporations Law (Cth), which had in turn replaced the earlier state legislation of the Securities Industry Act 1970 (NSW) and 1971 (QLD) and the Securities Industry Act 1980 (Cth). The earlier Securities Industry legislation referred to actions "calculated to create a false or misleading appearance of active trading". Section 998 also

---

17 *Director of Public Prosecutions (Cth) v JM*, above n 15; and *The Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch) at [156].

18 Corporations Act, s 1317S.

19 Section 1041A prohibits a person from taking part in market manipulation.

required intent. It provided that a person was prohibited from doing anything "that is intended to … create a false or misleading appearance …".

[51] In the High Court decision in *North v Marra Developments Ltd* when discussing s 70 of the Securities Industry Act 1970 (NSW) Mason J stated that:[20]

> The section seeks to ensure that the market reflects the forces of genuine supply and demand. By "genuine supply and demand" I exclude buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting or maintaining the market price.

And later:[21]

> When purchases have been made of shares in a company at or about a particular level for the purpose of setting and maintaining a market price for those shares, there is a breach of the statutory prohibition.

[52] "Calculated" under s 70 and "intended" under s 998 were replaced with "likely" under s 1041B (and s 1041A). Despite the difference in wording, the general principle expressed by Mason J in *North v Marra Developments Ltd* has been held to be still applicable to the current Australian provisions. The mischief the sections are intended to address remains the same.

[53] In *DPP (Cth) v JM* the High Court identified purpose as an important consideration under a prosecution for breach of s 1041A, noting that it had to be shown the manipulation was the sole or dominant purpose behind the transaction as referred to above at [44].[22]

[54] Importantly in the same decision, the Court went on to note:

> [76] To recognise that this is so is not to suggest that proof of a sole or dominant purpose is some separate element of the offence of market manipulation. Rather, proof of a sole or dominant purpose of setting or maintaining a price is one way of demonstrating that the impugned transaction was at least likely to have the effect of setting or maintaining an artificial price. …

---

20 *North v Marra Developments Ltd* [1981] HCA 68, (1981) 148 CLR 42 at 59 (Stephen, Murphy, Aickin and Wilson JJ concurring).

21 *North v Marra Developments Ltd*, above n 20, at 59.

22 *Director of Public Prosecutions (Cth) v JM*, above n 15.

[55] In *Australian Securities and Investments Commission v Soust* Goldberg J said:[23]

> [90] Having regard to the context in which the expressions "artificial price" and "false or misleading appearance" appear, I consider that the expression "artificial price" in s 1041A connotes a price created not for the purpose of implementing or consummating a transaction between genuine parties wishing to buy and sell securities, but rather for a purpose unrelated to achieving the outcome of the interplay of genuine market forces of supply and demand. I consider that the reasoning of Mason J in *North* (above) (para 83 above) in relation to the creation of a false or misleading appearance of active trading and the creation of a false or misleading appearance with respect to the market for, or the price of, securities is equally applicable to the creation of an artificial price for trading in securities. That is to say, the reasoning applies to ss 1041A and 1041B(1)(b).

[56] In *Winterflood Securities Ltd v Financial Services Authority* (FSA) the Court of Appeal for England and Wales rejected a submission for the appellants that for breach of the relevant section the FSA had to prove purpose on the part of the traders.[24] The Court confirmed that the test of the relevant section was wholly objective. The Court considered that to require the FSA to prove purpose would be to restrict the operation of the code:

> [33] For these reasons I do not think that the provisions of the Code on which the appellants rely are to be read as restricting market abuse of a kind which creates a false impression or distorts the market to cases in which the transaction was motivated, at least in part, by an intention to achieve either of those results. …

[57] With respect, that must be strictly correct, in that purpose is not an element of the section, but it is still a relevant consideration when considering whether there has been manipulation. In *7722656 Canada Inc (Swift Trade Inc) and Peter Beck v Financial Services Authority* by reference to the same section the upper tribunal of the Tax and Chancery Chamber took into account that the trading was deliberate, manipulative, designed to deceive other market users and undertaken for motives of profit, in concluding that the equivalent section had been breached.[25]

---

23 *Australian Securities and Investments Commission v Soust* [2010] FCA 68, (2010) 77 ACSR 98.

24 *Winterflood Securities Ltd v Financial Services Authority* [2010] EWCA Civ 423, [2010] 2 BCLC 502 at 513, per Moore-Bick LJ.

25 *7722656 Canada Inc (Swift Trade Inc) and Peter Beck v Financial Services Authority* [2013] Lloyds Rep FC 381.

[58] In both the United States and Canada, the purpose behind the trades is an important consideration.[26]

[59] In *Re De Gouveia* it was said:

> 93 The determination of whether a transaction or a trading order reflects real demand or supply (or both) may - perhaps inevitably it will - involve a consideration of what motivated the relevant market participant or participants …
>
> 96 It may be that objective evidence will alone suffice to demonstrate whether a set of trading orders reflects bona fide investment decisions, and thus whether the impression of trading activity thereby projected reflects reality.
>
> 97 More often, though, this assessment will also involve consideration of motivation. The discussion above concerning "artificial price" is also relevant for this purpose. That is, trading activity motivated by something other than bona fide investment intent would project a distorted image of demand or supply (or both), misinforming observers and the capital market generally by a "false or misleading appearance of trading activity" in the sense of section 93(a) of the Act.

[60] In this area of the law it may be useful to distinguish the concepts of intention and purpose. By definition, intent can be "the act or fact of intending or purposing; intention, purpose, (formed in the mind)". Purpose is "that which a person sets out to do or attain, an object in view; a determined intention or aim".[27] To the extent Mr Warminger's state of mind or intention is relevant from a legal point of view, as noted s 11B(b) requires the FMA to prove, on the balance of probabilities, either knowledge or constructive knowledge on Mr Warminger's part of the likely effect of his action. It need not prove a specific intent, but the purpose in relation to the trades, what Mr Warminger set out to achieve will be a relevant consideration in determining whether the trade was manipulative or not.

[61] Under s 11B the purpose behind the transaction in issue is a relevant factor in determining whether the trade has affected the genuine supply and demand in the market. Each trade in the market has the potential to impact on the price of the security traded and, depending on the volume transacted and the timing of the trade, may impact on the supply of or demand for the securities. A manipulative

---

[26] *Securities and Exchange Commission v Masri & Anor* 523 F Supp 2d 361 (SD NY 2007); and *Re Podorieszach* [2004] ASCD No 360.

[27] Oxford English Dictionary (online ed, Oxford University Press).

transaction may seem the same as a non-manipulative one in terms of its impact on the price, the supply of, demand for or the extent of the active trading in the security. The purpose of the trade may be the key factor which distinguishes culpable manipulation from a trade made for genuine reasons.

[62] While accepting that the purpose behind Mr Warminger's trades was key to each of the FMA's claims, Mr Heron submitted that to the extent the FMA argues that there can only be one legitimate purpose for trading, namely for a buyer to acquire at the lowest available price and for a seller to sell at the highest realisable price, it overstates the position. I agree. All the experts in this case acknowledge that in practice trades may be carried out for proper and legitimate indirect or collateral motives, for example, price or volume discovery and positioning. Such transactions have an effect on the price of shares but may not be manipulative.

[63] It is not the intention of the legislation to catch all such trading as manipulation. As Mason J said in *North v Marra Developments Ltd* noted:[28]

> [T]he statutory prohibition is directed against activity which is designed to give the market for securities or the price of securities a false or misleading appearance. In this setting, 'calculated' means 'designed' or 'intended' rather than 'adapted' or 'suited'. It is not altogether easy to translate the generality of this language into a specific prohibition against injurious activity, whilst at the same time leaving people free to engage in legitimate commercial activity which will have an effect on the market and on the price of securities.
>
> Purchases or sales are often made for indirect or collateral motives, in circumstances where the transactions will, to the knowledge of the participants, have an effect on the market for, or the price of, shares. Plainly enough it is not the object of the section to outlaw all such transactions.

[64] The concept of what may be legitimate commercial activity or what may provide a legitimate reason for the trade has been considered in a number of cases. In *Re De Gouveia* the Alberta Securities Commission considered allegations that Mr de Gouveia had breached the equivalent section of the Alberta Securities Act by trading in shares when he knew or might reasonably be expected to know his conduct would result in or contribute to a false or misleading appearance of trading

---

[28] *North v Marra Developments Ltd*, above n 20, at 58.

activity in or an artificial price for the particular shares.[29] The Commission accepted that buying or selling at a price above that in the preceding trades does not alone demonstrate any impropriety, as such trades happen all the time. If a buyer considers the higher price to be justified and imagines that ultimately he can profit from the purchase then the market price move is prima facie a fair reflection of an investment decision and a genuine pricing adjustment. The signal to the market is legitimate and the price is not artificial. However, where a trader continually upticks his stock but then turns around and sells the shares at a loss it is not an economically rational approach to investment. Absent isolated bad luck and attention, carelessness or ignorance, it will be a breach.

[65] In *Securities and Exchange Commission v Masri & Anor* the United States District Court, SD New York concluded that:[30]

> … if an investor conducts an open-market transaction with the intent of artificially affecting the price of the security, and not for any legitimate economic reason, it can constitute market manipulation. Indeed, the only definition [of market manipulation] that makes any sense is subjective. It focuses entirely on the intent of the trader.

[66] I reject the suggestion implicit in aspects of the defendant's expert evidence and submissions that a transaction is a genuine transaction if one party to the trade is a genuine buyer (or seller). If the purpose of the trader is to manipulate the market, then the fact the other party is a genuine buyer (or seller) does not mean the trade cannot be manipulative. Otherwise s 11B would effectively be restricted to wash sales and matching orders which it is not.

[67] The argument that the general purpose is relevant under s 11B is supported by the requirement that the trader must know or ought reasonably to know that their trading will or will be likely to have the effect pleaded. If the trader knows that it will have that effect, or is likely to have the effect, it is likely they intended it to have that effect. Both parties accepted and presented their cases on the basis that Mr Warminger's purpose on the trades was relevant.

---

29 *Re De Gouveia* 2013 ABASC 106.

30 *Securities and Exchange Commission v Masri & Anor*, above n 26, at 372; and *Siddiqi (Re)* 2005 BCSECCOM 416.

[68] So in summary while purpose is not an express element of s 11B, consideration of the purpose behind the trades is an important consideration when determining whether Mr Warminger's actions amount to market manipulation.

[69] The purpose behind the trade can be established in a number of ways. In some cases, it may be apparent from the market data alone. The aberration in normal trading patterns may be sufficiently significant to permit a finding of intent even in the absence of contextual evidence. This was the focus of Mr Warminger's expert witness Professor Aitken. His evidence focused on an analysis of the market data.

[70] However in most cases the context of the trading will be important. This was the approach of the experts called by the FMA, Mr McMahon and Mr Solarz. There may be direct evidence from letters, emails or telephone communications.[31] There may also be circumstantial evidence which suggests an opportunity or motive to manipulate the market. In *Siddiqi (Re)* the Court noted:[32]

> As is clear from these authorities, a person manipulating the market might use a variety of tools to do the job. Some of these tools are not inherently illegitimate trading practices – they only become so when employed with the intention of manipulating the market. It is also necessary to consider the conduct of the alleged manipulator as a whole. Some trading and order activity may not seem manipulative when viewed in isolation, but is clearly so when considered along with all of the manipulator's other conduct.

[71] Proof of intention may be based upon inferences. As noted *In the matter of Pagel, Inc*:[33]

> … Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behaviour, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces.

[72] In *Braysich v R*, the Court of Appeal of Western Australia noted that:[34]

> [92] … offences relating to trading in securities which require proof of the accused's subjective intention or purpose are often difficult to prove,

---

31 *Donald v Australian Securities and Investments Commission* [2001] AATA 366, (2001) 38 ACSR 10.

32 *Siddiqi (Re)*, above n 30, at 118.

33 *In the Matter of Pagel, Inc* (8-16764) SEC Release No 22280.

34 *Braysich v R* [2009] WASCA 178, (2009) 238 FLR 1.

> because they usually involve transactions which are also commonly engaged in for legitimate commercial reasons. Proof will invariably depend on inferences drawn from circumstantial evidence.

"Creating or causing the creation of a false or misleading appearance"

[73] The option of the trade "causing the creation" confirms that the false or misleading appearance can be created directly or indirectly.

"With respect to the extent of active trading; ...or the supply of, demand for, price for trading in, or value of those securities…"

[74] Section 11B(a)(i) and (ii) confirm that there are two principal ways in which the trading may be manipulative – either in relation to the appearance of demand for the securities or in relation to the appearance of the price or value of the securities. While there may well be a relationship or connection between the two, the section identifies both as the means of providing evidence of manipulative trading. Either will suffice to support a claim or prosecution. The FMA primarily relies on the false appearance of the price in its claims against Mr Warminger, but again, each cause of action must be considered separately in relation to its particular pleading.

"Knew or ought reasonably to have known"

[75] The FMA must also prove that Mr Warminger either had or ought to have had knowledge that his trading would create or cause the creation of the false or misleading appearance alleged in each case. Actual knowledge can be proved or inferred from Mr Warminger's actions in the context of the particular trade in issue. If actual knowledge were proved beyond reasonable doubt it would support a criminal conviction.[35] The second way knowledge can be established is by constructive knowledge, which is an objective standard.

[76] I am not attracted to the defence proposition that as this is the first case of its kind the absence of specific guidance or rules on the type of conduct in this case is relevant to the issue of what Mr Warminger ought to have known. Mr Warminger is a very experienced portfolio manager and trader. He ought to have known the effect

---

[35] Securities Markets Act, s 11D.

his actions would have on the market.[36] However, again it will be necessary to consider the issue of knowledge on each claim if the other elements are established.

Positive defence

[77] A preliminary issue arises as to the defences available to Mr Warminger, particularly whether the defence under s 11C is available.

[78] Section 11C provides:

> **11C Presumption as to false or misleading appearance of trading, etc**
>
> (1) A person (A) is presumed to contravene section 11B if A is directly or indirectly a party to trading in the securities of a public issuer from which no change in beneficial ownership results.
>
> (2) A person (A) is also presumed to contravene section 11B if—
>
> (a) A has made an offer to trade the securities of a public issuer; and
>
> (b) either A or, to A's knowledge, A's associate, has made or proposes to make an opposite offer (the opposite offer) to trade securities of the public issuer; and
>
> (c) the opposite offer substantially matches A's offer as to the number and price of the securities.
>
> (3) There is no presumption under subsection (1) or subsection (2), and it is a defence in any proceeding against A for contravention of section 11B, if A proves, on a balance of probabilities, that the trading in securities occurred, or the offer to trade was made, for a legitimate reason.
>
> (4) There is no presumption under subsection (1), and it is a defence in any proceeding against A for contravention of section 11B, if A proves, on a balance of probabilities, that—
>
> (a) in trading the securities A was acting on behalf of another person; and
>
> (b) did not know, and ought not reasonably to have known, when trading the securities that no change in beneficial ownership would result.

[79] As noted, trade-based manipulation can take a number of forms. Sections 11C(1) and (2) are directed at the particularly pernicious conduct of wash sales and

---

[36] *Re Lemay* 2012 OCRCVM 69 at [72]*; Re Podorieszach* [2004] ASCD. No 360 at [152].

matching orders.[37] There is the presumption of manipulation where the trading involves wash sales or matched orders. Sections 11C(3) and (4) then provide defences to that presumption.

[80] Section 11C(4) confirms that there is no presumption and there is a defence to what on its face appears to be a wash sale, if A proves on the balance of probabilities that in trading the securities A was acting on behalf of another and did not know and ought not reasonably to have known that no change to beneficial ownership would result. By its terms s 11C(4) can only apply to wash sales and does not apply more generally to trading that may otherwise breach s 11B.

[81] But Mr Heron submitted the defence under s 11C(3) applied to a claim under s 11B if the trade was made for a legitimate reason. He submitted that the defence under s 11C(3) could apply to the trades in the present case and the defence was not restricted to wash sales or matched orders.

[82] Section 11C(3) displaces the presumption in relation to both wash sales and matching orders and provides a defence in any proceeding for contravention of s 11B if A proves on the balance of probabilities that the trading or the offer was made for a "legitimate reason".

[83] The wording of s 11C(3) refers to both subs (1) and (2) and expressly relates the defence to the phrases "trading in securities" and "offer to trade" which are used in the sections dealing with wash sales and matching orders. While s 11C(3) goes on to provide for "a defence in any proceeding against A for contravention of s 11B", the general reference to s 11B is necessary as the infringing conduct under ss 11C(1) and (2) is a subset of s 11B. It does not necessarily expand the scope of the defence. Section 11C(4) uses the same phrase "a defence in any proceeding against A for contravention of section 11B …" but s 11C(4) can only relate to a matched order transaction. Further both s 11C(3) and (4) refer expressly to proceedings against "A". "A" is only referred to in s 11C. There is no such formulation in s 11B. I do not consider s 11C(3) applies generally or creates a statutory defence to infringement of s 11B on the basis the trade was made for a legitimate reason.

---

[37] They were described as such in *Braysich v R*, above n 34, at [77].

[84] However, even if I am wrong in that limited interpretation of s 11C(3), and it is available as a defence, it does not affect the outcome in this case. Under s 11B Mr Warminger can only be liable if he knew or ought reasonably to have known that his trading would have or would be likely to have the effect of creating or causing the creation of a false or misleading appearance of trading. As discussed above, if the trade was for a genuine purpose or for a legitimate reason then it is not likely to have the effect of creating or causing the creation of a false or misleading appearance of trading and the FMA could not establish that Mr Warminger would or ought to have known that it would be likely to have that necessary effect.

[85] That is effectively the position that counsel arrived at. Mr Smith conceded that if Mr Warminger could establish a legitimate reason for the transaction in issue he would equally be able to show he did not have the necessary purpose in effecting the trades to be in contravention of s 11B.

The evidence

[86] The FMA called a number of witnesses to prove its case against Mr Warminger. In addition to its experts, Mr McMahon and Mr Solarz, it called Mr Wyeth of NZX, Ms Mackenzie of the Guardians of the New Zealand Superannuation (the Guardians) and brokers or managers from Forsyth Barr, Goldman Sachs, Macquarie and First Capital, some of whom were involved in the transactions with Mr Warminger.

[87] Mr Wyeth gave evidence of the NZX investigation into Mr Warminger's trading which led to the referral to the FMA on 12 August 2014.

[88] Ms Mackenzie confirmed that when the investigation became public knowledge in April 2015, the Guardians suspended the Fund's mandate with Milford.

[89] Ms Mackenzie also confirmed that the Guardians carried out reviews of Milford's performance. The last was in January 2014. She accepted at that time the report recorded that Mr Warminger was an effective and efficient trader. She acknowledged the Guardians were aware that Mr Warminger adopted an active

management style to the funds under his control as opposed to a passive management style. He took active decisions to buy or hold stocks and was not constrained by market capitalisation or index weights. Mr Warminger said that he was permitted to trade up to a 200 per cent turnover.

[90] In addition to the expert evidence of Professor Aitken, Mr Warminger called Mr Gaynor of Milford and also gave evidence himself.

The expert witnesses

[91] The FMA called Mr McMahon and Mr Solarz as experts. Mr McMahon has a Bachelor of Commerce with Honours, a Master of Business Administration and is a chartered financial analyst. He has over 20 years experience in the securities industry. Most of his experience is in share broking but he also has three years experience in funds management.

[92] Mr Solarz is an investment banker who currently lives in Wellington having recently relocated from Hong Kong. Mr Solarz is an experienced trader. He worked as a trader for a number of share broking firms in New Zealand from 1986 until he moved to Hong Kong in 2000. From 2000 to 2016 he traded equities in all the Asian markets and worked as a sales trader between 2000 and 2008. Between 2008 and 2012 he traded on his own account. Between 2013 and 2016 he worked with Barclays. Mr Solarz has been licensed by the National Association of Security Dealers in the United States.

[93] Both Mr McMahon and Mr Solarz considered that contextual evidence was relevant to determine whether Mr Warminger was guilty of manipulation. Both agreed Mr Warminger had been guilty of market manipulation on a number of occasions, although Mr Solarz disagreed with Mr McMahon in relation to some trades.[38]

[94] Mr Warminger called Professor Aitken as his expert. Professor Aitken is the CEO of Capital Markets Co-operative Research Centre. He has a PhD in the area of

[38] Causes of Action 4, 5 and 10.

security market micro structure and is Professor of ICT Strategy at Macquarie University, Sydney. Professor Aitken designed the SMARTS real-time market surveillance system which is used in 50 national exchanges and regulatories, including NZX.

[95] Professor Aitken analysed Mr Warminger's trades in the 10 causes of action. He obtained the full order booklet data and arrayed the data in software so he was able to manipulate it in a way he was familiar with. Having analysed and interpreted that data, he then considered whether the data disclosed pattern alerts.

[96] In Professor Aitken's opinion there are seven tell-tale signs or pattern alerts of market manipulation. They are:

- establishing a new bid/ask price;
- moving the bid/ask price three price levels;
- trading in small volume;
- trading in small volume at the end of the trading session;
- no independent auction;
- price revision in the next trading session; and
- uneconomic trading.

[97] Professor Aitken said that if four out of seven of those factors were present he would start to look at the matter seriously. With three he might look at the trading depending on how many other instances there had been. While some of Mr Warminger's impugned trades had one or more of the above features, such as trading in small volume near to the close, they were not sufficient for him to conclude Mr Warminger had manipulated the market. In his opinion there were a number of relevant factors (such as an auction post the trades in question which reached the same price) and Mr Warminger's trading history which supported his conclusion.

[98] Overall Professor Aitken concluded that the trading data was not consistent with market manipulation. Mr Warminger's trading did not and was not likely to have the effect of market manipulation in terms of s 11B. In coming to that conclusion, Professor Aitken did not take into account the surrounding context of the trades. He considered it unnecessary to do so unless the data established there had been a false or misleading demand or price created by the trading. In relation to some trades he suggested Mr Warminger's explanation also provided a legitimate reason for the trades, which further militated against a conclusion of manipulation.

The cross-examination of Professor Aitken

[99] Mr Heron suggested that the FMA had failed to challenge Professor Aitken's conclusions so that the weight of the FMA's experts should be significantly reduced.

[100] Mr Smith's challenge to Professor Aitken's evidence proceeded, not on the basis of a challenge to his expertise or his opinion as such, but rather to the basis on which he had formed that opinion, namely that his opinion was formed without considering any contextual or external information. Professor Aitken accepted that was the case. There was relatively little in his evidence to suggest he had considered the purpose of Mr Warminger's trades outside consideration of the trading data itself and, at times, Mr Warminger's explanation. He acknowledged he had not seen or called for evidence concerning the surrounding circumstances of the trades. He suggested that certain causes of action relied entirely or primarily on what the trading data demonstrated so that context or external information was not particularly material. The eighth cause of action involving trading in Xero Limited shares on 30 June 2014 was a primary example.

[101] The duty to cross-examine a witness (in this case an expert), which is now provided for by s 92 of the Evidence Act 2006, is founded on the requirement for fairness in the conduct of trials. A witness, particularly an expert, should be given the opportunity to respond to opposing opinions. There was no unfairness in the way the FMA approached the expert evidence in the present case. Professor Aitken was aware of the FMA case, including Mr McMahon's and Mr Solarz's evidence before he gave his evidence. Professor Aitken had the opportunity to comment on aspects

of their evidence. He did so. Mr Smith's cross-examination of Professor Aitken elicited for the Court the facts upon which his expert opinion evidence was based. It was not necessary for Mr Smith to cross-examine Professor Aitken further, given the FMA case relies on the context of the trades as informing the purpose behind the trades.

[102] There is a little more force in Mr Heron's point as to the weight to be given Professor Aitken's evidence where the cause of action is not so dependent on context – for example, in relation to the eighth cause of action.

[103] Overall, I do not accept Mr Heron's criticism of Mr Smith's approach to the cross-examination of Professor Aitken nor his proposition that as a result the weight of the evidence of Mr McMahon and Mr Solarz is significantly reduced. It was open for Mr Smith to challenge Professor Aitken's evidence on the basis that his opinion evidence did not take into account the context of the trades. The different approaches of the parties' respective experts highlighted the different approaches the parties took to the case. Mr Warminger's case, based on Professor Aitken's evidence, was that the context in terms of the emails and telephone calls was largely irrelevant to whether the trading had created or was likely to create a false and misleading appearance in the market. It was the trading data that was central to that issue. The FMA on the other hand took the position that the surrounding context informed the purpose behind the trades. I agree with that approach, which in my judgment is supported by the authorities referred to above.

The transactions in issue

[104] Against that background analysis I turn to the detailed claims by the FMA. There are 10 of them:

- trading in Fisher and Paykel Healthcare Corporation Limited shares on 27 May 2014 (COA1);

- trading in The a2 Milk Company Limited shares on 29 January 2014 (COA2);

- trading in The a2 Milk Company Limited shares on 9 July 2014 (COA3);

- trading in The a2 Milk Company Limited shares on 6 August 2014 (COA4);

- trading in Restaurant Brands New Zealand Limited securities on 30 April and 1 May 2014 (COA5);

- trading in Sky Network Television Limited securities on 19 February 2014 (COA6);

- trading in Xero Limited shares on 15 May 2014 (COA7);

- trading in Xero Limited shares on 30 June 2014 (COA8);

- trading in Wynyard Group Limited securities on 31 July 2014 (COA9);

- trading in Skellerup Holdings Limited securities on 30 April 2014 (COA10).

[105] All the companies were public issuers within s 2 of the Act.

Fisher & Paykel Healthcare Corporation Limited – 27 May 2014 (COA1)

[106] As at 27 May 2014 Fisher and Paykel Healthcare Corporation Limited (FPH) had approximately 551,155,537 shares outstanding. Its market capitalisation was approximately $2.42 billion.

[107] As at 30 April 2014 the funds held approximately $12 million FPH shares. FPH shares amounted to 6.8 per cent of the NZ Superannuation Fund; and 6.9 per cent of the Milford NZ Equities Wholesale Fund. At the time of the transaction in issue FPH's NZX 50 weighting was 4.096%. The funds were overweight in FPH stock.

[108] On Friday 23 May 2014 FPH announced its full year financial result. It was better than expected. On Monday 26 May 2014 FPH shares had traded as high as $4.36. The market closed at $4.34. On 27 May 2014 FPH opened at $4.32.

[109] The FPH transaction is one in which the surrounding circumstances and the evidence of other traders is particularly relevant. Two traders gave evidence of their dealing with Mr Warminger that day – Ms Pettit of Forsyth Barr and Mr Rutherford of Goldman Sachs.

[110] Ms Pettit has been the primary Forsyth Barr contact for Milford since late 2009. Mr Warminger was one of her main contacts at Milford. Ms Pettit would generally telephone Mr Warminger every day before the market opened and before the Forsyth Barr morning email, which went out to all clients following the institutional dealing team's meeting.

[111] Ms Pettit said that on 27 May 2014 she spoke to Mr Warminger before the market opened to discuss research, what Forsyth Barr had to trade that day, the order flow that they had at the time and whether there was anything he or Milford were looking to accomplish that day. It appears that she was mistaken about actually speaking to Mr Warminger at that time as the call data suggests the call went through to his answer phone. However, the length of call is consistent with her leaving a message and Mr Warminger accepted he listened to the message at 9.35 am.

[112] Some time after that call a Forsyth Barr client spoke to Mr Butters, one of ForBar's institutional dealers. The client gave a firm order to buy various shares, including 450,000 FPH shares. Mr Butters then emailed those orders around the Forsyth Barr team at 10.37 am. At 10.38 am Ms Pettit sent an email to her Milford contacts, including Mr Warminger, to advise that she had a buy order for 450,000 FPH shares. She did so by the following headline to the email: "Buyer 450 k FPH".

[113] Ms Pettit said she likely sent the email to Milford because she thought Milford could be interested in selling FPH shares. Mr Warminger had previously been a seller of FPH stock. Mr Warminger replied almost immediately at 10.39 am "at 35" which is accepted meant he was prepared to sell FPH shares for $4.35 per

share. At this time the last traded price was $4.31. Only small volumes were being traded.

[114] Mr Warminger said that he did not take Ms Pettit's communication as an offer to buy 450,000 FPH shares. He sought to downplay the significance he would have attached to the information. He says he considered it a fishing expedition. He said Forsyth Barr often engaged in fishing expeditions. Mr Warminger said it was no more than an indication that they had a potential buyer. Mr Warminger said some brokers put "firm" at the end of an email to confirm they were buyers at that volume. In cross-examination Mr Warminger suggested that Ms Pettit replied "sorry it's a no" but there is no evidence of such an email reply. It was not put to Ms Pettit that she had.

[115] Mr Solarz considered Ms Pettit's email was a clear indication of interest. In his opinion, an experienced trader such as Mr Warminger would conclude that Ms Pettit had an order in hand to buy 450,000 FPH shares. It was a direct and specific reference to one particular stock. Further, Mr Warminger effectively opened himself up by offering to sell at $4.35.

[116] Mr Warminger is strictly correct that Ms Pettit's email was not a buy offer capable of acceptance as there was no price stated. But if she had responded to his email "at 35" by accepting or agreeing to it, both Forsyth Barr and Mr Warminger would have been committed to the transaction at that volume for that price of $4.35. Mr Warminger accepted that in cross-examination. He treated the email seriously enough by responding with a price at which he would sell that volume.

[117] As Mr McMahon noted, at the very least Mr Warminger would have known there was a potential buyer for volume in the market.

[118] Within three minutes of Ms Pettit's email at 10.38 am, Mr Warminger entered the market as a buyer. At 10.41:34 he placed a DMA order to buy 30,000 FPH shares at $4.32 resulting in three trades for 30,000 FPH shares at $4.32.

[119] In the meantime Ms Pettit relayed Mr Warminger's response to David Price, who was the Forsyth Barr contact for the potential buyer of FPH, over an open voice link with the Wellington office. Mr Price confirmed this in his evidence. Mr Price considered that they should try to buy half the 450,000 shares wanted by their client. Ms Pettit then emailed Mr Warminger at 10.41 am to see if he would sell half the volume for $4.32. "Would buy 225 FPH at 432 now?" Mr Warminger did not respond.

[120] Ms Pettit said that shortly thereafter, at 10.54 am she saw a crossing reported of 300,000 FPH shares at $4.35. As a result of that trade Mr Price became interested in buying 200,000 FPH shares at $4.35 for the client. At 10.58 am Ms Pettit tried to telephone Mr Warminger but could not get hold of him. At 10.58 am she then emailed Mr Warminger and asked him whether, in light of the crossing at $4.35, he would sell 200,000 FPH shares at $4.35:

> Given that crossing would you sell 200 k FPH at $4.35?

Mr Warminger replied "ok" at 11.02 am. Ms Pettit then reported that crossing of 200,000 FPH at $4.35 at 11.03 am.

[121] Duncan Rutherford of Goldman Sachs was also involved in dealing FPH shares with Mr Warminger that day. Prior to 27 May 2014 Goldman Sachs had undertaken three other sizeable FPH trades with Milford, including on 23 May 2014. Mr Warminger had been the seller of the FPH shares. Mr Rutherford said that on 27 May he spoke to Mr Warminger in the pre-opening session and indicated Goldman Sachs were likely to be a buyer on the day. Mr Warminger had indicated he would potentially be a seller. The Goldman Sachs order book that went to Milford on the day indicated they were looking to buy 141,000 FPH at $4.30 over the day.

[122] Mr Rutherford was also in direct email contact with Mr Warminger that morning. At 10.42 am he emailed Mr Warminger: "FPH – CAN BUY 500 AT 32". At that time the last traded price of FPH shares was $4.32. Mr Warminger did not respond to the email from Mr Rutherford.

[123] After his first DMA trades at $4.32, Mr Warminger entered a further five DMA buy orders for 125,000 FPH shares between 10:43:22 and 10:45:39 as follows:

(i) 10:43:22 – 20,000 at $4.33;

(ii) 10:43:40 – 20,000 at $4.33;

(iii) 10:44:06 – 50,000 at $4.33;

(iv) 10:44:21 – 30,000 at $4.33;

(v) 10:45:39 –5,000 at $4.34.

[124] Mr Warminger's DMA trades moved the quoted price up to $4.34, an increase of approximately 4.6%. Over the same period of time, the overall movement of the NZX 50 was only 0.014%.

[125] At 10.48 am, some two to three minutes after his last trade, Mr Warminger called Mr Rutherford. During the call Mr Warminger said he would sell FPH at $4.35. By that time the price had moved from $4.32 to $4.34 as a result of Mr Warminger's trading. While Mr Rutherford was on the call with Mr Warminger he told other members of the Goldman Sachs equity team that Milford could sell stock at 35, meaning $4.35. Goldman Sachs were prepared to buy 300,000 FPH shares at that price but not the full 500,000. While still on the phone Mr Rutherford agreed with Mr Warminger to buy 300,000 FPH at $4.35.

[126] Mr Rutherford said that while the price was above what they initially wanted to pay, Goldman Sachs agreed to pay more than the initial offered price of $4.32 because the price had moved during the morning. He was concerned the price might be running away from them based on what was occurring to the price on the screen in the minutes prior to the call. On Mr Rutherford's evidence, seeing the price go to $4.34 was instrumental in Goldman Sach's decision to pay $4.35 to secure the 300,000 volume. Because of the anonymity of the market Mr Rutherford was not aware that it was Mr Warminger who had been purchasing FPH shares that morning.

[127] Goldman Sachs was slow to report the crossing. At 10.54 am Mr Warminger emailed Goldman Sachs and requested that they report: "cross please FPH". The email was clearly a reminder from Mr Warminger to Goldman Sachs to report the crossing. As broker they, not Mr Warminger, had that responsibility. Goldman Sachs then reported the crossing of 300,000 FPH shares at $4.35 at 10:54:27.

[128] The terms of Ms Pettit's email at 10.58 am are consistent with her evidence that she decided to accept Mr Warminger's sale price of $4.35 because she was influenced by the crossing with Goldman Sachs.

[129] Mr Warminger did not engage in any further DMA buying activity in FPH shares that day. However, at 15:11:44 Goldman Sachs reported a further crossing of 200,000 FPH shares at $4.35. Mr Warminger was again the seller in that crossing.

[130] The FMA says that Mr Warminger knew Ms Pettit of Forsyth Barr and Mr Rutherford of Goldman Sachs wanted to buy substantial volumes of FPH shares (in crossings) before he made the FPH purchases using DMA. It says that Mr Warminger placed buy orders through the DMA system to manipulate the price of FPH shares to a stage where he could sell large volumes of FPH shares at his desired price of $4.35.

[131] The FMA alleges that Mr Warminger's DMA trades on 27 May 2014 in FPH shares were in breach of s 11B in that his buy orders increased the offer, quote and price for FPH shares and maintained them at a higher level than would otherwise have been the case. The FMA says that Mr Warminger's DMA buy orders did not reflect genuine demand for FPH shares and were made for the purpose of increasing and maintaining at a higher level the offer, quote and price of FPH shares, and resulted in trading activity that would not otherwise have occurred (the crossings at $4.35). Mr Warminger's DMA trades created a false or misleading appearance for those reasons individually or in combination. The subsequent crossings on the same day also created a misleading appearance as the prices at which they occurred were influenced by Mr Warminger's DMA trades.

[132] The FMA says that Mr Warminger knew or ought reasonably to have known that his trades were likely to have that effect, bearing in mind the pleaded purpose of the trades, his experience as an equities market participant and his role with Milford.

[133] Mr Warminger denies the allegations. He says that on 27 May 2014 he was a willing seller at $4.35 and considered that any stock he could buy for less than $4.35 was good buying. He bought stock at less than $4.35 because he thought it was undervalued. He sold stock at $4.35 as he considered that was where the stock would rerate given the better than anticipated financial results FPH announced on 23 May 2014. He says he was proved right by subsequent events. Mr Warminger said his DMA buy orders reflected genuine demand for FPH shares, and that any movements in price, volume and/or active trading following his DMA buy orders were a normal consequence of the market operating as it should.

[134] Mr Warminger explained his trading on the basis he was trading around a position in FPH and the stock "rained on him".

[135] Trading around a core position is a common fund management strategy. A fund manager may have a desired core position in stocks, say five per cent of his or her own portfolio and may take the weighting up to six per cent if he or she perceives the stock is temporarily undervalued. Conversely they may reduce their weighting down to four per cent if they believe the stock is temporarily overvalued. However, the experts called by the FMA considered that very few fund managers would trade around a position for less than a 10 per cent expected return.

[136] Mr Warminger's argument he was trading around the position makes little sense from a profitability perspective. Having indicated at 10.40 am he was a seller at $4.35, his subsequent DMA purchases resulted in an average profit per share of a modest fraction of one cent on the volume purchased for a total profit of $656. He would have lost money on the last purchase of 5,000 shares at $4.34 after brokerage was taken into account. By contrast, if his DMA activity led to the increased sale price of $4.35 it improved his crossing price by three cents resulting in a benefit of around $16,350.

[137] Mr Warminger said it was simply coincidental that he entered the market to purchase about the time Mr Rutherford sent the email at 10.42 am advising that Goldman Sachs wished to buy 500,000 FPH shares. But, while Mr Warminger's first trade was before the Goldman Sachs' email, it was after Ms Pettit's email. For the reasons given above I find that Mr Warminger was aware from Ms Pettit's email there was potentially a large buyer of FPH in the market before he first traded. Shortly thereafter he became aware of further interest from Mr Rutherford. I do not accept that Mr Warminger's DMA buying activity was coincidental or was carried out for the reasons he gave.

[138] Professor Aitken accepted that taken on its own, Mr Warminger's DMA activity suggested there was a sudden movement in price, but he considered that when analysed, there was nothing particularly unusual about Mr Warminger's trades in FPH shares. Professor Aitken said that if Mr Warminger was confident of a $4.35 crossing trade then any shares acquired below that price were likely to be good buying which was a legitimate purpose for buying the 155,000 shares. But that does not address the point of the FMA case, which is that given his knowledge of significant buying interest, Mr Warminger acted to move the market price so that he could achieve crossings for volume at $4.35. While Professor Aitken referred generally to the interest expressed by Ms Pettit and Mr Rutherford, he did not deal with the specific communications nor, importantly the timing of their interaction with Mr Warminger as it related to Mr Warminger's trading.

[139] Both Mr Warminger and Professor Aitken placed emphasis on the fact that on 26 May 2014 Mr Warminger had sold stock at $4.35. But as Mr Solarz noted, the stock opened down on 27 May 2014 at $4.32. There was limited trading before Mr Warminger entered the market that day and it had drifted to $4.31.

[140] On 27 May the market was trading flat to slightly down. Mr Solarz considered Ms Pettit's advice would have been an encouraging signal to Mr Warminger as to the existence of a buyer for substantial volume. If Mr Warminger was genuinely trying to buy FPH stock then, given that the stock traded down after he had completed the initial purchase, Mr Solarz would have expected Mr Warminger to sit on the bid a few cents lower to try and buy the stock cheaper in

order to improve his average price. Instead Mr Warminger re-entered the market at $4.33 despite the fact that only seconds before the stock had been offered at $4.31. In Mr Solarz's view Mr Warminger did so in an attempt to push the price up. His opinion was that Mr Warminger was not simply trading around the position as claimed (that is he did not just buy stock at $4.32 and $4.33 because it was trading too cheap). Mr Warminger would have been well aware of the commission payable and the cost of the transactions.

[141] In Mr Solarz's opinion Mr Warminger's actions in purchasing relatively small parcels (small in the context of the number of shares he subsequently sold) were consistent with a purpose to push the price up to his selling price of $4.35. The key trade was his last purchase of 5,000 shares at $4.34 at 10:45:39. In Mr Solarz's view there was no economic reason for that trade and it was apparent Mr Warminger made it to deliberately set a new high price for the day.

[142] There is a common theme to the defence case on this and other transactions to the effect of "why would Mr Warminger engage in such behaviour and place his career at risk for either a very limited or even nil financial benefit to himself?" The FMA does not have to prove a motive. But Mr Warminger's evidence, both in what he said and also how he answered questions as well as the evidence of Mr Gaynor provides some insight. Mr Warminger is a goal driven individual. He is motivated by personal performance, the performance of the funds under his management and the targets he has to meet. As Mr Lee said, Mr Warminger would regularly remark to brokers that he was so many basis points up (or down) for the day. Mr Warminger has been very successful in a performance driven industry. He was the INFINZ fund manager of the year for three years preceding 2014. He was used to success and took pride in being on the winning side of a deal. His personality provides some explanation why he would engage in such activity.

[143] Mr Warminger also said that in fixing the price for the sale of a substantial volume he would not be influenced by retail sales. Another FMA witness, Mr Lee from First NZ agreed generally in cross-examination that he would not be influenced by the screen prices when considering a large crossing off-market. That may be so, but Mr Warminger's suggestion that he responded to the offer from Forsyth Barr

before looking at the market on screen is difficult to accept. He had immediate access to the information on his screen. It is hardly likely a trader of Mr Warminger's experience would commit himself to a potential sell of 450,000 shares at $4.35 without checking the screen even if, as he says, the screen price would not significantly influence him. It was still a relevant consideration.

[144] Both Ms Pettit and Mr Rutherford gave evidence, which I accept, that they were influenced at least in part by the DMA sales. While not determinative, the market price shown on the screen must be a relevant consideration, particularly when the market appears to be moving in a particular direction. Further, in terms of effect on the market it is important to note that the market is not restricted to institutional or fund managers.

[145] The experts called by the FMA identified a number of other factors which I consider relevant:

- Mr Warminger's DMA buy orders were placed over a very short time frame (155,000 shares purchased in four minutes and five seconds) and the overall buying size was significant relative to the general on-market trading volume of FPH that day.

- All Mr Warminger's offers crossed the bid/ask spread to hit the ask offer. With the exception of the last order they had the effect of raising the bid/ask/quote levels. His fourth bid for 50,000 shares crossed a two cent spread and could be categorised as aggressive. Such behaviour was unusual when, after his orders for 40,000 shares were filled, FPH traded down to $4.32 then $4.31.

- Mr Warminger's explanation of why he bought the shares makes little sense in the context of his overall selling behaviour. Had he in fact seen a trading opportunity to buy he could simply have stopped selling and perhaps sold a lesser number of shares to retain the net long trading position.

- Mr Warminger did not trade again using the DMA after his first crossing.

[146] While there was no price reversion, that is not determinative.

[147] Both Mr Warminger and Professor Aitken sought to justify the price of the crossing at $4.35 based on past trading (and future results) and, in Mr Warminger's case, the historical cost of the shares. But share markets are volatile and change minute by minute, hour by hour let alone day by day. The trades in question must be considered in the context of the day in issue. As noted, the market opened at $4.32 and the initial trading was light, with the price drifting to $4.31 before Mr Warminger placed his first buy order.

[148] Nor does the historical cost argument assist Mr Warminger, particularly on this trading. Mr Warminger said himself, under cross-examination:

> I literally bought stock that I thought was cheap and I sold it and made a profit from it and that's as simple as that.

That does not suggest Mr Warminger had in mind the historical cost, but rather he was looking at the trading on the day. Further, historical cost is a more relevant consideration to an absolute fund manager. Mr Warminger is not an absolute fund manager. As he said in his first interview, his mandate is to beat the benchmark of the NZX by a certain amount over a rolling three year period.

[149] I am unable to accept Mr Warminger's evidence that he was not aware of or did not consider it realistic that there was a purchaser for 450,000 FPH shares at the time of the DMA trades. In fact, with Mr Rutherford's client as well there were potentially two buyers for volume that day. To the extent there is a difference in the evidence of Mr Warminger and Ms Pettit and Mr Rutherford, I prefer the evidence of Ms Pettit and of Mr Rutherford as to their dealings and discussions with Mr Warminger on the day (apart from Ms Pettit's mistake about speaking to Mr Warminger pre-market). The most significant feature on this claim however is the timing of Mr Warminger's buying activity in the market in relation to his interaction

with Ms Pettit and Mr Rutherford. I do not accept that it was co-incidental as Mr Warminger suggested.

[150] I find that the purpose of Mr Warminger's buying activity in FPH shares on 27 May 2014 was to raise the price for FPH shares to a level at which he could sell volume to Ms Pettit and Mr Rutherford at $4.35. His actions had the effect of creating or causing the creation of a false or misleading appearance of the demand for and price for trading in FPH stock on 27 May 2014. As an experienced market trader with knowledge of the buying interest for large volumes Mr Warminger would have known his trading would have that effect. Indeed that was the purpose behind his trading.

[151] The FMA has satisfied the Court that the first cause of action is made out.

The a2 Milk Company Limited – 29 January 2014 (COA2)

[152] Between 29 January 2014 and 6 August 2014 there were approximately 660,066,979 The a2 Milk Company Limited (ATM) shares outstanding. ATM's market capitalisation was between $429 and $614 million.

[153] As at 31 January 2014 the funds held in total 33.8 million ATM shares. The ATM shares amounted to 4.2 per cent of the NZ Superannuation Fund and 4.2 per cent of the Milford NZ Equities Wholesale Fund holdings. As at 29 January 2014 ATM's NZX 50 weighting was 0.881 per cent. Mr Warminger's funds were heavily overweight in ATM stock.

[154] ATM closed on 28 January 2014 at $0.91. On 29 January 2014 Mr Warminger entered orders in ATM shares and traded in ATM as follows:

- At 09:30:07 Mr Warminger entered a DMA buy order for 60,000 ATM shares at $0.92, which resulted in him buying 60,000 ATM shares at that price in the opening auction.

- Apart from one trade for 3,050 ATM shares at $0.93 at 12:49:25, between 10:00:10 and 13:54:20 all trades in ATM shares occurred at $0.92.

[155] At 12.56 pm James Lee of First NZ emailed Mr Warminger: "Can buy 750 ATM if you want to make room" to which Mr Warminger responded at 1.17 pm "At 93".

[156] Between 1.21 pm and 1.54 pm Mr Lee of First NZX and Mr Warminger had the following email conversation:

Warminger:	1.21 pm	We done at 93?
Lee:	1.21 pm	Give me a tick.
Warminger:	1.23 pm	?
Lee:	1.35 pm	750k done @ .93, would you do up to 1.5m?
Warminger:	1.53 pm	Yes.
Lee:	1.54 pm	1.5m done.

[157] At 13:54:20 First NZ reported a crossing of 1.5 million ATM shares at 93 cents for a value of $1,395,000. Mr Warminger was the seller. At the time of the crossing the last traded price was $0.92.

[158] At 2.00 pm Mr Lee of First NZX confirmed by email: "… sold 1.5m ATM at 93". Mr Warminger responded to Mr Lee by email asking "Whys [sic] it trading 92".

[159] At 14:01:37 Mr Warminger bought 500 ATM shares at $0.93. This was the next trade in the market after the crossing and moved the last traded price on the market from $0.92 to $0.93.

[160] At 2.02 pm Mr Lee responded to Mr Warminger by email and stated: "You sold them @ 93 why do you care if it is trading 92 …".

[161] At 14:21:31 there was a trade of 4,000 ATM shares at $0.93 which did not involve Mr Warminger.

[162] At 14:23:58 UBS reported a crossing of one million ATM shares at $0.93 for $930,000. Another portfolio manager (other than Mr Warminger) at Milford sold 500,000 ATM shares in this transaction.

[163] At 14:31:24 a trade for 4,000 ATM shares, to which Mr Warminger was not a party, took place at $0.92.

[164] At 14:44:26 Mr Warminger bought 500 ATM shares at $0.93 for $465, which moved the last traded price back to $0.93.

[165] Between 15:26:38 and 15:27:41 one on-market trade and two off-market trades (not involving Mr Warminger) occurred at $0.92. That moved the last traded price of ATM to $0.92.

[166] At 15:39:29 Mr Warminger entered a DMA buy order for 500 ATM at $0.93 again moving the last traded price back from $0.92 to $0.93. There were no further trades until the closing auction at 17:00:19.

[167] At 17:01:47 First NZ reported a second crossing of 1.5 million ATM shares at $0.93 for $1,395,000. Mr Warminger was the seller in that transaction.

[168] The FMA alleges that in buying the small parcels of ATM shares at $0.93 Mr Warminger manipulated the market price to facilitate the later crossing after the market closed. It says his actions had or were likely to have the effect of creating or causing the creation of a false and misleading appearance with respect to the active trading. In particular the buy orders increased the offer, quote and price for ATM shares and maintained them at a higher level than would have been the case in the absence of his DMA buy orders. It says Mr Warminger's buy orders did not reflect genuine demand for ATM shares but were for the purpose of increasing and maintaining at a higher level the offer and price for ATM shares, and resulted in trading activity that would not otherwise have occurred and created a false or misleading appearance as a result.

[169] The focus in relation to the 29 January 2014 ATM trades as pleaded is particularly on Mr Warminger's three DMA buy orders for 500 shares in the afternoon. The FMA argues that Mr Warminger intended to set the last traded price at $0.93 and the trades were intended to accomplish that purpose. It refers to his email exchange with Mr Lee at 2.00 pm regarding the price which, it argues, shows

he wanted to maintain the price at $0.93. The FMA says he then set the last traded price at $0.93 before the further crossing at 17:01:47.

[170] The FMA case on this cause of action is primarily based on the premise that Mr Warminger crossed the spread to $0.93 on three occasions in small bundles to ensure that he could achieve the price of $0.93 in the later crossing of 1.5 million shares with Mr Lee. It also argues, somewhat faintly, that he was motivated generally to support the price at $0.93.

[171] Mr Warminger's recollection was that Mr Lee came back to him after the market closed and asked if he would sell him another line of 1.5 million. Mr Warminger says he agreed.

[172] Mr Lee's evidence is important. He said that he would have spoken to Mr Warminger at some time after 2.00 pm at which point:

> … We would have opened up a discussion about doing more. At that point he probably got a phone call from me saying alright my real size is this, how many can you really sell?

[173] Under cross-examination, when asked whether he agreed with Mr Warminger's recollection that he had come back to Mr Warminger after the market closed and asked whether Mr Warminger would sell him another line of 1.5 million Mr Lee accepted that it was "entirely plausible, absolutely". Further he accepted the call concerning the trade of 1.5 million shares would have been immediately before the crossing reported at 5.01 pm.

[174] Mr Lee agreed that he had not told Mr Warminger at the time of the first crossing that he was looking to purchase another 1.5 million shares. In fact Mr Lee had effectively suggested he was not after volume when he said "I might use the screen to get some more". He would not have been able to get anything like the further volume of 1.5 million ATM shares off the screen that day.

[175] Mr Lee also accepted that whether the market price was $0.92 or $0.93 had no bearing on what he was prepared to pay for both lines of 1.5 million shares. Mr Lee said he was unaffected by the three trades of 500 shares at $0.93. Mr Lee agreed

that the screen price might be part of the discussion but in a discussion between a sophisticated buyer and sophisticated seller involving a large line of stock there would be other factors more material than what two or three thousand shares had traded for on the screen.

[176] While I accept the point Mr Lee makes as to the impact on a sophisticated trader, the screen price is still a consideration as discussed above, even if not a dominant one and the market also involves smaller, retail clients who may be affected in their decision-making by relatively minor shifts in pricing. If Mr Warminger's purpose in the trades in issue was to fix the price at $0.93 to facilitate the crossing at $0.93, whether the trade had that impact on Mr Lee is not a complete answer to the FMA case.

[177] However, on the basis of Mr Lee's evidence, and taking account of the length of time between Mr Warminger's last trade (at 3.59 pm) and the close of the market, I am not satisfied that the FMA meets the burden of proof on it for this cause of action.

[178] Mr Warminger traded at the ask. While the volume traded was small, Mr Warminger did trade in small parcels from time to time. The email communication at about 2.00 pm with Mr Lee is equivocal at best. Mr Lee's evidence is consistent with Mr Warminger's evidence that he was not aware of the opportunity of the further crossing until the communication after the market closed. Taken overall the evidence does not establish Mr Warminger's trades in ATM on 29 January 2014 were made for an improper purpose and there is no other evidence of manipulation.

[179] This claim is dismissed.

ATM – 9 July 2014 (COA3)

[180] As at 30 June 2014 the funds held approximately 54 million ATM shares. By that date the funds' holdings in ATM had increased to 5.7 per cent of the NZ Superannuation Fund and 5.7 per cent of the Milford NZ Equities Wholesale Fund. As at 9 July 2014 ATM's NZX 50 weighting was 0.633 per cent. Mr Warminger's

funds were heavily overweight in ATM stock. The closing price for ATM shares on 8 July 2014 was $0.69.

[181] On 9 July 2014 Mr Warminger entered 26 DMA buy orders for a total of 709,900 ATM shares during the day. The total volume of ATM shares traded that day was 1,050,372 shares. Mr Warminger's trades accounted for approximately 67 per cent of the day's volume.

[182] In the opening auction and up until 11.05:09 Mr Warminger accounted for 93.4 per cent of the total volume traded of 651,996 ATM shares. There were no on-market trades in ATM shares between 11:05:09 and 14:01:03. The last traded price of ATM shares up to 14:01:03 was $0.71 which was set by Mr Warminger's DMA market trade at 11:05:09. At 14.01:03 four trades totalling 108,199 ATM shares not involving Mr Warminger transacted at $0.69 which widened the spread to $0.68–$0.70.

[183] At 14:02:45 Mr Warminger re-entered the market and bought 1,000 ATM shares via DMA at $0.70. The next trade at 14:37:04 (not involving Mr Warminger) was for 11,801 ATM shares at $0.69 which moved the last traded price back down to $0.69. Just over a minute later at 14:38:59 Mr Warminger bought 1,000 ATM at $0.70 and moved the last traded price back up to $0.70. The next trade at 14:40:17 did not involve Mr Warminger. It was for 57,200 ATM shares at $0.69, which moved the last traded price down to $0.69. At 14:40:44 Mr Warminger bought 500 shares at $0.70 for a total value of $350 which moved the traded price back to $0.70. At 14:41:18 a sell order for 50,000 ATM at $0.69 moved the quotes to $0.68–$0.69 and left 44,001 ATM on offer at $0.69. At 14:41:53 Mr Warminger entered a buy order for 44,500 shares at $0.70. This cleared the 44,001 ATM on offer at $0.69 and 499 of the ATM shares on offer at $0.70, moving the last traded price to $0.70 and the spread to $0.68–$0.70.

[184] From 14:41:53 until 15:34:58 six trades totalling 49,636 ATM shares which did not involve Mr Warminger occurred at $0.69 and $0.68 moving the last traded price down to $0.68 and the quotes to $0.68–$0.69.

[185] At 15:35:27 Mr Warminger bought 500 ATM shares at $0.69 moving the last traded price from $0.68 to $0.69. The next trade at 15:42:17 did not involve Mr Warminger. It was for 8,000 ATM at $0.69. Four further trades for a total of 44,000 ATM shares not involving Mr Warminger traded at $0.68 which moved the last traded price to $0.68 and the quotes $0.68–$0.69.

[186] Between 15:45:56 and 15:51:12 with over 31,000 ATM shares on offer at $0.69 Mr Warminger entered and traded 10 DMA buy orders for parcels of 500 or 200 ATM shares at $0.69, each order alternating with 10 sell orders placed by Goldman Sachs at $0.68 (the ping pong trades).

[187] At 15:51:10 Goldman Sachs entered a sell order for 50,000 ATM shares at $0.68 which cleared the outstanding orders to buy 4,087 ATM at $0.68 and left 45,930 ATM shares on offer at $0.68. At 15:51:12 Mr Warminger entered a buy order for 200 ATM shares at $0.69, which resulted in an immediate trade for 200 shares at $0.68. At 15:51:24 Mr Warminger entered a DMA buy order for 50,000 ATM shares at $0.69 which cleared Goldman Sachs' residual volume of 45,713 shares at $0.68, resulted in a buy trade of 4,287 ATM at $0.69, moved the quotes to $0.67–$0.69 and the last traded price to $0.69.

[188] At 15:51:35 Goldman Sachs entered a sell order for 50,000 ATM shares at $0.68 which did not trade that day.

[189] On the next day, 10 July 2014, the opening price for ATM was $0.70. After trading at $0.70 initially it later traded at $0.68 and $0.69, closing at $0.68.

[190] The FMA alleges that Mr Warminger manipulated the market on 9 July 2014 by several times increasing the last traded price of ATM shares, particularly during the series of trades with Goldman Sachs after 2.02 pm. The FMA alleges that Mr Warminger's buy orders increased the offer, quote and price for ATM shares and maintained them at a higher level than otherwise would have been the case. It says they did not reflect genuine demand and were made for the purposes of increasing or maintaining the offer, quote and price for ATM shares.

[191] The trades were for extremely small volumes in the context of the funds' holdings of 54 million ATM shares. The FMA pleads that the trades had or were likely to have the effect of creating a false or misleading appearance as to the extent of active trading or with respect to the supply of or demand for the price of trading in ATM. The trading increased the offer, quote and price for ATM and maintained them at a higher level than would have been the case in the absence of those orders.

[192] The FMA says that Mr Warminger traded in the way he did in order to maintain or to push the ATM price higher, given his overweight position in the stock.

[193] Mr Warminger said that he was a buyer for volume of ATM as he considered the share price had stabilised between $0.69 and $0.71 and it was good buying at that price. He considered the true value was around $1.05 a share. Mr Warminger says he was looking at buying between two and three million shares that day.

[194] In Mr Solarz's opinion, Mr Warminger initially set out to dominate the market by suggesting there was a large buyer present, and thereby encourage others into the market as buyers. Mr Warminger denied that was his intention. He also said his goal in buying small parcels at $0.69 was not to set the price at $0.69 but rather to ultimately purchase shares in volume. He hoped that by nibbling away at the market at $0.69 he might cause a seller to reveal a volume at a lower price. His bidding for small parcels at $0.69 was him saying, "look I'm a buyer, show me your volume". He noted that at 15:51:24 he had bid for 50,000 shares at $0.69.

[195] Mr Warminger also noted that there were several parcels of shares offered by brokers at $0.70 in the period between 11.05 am and 2.01 pm on 9 July 2014. During that period he said he was absent from the market at meetings.

[196] Mr Warminger was a very active trader on the bid side in the morning. There was a note of frustration in the email he sent to brokers at 11.06 am before going into the meetings "Who is selling ATM and hasn't shown it to me?"

[197] Mr Sigley of Goldman Sachs responded to Mr Warminger's email at 1.09 pm with an offer "2m ATM @ 70 (htd)". Mr Warminger responded" "How many

behind". Mr Sigley replied at 13:18 "zero". Mr Warminger then offered ".68". Mr Sigley then sent a further email:

> Sorry to do this but… .
>
> Seller is 3m shares, which was only revealed when I reflected your bind in. 100% guarantees me that is him done (not just for today either)
>
> Will deal at 68 if for full line
>
> Apols for the change in information set. Let us know

Mr Warminger did not accept that offer and responded "No then" at 13:46. Mr Sigley replied "Fair enough".

[198] In evidence Mr Warminger said that he spoke to Mr Sigley in the early afternoon but that Mr Sigley's stance was "commercially unacceptable to me". He said Mr Sigley was only prepared to sell three million at $0.68 or two million at $0.70. Mr Warminger said by the time of that discussion he had already purchased 600,000 shares and did not want another three million on top of it. He would have been prepared to pay $0.69 for the two million shares but Mr Sigley did not come back to him.

[199] Mr Warminger said that when he engaged in the ping pong trades, he initially thought he was trading against an algorithm, programmed to place sell orders in the market.

[200] Professor Aitken noted that Mr Warminger did not establish the ask price at $0.69. That had been established by others and the spread was even higher earlier in the day. He also noted that it was not unusual for Mr Warminger to trade in small volumes. Professor Aitken considered that the strategy Mr Warminger described was ultimately successful to the extent that Goldman Sachs revealed a substantial order for 50,000 shares.

[201] Professor Aitken considered Mr Warminger would have been frustrated to learn of a substantial seller in the market for three million shares at $0.68 when he had bought 609,000 shares at a VWAP over $0.70 which could explain why he did not deal further with Goldman Sachs. He considered Mr Warminger's trading did

not and was not likely to create a false and misleading appearance in respect of the trading or price of ATM shares.

[202] Mr Warminger dominated the opening market for ATM shares and then, when he re-entered the market later in the day he engaged in trading small parcels of shares which maintained the price at $0.69. His last trade for the day appears to have been strategically placed to take out all shares on ask at $0.68 and to leave the last trade at $0.69.

[203] I am unable to accept Mr Warminger's explanation for his approach to the trading in ATM on 9 July. I note Mr Solarz's point that in 30 years of being involved in markets he had never seen a seller move down because someone lifted a small number of shares off an offer. Significantly also, if Mr Warminger was interested in volume, by 1.46 pm he knew where the volume lay. If he was genuinely interested in the stock he could have sought to negotiate further with Mr Sigley.

[204] After declining to buy the three million shares from Mr Sigley at $0.68, Mr Warminger's subsequent purchases via DMA were at $0.70 and then $0.69, higher than the price at which he had declined to buy stock from Mr Sigley. Further, Mr Warminger also did not buy any of the 50,000 ATM shares put on the market by Goldman Sachs at $0.68 even though the price was less than he had paid earlier and he was well short of the three million he said he was interested in.

[205] Nor do I accept Mr Warminger's claim that he thought he was trading with an algorithm. Mr Warminger accepted in cross-examination that he realised during the course of dealing that it could not be an algorithm as the time differences were not constant.

[206] Mr Warminger was clearly frustrated by Goldman Sachs (who he assumed was the other side of the ping pong trades). He sent an email to them at the end of the day putting them on notice about their performance and drawing their attention to the fact their target was 16 per cent, and they had achieved only four per cent. But that frustration does not excuse his trading behaviour on the day if he ought to have known it would have the effect or that it was likely to have the effect of creating a

false or misleading appearance as to the extent of active trading or demand for or price or value of ATM shares on 9 July 2014.

[207] The evidence of the trading this day supports the inference the FMA argues for. Mr Warminger's explanation is contradictory. Mr Warminger says that he was searching for volume. But he was aware Goldman Sachs were a seller for volume and did not pursue negotiations with them. Further, when some volume emerged after the ping pong trades, Mr Warminger bought the first 50,000 shares but not the second block of 50,000 that became available at $0.68 even though that was less than the price he had paid earlier and he was still well short of the volume he said he was seeking that day.

[208] The fall in the share price of ATM at this time would have been a concern to Mr Warminger given that Mr Warminger's funds were significantly overweight in ATM compared to the index. Mr Gaynor said Milford had some issues with Mr Warminger in the period up to August 2014 and that such issues could occur when a portfolio manager was underperforming their benchmark. The fall in the share price of ATM (from $0.97 in late February) would have been a contributor to that underperformance. Mr Warminger had an incentive to increase or maintain the price for ATM shares during July. In his evidence Mr Gaynor suggested that he did not consider Mr Warminger to be underperforming, given the rolling three year benchmark against which he worked. But that is not consistent with the record of a meeting Mr Gaynor and Mr Quirk, Milford's managing director, had with Mr Warminger on 19 August 2014. The minute of the meeting records:

> Hi Mark – this is a written record of the concerns that we raised with you in this meeting and that we would like to meet again with you about next week.
>
> As discussed the meeting was not about your recent underperformance against your investment benchmark. …

The minute confirms that about the time of the 9 July trades Mr Warminger was underperforming against his benchmark. He undoubtedly would have felt pressure as a consequence.

[209] On the balance of probabilities I find this claim proved. Mr Warminger's trading in ATM this day had or was likely to have the effect of creating a false or misleading appearance as to the extent of active trading or with respect to the supply of or demand for the price of trading in ATM. The purpose of his trading was to increase the offer, quote and price for ATM and to maintain the price at a higher level than would have been the case in the absence of his orders. It had that effect.

[210] As an experienced trader Mr Warminger would have known or ought reasonably to have known it would have that effect.

[211] The FMA has made out its case on this cause of action.

ATM – 6 August 2014 (COA4)

[212] As at 31 July 2014 the funds were still significantly overweight in ATM shares. ATM shares amounted to 5.8 per cent of the NZ Superannuation Fund and 5.9 per cent of the Milford NZ Equities Wholesale Fund. As at 6 August 2014 ATM's NZX 50 weighting was 0.600 per cent.

[213] ATM shares closed at $0.63 on 4 August 2014. On 5 August 2014 ATM shares opened at $0.64. Mr Warminger entered a buy order at 09:51:41 for 15,000 ATM shares at $0.65, which traded at $0.64 and accounted for 100 per cent of the opening auction volume. The next ATM trade was 10.52:16 when Mr Warminger entered an order to buy 30,000 ATM shares at $0.65. Mr Warminger's order crossed three price levels and left the quotes at $0.64–$0.65. From 12:14:06 to 13:59:38 the ATM share price fluctuated between $0.64 and $0.66. During this time Mr Warminger placed two orders at $0.66 (both placed when the previous traded price was $0.65). Both trades were executed. ATM shares closed at $0.64 on 5 August 2014.

[214] On 6 August 2014 Mr Warminger entered the following orders and effected the following trades in ATM shares:

- Between 09:09:15 and 09:59:27 Mr Warminger entered four DMA buy orders for 105,000 ATM shares at $0.64, two of which were

entered in the last minute before the opening auction. Mr Warminger's four orders were the only bids at $0.64. Mr Warminger's orders resulted in nine trades for 101,712 ATM shares at $0.64 in the opening auction and left the quotes at $0.64–$0.65. Mr Warminger's buy trades were 100 per cent of the buy volume in the opening auction.

- At 10:06:01 a further trade occurred at $0.64, clearing Mr Warminger's residual buy volume of 3,288 ATM shares and leaving the quotes at $0.63–$0.64.

- At 10:07:34 Mr Warminger entered an order to buy a further 10,000 ATM shares at $0.64. That resulted in a trade of 1,712 ATM shares at $0.64 and returned the quotes to $0.64–$0.65.

- At 10:28:42 a further 165 ATM shares from Mr Warminger's buy order was transacted at $0.64. The quotes remained at $0.64–$0.65.

- At 11.18 am Mr Gaynor of Milford emailed Mr Warminger with an instruction to sell 500,000 ATM shares.

- At 11:25:27 a buy order for 50,000 ATM shares cleared all but 248 shares of the volume on offer at $0.65. Mr Warminger was not a party to the trade.

- At 11:29:21 First NZ reported a crossing for 200,000 ATM at $0.65 for a value of 130,000. Mr Warminger was the seller in this crossing.

- At 11.35 am Mr Warminger emailed Mr Gaynor stating "ATM 200,000 done at 65 (nice price!)".

- At 12:40:30 UBS reported a crossing for 200,000 shares at $0.65 for a value of 130,000. Mr Warminger was the seller in this crossing.

- Between 12:40:39 and 14:13:48 there were 11 trades in ATM shares which Mr Warminger was not involved in. The trades were at $0.65.

- At 15:29:10 a trade for 206 ATM shares (to which Mr Warminger was not a party) occurred at $0.64 leaving the last traded price at $0.64.

- At 15:38:07 Mr Warminger entered a bid for 200 ATM shares at $0.65, which resulted in a trade for 200 shares for a value of $130 and moved the last traded price to $0.65.

- At 16:18:18 a trade for 206 ATM shares (to which Mr Warminger was not a party) occurred at $0.64, moving the last traded price to $0.64.

- At 16:44:49 immediately before the pre-close, Mr Warminger entered a bid for 518 shares at $0.65 which resulted in a trade and moved the last traded price back to $0.65.

[215] The FMA's case is that Mr Warminger manipulated the market in two ways: first, that he ramped the open and set the price at $0.64; and second, that he marked the close at $0.65. It is common ground that Mr Warminger's funds were heavily overweight in ATM compared to the index and the stock had been underperforming over the previous months, having fallen from a high of $0.97 in late February.

[216] The FMA says that in acting as he did Mr Warminger manipulated the market. The entry of his multiple bids for ATM gave the appearance of broader buying interest than was the case. Without Mr Warminger's orders in the opening auction the opening price would have been 3.1 per cent lower at $0.62. Mr Warminger's trades ensured the quotes immediately after the opening auction were $0.64 to $0.65 and caused the last closing price to be $0.65. The FMA says Mr Warminger's purpose in executing the trades for 200 and 500 ATM shares was to set and maintain the last traded price at $0.65. His trades on 6 August 2014 increased the offer, quote and price for ATM shares and maintained it at a higher level than otherwise would have been the case.

[217] The FMA also alleges that Mr Warminger's multiple bids created a misleading impression as to the demand for ATM and the crossings created a misleading appearance as the prices at which they occurred were influenced by Mr Warminger's trades.

[218] Mr McMahon considered that Mr Warminger ramped the open by giving an appearance of a number of buyers. While Mr Warminger dominated the open and bid aggressively, leading the share price to the open at $0.64, that was the closing price from the day before. Mr Solarz does not take any particular issue with Mr Warminger's actions in the opening auction. To that extent Mr Solarz differs from Mr McMahon.

[219] Both Mr Solarz and Mr McMahon consider that Mr Warminger manipulated the market on this day in relation to the last two trades of 200 and 500 shares at 3.38 pm and 4.44 pm. In Mr Solarz's opinion they were so small as to be insignificant in the context of the funds under his management and were executed purely to reset the last sale price back up to $0.65. Mr McMahon suggested that Mr Warminger would have executed the trades so as to mark the close, which would have benefitted Milford. Some of the funds earned substantial performance fees. Mr Warminger was a beneficiary of that through the Milford bonus processes and the value of the business, of which he was a shareholder.

[220] Mr Warminger could not recall why he had carried out those two trades.

[221] Professor Aitken noted that in those trades, Mr Warminger was trading at the ask. He did not establish it. Mr Warminger took no part in the closing auction. Craigs placed bids in the closing auction at $0.65. Twenty thousand shares traded at $0.65 and a further 100,000 shares traded later, off market at that price.

[222] While Mr Warminger completely dominated the opening market, I do not consider that amounted to market manipulation. As Professor Aitken noted, Mr Warminger's first order was placed some 50 minutes before the open. His two orders for 40,000 at $0.64 entered in the last minute still left some time (albeit limited) for others to respond and there was plenty of volume at lower ask prices.

While accepting that the order volume changed the opening price from $0.63 to $0.64, the closing price from the previous day was $0.64 and there were no material moves overnight. It was reasonable for Mr Warminger to assume the share price would open unchanged. It is plausible Mr Warminger was trying to acquire as much stock as he could at the same price as the close from the day before. The fact that he bid for a further 10,000 shares shortly after the opening at $0.64 is consistent with a genuine purchase intent.

[223] The FMA also pleads that the crossings with First NZ and UBS created a misleading appearance as the price in each case was influenced by Mr Warminger's previous trades. On the basis that I do not consider there was anything wrong with Mr Warminger's actions around the opening, it cannot be said the crossing price was as a result of a false or misleading appearance as to the proper price. Nor is there any evidence to suggest that Mr Warminger had any prior knowledge of the sell order from Mr Gaynor. Mr Gaynor's evidence was clear that Mr Warminger had no reason to expect he would give such an order. The shares were from one of Mr Gaynor's funds, the Milford Active Growth Wholesale Fund, not Mr Warminger's funds.

[224] That leaves the issue of Mr Warminger's last two trades.

[225] On this cause of action, and in the absence of any evidence of context or surrounding circumstances, I prefer Professor Aitken's evidence that Mr Warminger's two trades at 15:38 and 16:44 were not manipulative. While not determinative, it is relevant Mr Warminger's trades were at the ask which had not been set by Mr Warminger. Also, there were a number of trades at $0.65 during the day that Mr Warminger was not a party to. It is relevant that after the Craigs' offer in the pre-close session, Mr Warminger did not seek to make any further offer nor participate in the closing auction. The suggestion that the trades were conducted to enhance the funds' performance fees is not made out in this case.

[226] While Mr Warminger's last two small trades are questionable, they are only two trades and in the context of Mr Warminger's trading overall that day the FMA is not able to meet the standard of proof on this claim.

Restaurant Brands New Zealand Limited – 30 April and 1 May (COA5)

[227] As at 30 April 2014 Restaurant Brands New Zealand Limited (RBD) had approximately 97,871,090 shares outstanding. RBD's market capitalisation was approximately $308 million. The RBD shares amounted to 3.3 per cent of the NZ Superannuation Fund and 3.2 per cent of the Milford NZ Equities Wholesale Fund. As at 30 April 2014 RBD's NZX 50 weighting was 0.512 per cent and as at 1 May 2014 its weighting was 0.5145 per cent. Mr Warminger's funds were overweight in RBD stock.

[228] The closing price of RBD shares on 29 April 2014 was $3.13. On 30 April 2014 the RBD share price opened at $3.08. On 30 April and 1 May 2014 Mr Warminger entered orders in the RBD shares and traded them as follows:

- At 9.38 am on 30 April Mr Warminger sent an order to Jeremy Coe of UBS on a spreadsheet marked "MOC".[39]

- At 10.20 am Mr Warminger sent an update to his order to Mr Coe including an order to buy 30,587 RBD shares. The spreadsheet was again marked "MOC".

- At 15:15:03 Mr Warminger entered a DMA buy order for 50,000 RBD shares at $3.10 resulting in a trade for 44,883 shares. The trade cleared all the volume on offer and left the quotes at $3.10–$3.12. Prior to the trade, the last traded price of RBD shares was $3.08.

- At 15:15:51 a seller offered 25,000 RBD shares at $3.10 which cleared the remainder of Mr Warminger's buy order and returned the quotes to $3.08–3.10, leaving 19,883 shares on offer.

- At 15:17:24 Mr Warminger entered a second DMA buy order for 60,000 RBD shares at $3.10. This trade cleared all the volume on offer and raised the quotes to $3.10–$3.12. At 3.18 pm the second

[39] MOC is an acronym for "Market on Close".

DMA buy order by Mr Warminger cleared a further offer of 18,270 RBD shares at $3.12.

- At 15:18:09 Mr Warminger amended his bid for the remainder of his buy order from $3.10 to $3.13. This cleared the volume on offer at $3.13 and moved the quotes to $3.13–$3.14.

- The next highest bid behind Mr Warminger's was at $3.08. A further sell order for 30,000 RBD shares cleared the remainder of Mr Warminger's buy order and moved the quotes to $3.08–$3.13.

- At 16:47:31 UBS entered a buy order to meet Mr Warminger's order for 30,587 RBD shares at $3.14 during the pre-close phase.

- At 16:52:09 UBS increased the bid on Mr Warminger's buy order to $3.15. In response two small buy orders entered higher bids than Mr Warminger's buy order. The closing auction resulted in RBD closing price at $3.15.

- On 1 May 2014 the opening price of RBD shares was $3.13. The market slipped during the morning session. Before Mr Warminger entered his first buy order at 13:56:45 the previous six trades had executed at $3.10. Five and a half minutes after the last trade at $3.10 Mr Warminger entered an order to buy 15,000 RBD shares at $3.15 resulting in three trades totalling 12,379 shares and moving the quotes to $3.15–$3.16. Mr Warminger was left with a buy order for 2,621 RBD at $3.15. At 13.57:18 a sell order for 2,621 shares cleared Mr Warminger's remaining buy volume at $3.15 and moved the quotes to $3.10–$3.16.

- At 14:16:21 Macquarie reported a crossing for 450,000 RBD shares at $3.15. Mr Warminger was the seller of 200,000 RBD shares in that crossing.

[229] The FMA says that Mr Warminger dominated the trading in RBD over the course of the day and dominated the trading volume in the closing auction on month's end on 30 April 2014, effectively ramping the closing price to $3.15. The FMA also says that in buying RBD shares on-market before selling them off-market on 1 May 2014, Mr Warminger manipulated the market, because his buy orders increased the offer, quote and price for RBD shares and maintained them at a higher level than otherwise would have been the case. It says the crossing on 1 May 2014 created a misleading appearance as the price at which it occurred was influenced by Mr Warminger's buy orders.

[230] Mr McMahon was of the opinion that Mr Warminger's trading on both 30 April 2014 and 1 May 2014 was manipulative. Mr Solarz did not share that view in relation to the trading on 30 April 2014.

[231] In coming to his opinion, Mr McMahon took into account the historic on-close volumes and also the fact that 30 April 2014 was an end of month date, which he considered would be more relevant to a fund manager. Although Mr Warminger bought a total of 225,000 shares on 30 April 2014 between 3.15 pm and 3.20 pm which moved the price from $3.08 to $3.13, Mr Solarz accepted the buying would be legitimate if done for the purpose of genuinely acquiring stock. There was no evidence the purchases on 30 April 2014 were for a purpose other than the genuine acquisition of RBD shares. Mr Solarz also accepted that it was apparent Mr Warminger's funds received an inflow of $2.7 million and he needed to add to all positions in his portfolio in proportion to his existing weightings. That explained Mr Warminger's instruction to Mr Coe. In Mr Solarz's opinion Mr Warminger left it with the broker, Mr Coe, to take care of the trade on a risk basis. Mr Solarz was not of the view that Mr Warminger's trading or his market order with Mr Coe created a false or misleading appearance in the market.

[232] The best independent evidence about market on close orders is Mr Lee's. Mr Lee explained that a broker will deal differently with a market on close instruction depending on the size of the order and the stock involved. On a large order of $50 million say, over 25 stocks, it would be straightforward to transact a large value

stock on the close. Other stocks might be sought off-market or sometimes the broker might provide the stock themselves.

[233] Based on Mr McMahon's opinion, the FMA submits that Mr Warminger had an obligation to consider the effect of the size of his market on close orders and their likely effect on the market on a sensitive day at the end of the month. Effectively it submits he should have disaggregated both sets of trading. But that says nothing of Mr Warminger's purpose. The FMA cannot satisfy the Court on the balance of probabilities that Mr Warminger intended to mark the close or window dress on the 30 April 2014. Mr Warminger's instructions to Mr Coe left it up to him as to how he would execute the market on close orders.

[234] The FMA's case in relation to the 1 May 2014 trading is that Mr Warminger was likely aware of the opportunity to sell volume at the time he entered his DMA orders. Mr Warminger's order at 1.56 pm to buy at $3.15 had the effect of increasing the price, moving the quotes from $3.10 to $3.16. Mr Warminger was then the seller of 200,000 RBD shares at 14:16:21, some 20 minutes later. The FMA says that while the purchase of shares for the purpose of rebalancing a fund may sometimes be necessary, it was not necessary that it be undertaken this day. Further, it invites the Court to infer that Mr Warminger was aware of the opportunity to sell.

[235] The fact that Mr Warminger's aggressive buy order was made very shortly before the crossing in which he participated in supports an inference that the bid was made in order to manipulate the market. As Mr McMahon observed, the prices of Mr Warminger's buy order and the crossing were exactly the same. The DMA was therefore an uneconomic trade and in fact incurred a small loss after accounting for brokerage. The volume of Mr Warminger's buy order was sufficient to clear all stock selling at $3.15 and raised the quotes to $3.15 to $3.16. Also, price reversion occurred the following day.

[236] In Mr Solarz's view, Mr Warminger's actions in resetting the last sale price at $3.15 caused Macquarie to pay up to five cents per share more than they otherwise would have paid, had he not interfered with the pricing that was evident in the

market before his action. The defendant's actions in the stock on this day created a false and misleading appearance as to demand.

[237] There is no direct evidence from Macquarie on this trade. The FMA case on this aspect of the manipulation is based on an inference that Mr Warminger was aware of the opportunity to sell a large volume of RBD stock to Macquarie. It says he traded in the earlier part of the day in order to increase the price he could sell at.

[238] The only direct evidence concerning the circumstances of the crossing is from Mr Warminger. Mr Warminger said that he was contacted by Macquarie about 20 minutes after he had completed his purchase of 15,000 shares. Until then he had no knowledge of the sell opportunity. The agreement to do the trade was reached during that phone call, and on the spot. The opportunity was attractive to him because of the chance to sell a large volume of RBD shares at a price in excess of his average buying price from the previous day. It also represented a significant margin over the historical cost price for his long term holdings. Both Mr McMahon and Mr Solarz accepted there was no evidence to assume that Mr Warminger was aware of this trading opportunity. Further, the Macquarie note confirms the 15,000 shares Mr Warminger bought were for the Milford NZ Equities Wholesale Fund which is consistent with Mr Warminger's explanation that he was rebalancing the fund.

[239] In the absence of Mr Warminger's evidence the Court would have been entitled to draw an adverse inference about Mr Warminger's actions on 1 May. But given Mr Warminger's evidence, which remained consistent under cross-examination on this point and in the absence of any evidence to the contrary from Macquarie I am not prepared to draw that inference. This claim fails.

Sky Network Television Limited – 19 February 2014 (COA6)

[240] As at 19 February 2014 there were approximately 389,139,785 Sky Network Television Limited (SKT) shares on issue. SKT's market capitalisation was approximately $2.27 billion. As at 31 January 2014 the funds held approximately 1.8 million SKT shares. SKT shares amounted to 1.3 per cent of the NZ Superannuation Fund and 1.3 per cent of the Milford NZ Equities Wholesale Fund.

As at 19 February 2014 SKT's NZX 50 weighting was 3.973 per cent. Mr Warminger's funds were underweight in SKT.

[241] SKT opened at $5.78 on 19 February 2014 and traded between $5.76 and $5.78 until 13:13:52. Between 13:26:41 and 13:30:06 seven on-market trades (to which Mr Warminger was not a party) transacted at prices of $5.82 and $5.85.

[242] The relevant background and trading in SKT on 19 February 2014 was as follows:

- At 13:39:09 UBS received an order from a client to sell 362,745 SKT shares at a lower limit price of $5.78. The order was transmitted to Mr Coe's IRESS order pack at 13:40:24.

- At 1.41 pm Mr Coe phoned Mr Warminger. The two spoke for 36 seconds.

- At 13:42:45 Mr Warminger entered a DMA order to sell 5,000 SKT shares at $5.81, which moved the spread to $5.80–$5.81.

- At 13:43:02 a buy order at $5.81 cleared the residual of Mr Warminger's sell order and returned the quotes to $5.81–$5.85.

- At 13:44:33 Mr Warminger entered a DMA order to sell a further 5,000 shares at $5.81 which crossed a forcing spread of $5.81–$5.85, and resulted in one trade at 13:44:13 leaving a small residual of Mr Warminger's sell order and moved the quotes to $5.80–$5.81.

- At 13:44:24 a buy order cleared Mr Warminger's residual order which moved the quotes back to $5.81–$5.85.

[243] At 1.53 pm a call was recorded from Milford to Mr Coe. It lasted two minutes. Then at 2.00 pm Mr Coe called Mr Warminger. The two spoke for one minute, six seconds. At 14:02:14 the sell order from UBS for 4,000 shares at $5.80

cleared the bid volume at $5.80 and moved the quotes to $5.77 to $5.80. At 14:02:15 UBS reported a crossing of 360,000 shares at $5.80 for a value of $2,088,000. Mr Warminger was the buyer.

[244] Following the crossing the SKT share price subsequently increased to close four cents higher at $5.84.

[245] The FMA says that Mr Warminger sold the SKT shares on-market before buying off–market; that his actions manipulated the market in that his sell orders decreased the offer, quote and price for SKT shares and maintained those offer, quote and price at lower levels than would have been the case in the absence of sell orders; and that he did so for the purpose of decreasing and maintaining at a lower level the offer, quote and price. The crossing created a misleading appearance as the price at which it occurred was influenced by Mr Warminger's DMA trades.

[246] The FMA's case in this cause of action relies on the timing of the telephone conversations between Mr Warminger and Mr Coe from UBS. The FMA says it is highly likely that during the calls, particularly the second call at 13:41:12, Mr Coe would have informed Mr Warminger about the SKT sell order UBS had received and which had been communicated to Mr Coe's IRESS order pad about half a minute earlier at 13:40:24. Mr Solarz said brokers keep a constant eye on the order screen. Their aim is to get an order filled as soon as possible. While Mr Coe may have known Mr Warminger was deliberately underweight, he would also have known that Mr Warminger could have been persuaded to change his view on stock. Mr Warminger conceded he could be persuaded to change his view about a stock.

[247] The FMA case relies on the Court drawing an adverse inference based on the timing of the transactions. The FMA asks the Court to draw an inference that Mr Coe told Mr Warminger of his client's sell order before Mr Warminger placed his sell orders and that Mr Warminger took advantage of that knowledge. That inference would be open absent Mr Warminger's evidence to the contrary.

[248] Mr Warminger's explanation for the two sell orders is that he was happy to sell the shares because he thought at $5.80 to $5.85 the price for SKT shares may

have topped out. He was expecting a largely unflattering profit announcement and thought he would sell some stock at $5.81 if he could. Mr Warminger denied that he knew of the opportunity to buy SKT shares at the time he sold SKT stock at around 1.42 pm and 1.44 pm. He said that it was only during the call at 1.53 pm or possibly the call five minutes later at 14:00:21 that the transaction was discussed and agreed. The fact the crossing of 360,000 SKT was reported at 14:02:15 is consistent with the deal being agreed at that later 14:00:21 call.

[249] I accept it is unlikely that Mr Warminger would have learned of the UBS sell order when he first phoned Mr Coe at 13:39:54. The order had only been taken by UBS 45 seconds before that call. Also, as Mr Heron pointed out, it is quite possible Mr Coe himself was not aware of the order until after 13:44:13 because someone on the UBS system was on-market buying SKT stock at $5.81 up to that time. It is unlikely they would have been doing so if there was general knowledge within UBS they had a firm limit order to sell.

[250] Mr Heron submitted that it was notable the FMA had failed to call a number of relevant witnesses, in particular Mr Coe, on this and other causes of action. Relying on *Perry Corp v Ithaca (Custodians) Ltd* he submitted the Court would be entitled to draw an inference that Mr Coe's evidence would not have assisted the FMA.[40]

[251] In *Ithaca* the Court of Appeal confirmed a principle which authorised a particular form of reasoning, namely that the absence of evidence, including the failure of a party to call a witness in some circumstances, may allow an inference that the missing evidence would not have helped a party's case.[41] The inference may arise only when:

(a) the party would be expected to call the witness;

(b) the evidence would explain or elucidate a particular matter;

(c) the absence is unexplained.

---

[40] *Perry Corp v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA).
[41] At [153].

[252] The principle of law is attributed to Windeyer J's approval of a passage from *Wigmore on Evidence* in *Jones v Dunkel*. The passage also includes a caution that the adverse inferences are open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of disclosure.[42]

[253] Mr Coe's evidence could have explained or informed the content of the telephone calls with Mr Warminger. But that does not mean the FMA would be expected to call him. Nor can it be said that his absence was unexplained. While the FMA interviewed Mr Coe, they considered him unreliable. Also, on Mr Warminger's evidence, Mr Coe was a very good friend. While the FMA could have called Mr Coe, given his close relationship with Mr Warminger it is understandable why the FMA may have tactically chosen not to call him. To do so would have made him available for cross-examination by Mr Warminger's counsel. There is no property in a witness. If Mr Warminger had wanted to speak to or call Mr Coe, he could have.

[254] In the circumstances of this particular case I am not prepared to draw an inference that Mr Coe's evidence would not necessarily have helped the FMA case. However, in the absence of his evidence, the Court is left with Mr Warminger's oral evidence as the only direct evidence for consideration. In that situation it is appropriate to treat the inferences which the FMA seeks to draw with greater reserve.[43]

[255] Following the hearing and while the decision was reserved, counsel exchanged memoranda relating to Mr Coe's position. At the conclusion of the trial counsel continued to exchange correspondence on the issue of Mr Coe and the failure of the FMA to call him as a witness. In particular the defendant's solicitors inquired about a second signed statement which Mr Coe had made which had not been provided to them. That statement was provided to the defendant's solicitors on 14 November 2016. The parties continued to exchange correspondence. The defendant considers the plaintiff gave an incorrect explanation to the Court for not calling Mr Coe, noting that one reason given was that his recollection was poor and

---

42 *Wigmore on Evidence* (3rd ed, 1949) at 142 in *Jones v Dunkel* (1959) 101 CLR 298 at 321.
43 *Ward v Apprice* (1704) 6 Mod Rep 264.

therefore his evidence was unlikely to be of assistance. The defendant said that Mr Coe's second signed statement was helpful to the defendant. He said that if it had been provided at an earlier stage, the defendant may have taken a different course at trial. Counsel argue that Mr Warminger has therefore been prejudiced.

[256] The FMA placed the correspondence (but not the statement) before the Court to support its submission to the Court that it considered Mr Coe's evidence to be poor not just because he could not recall matters but also because on matters he did purport to recall, he gave contradictory accounts.

[257] The FMA repeated its submission there was no general obligation to call Mr Coe nor, having received the second unsolicited brief from him, to serve that brief given that Mr Coe was not to be called and there was no property in a witness. Counsel for the FMA however advised that it would not stand in the way of a properly granted application to reopen the defence.

[258] In the absence of any formal application to reopen the hearing I deal with the matter on the basis of the evidence that was before the Court at the hearing. The position remains as I have set out above. In the absence of Mr Coe's evidence on issues where Mr Coe has been a counterparty to the transaction, the FMA's case is based on circumstantial evidence and the drawing of inferences. The only direct evidence on the issue has been given by Mr Warminger. The issue is whether the adverse inferences sought by the FMA can properly be drawn and Mr Warminger's evidence, to the extent it is contradictory, rejected. In making that assessment, I treat the invitation to draw the inferences with some reserve.

[259] Returning to the SKT trades, Mr Warminger was deliberately underweight in SKT stock. It would have required a change in Mr Warminger's strategy towards the stock for him to purchase more. Both Mr Solarz and Mr McMahon had to accept that it was possible the crossing opportunity was discussed during the third call, after Mr Warminger's DMA sales. It is likely the deal was discussed and agreed immediately before the crossing was reported. The fourth call in the afternoon finished about 35 seconds before the crossing was reported. The first and second calls were over 20 minutes before the crossing was reported. Mr Warminger's

explanation for selling the two parcels of shares, namely that he considered the price may have topped out at $5.85 and he began selling as he was expecting an unflattering profit announcement, is plausible.

[260] The FMA case fails on this cause of action.

Xero Limited – 15 May 2014 (COA7)

[261] Between 15 May 2014 and 30 June 2014 there were between 127,549,992 to 127,809,631 Xero Limited (XRO) shares outstanding. Its market capitalisation was between approximately $3.3 billion and $4.2 billion. Milford was one of a limited number of New Zealand institutional investors in XRO who had large volumes available for trading. As at 30 April 2014 the funds in total held approximately 1.4 million XRO shares. XRO shares amounted to 6.5 per cent of the NZ Superannuation Fund and 6.4 per cent of the Milford NZ Equities Wholesale Fund. As at 15 May 2014 XRO's NZX 50 weighting was 4.254 per cent.

[262] Overnight on 14 May 2014 changes were announced that would see XRO removed from the Morgan Stanley Small Cap Index and added to the Morgan Stanley Capital Index (MSCI) from 30 May 2014. This was seen as a positive change. The closing price for XRO on 14 May 2014 before the announcement was $31.85.

[263] The relevant background to the trading in XRO on 15 May 2014 was as follows:

- At 09:42:20 Mr Warminger entered a DMA order to buy 10,000 XRO shares at $32.50. At the time Mr Warminger's order (together with a smaller order from a third party) was sufficient to clear the volume on offer up to $32.70 indicative opening price. At 9.48 am Mr Warminger called Mr Coe. The call lasted five minutes and 55 seconds.

- After the call, at 09:57:54 Mr Warminger amended his DMA order to buy 5,000 shares at $34.00. The amended order increased the indicative opening price from $32.70 to $33.00.

- At 09:59:51 Mr Warminger bought 5,000 XRO shares at $33.55 in the opening auction.

- At 10:01:34 Mr Warminger entered a DMA order to buy a further 5,000 XRO shares at $34.00. The order crossed the spread at $33.61–$33.80, immediately resulting in six buy trades between 10:01:34 and 10:01:46 at prices between $33.80 and $34.00 for a total consideration of $169,775. The order raised the quotes to $34.00–$34.40 at 10:01:34 and $33.61–$34.00 at 10:01:46.

- At 10:02:22 Mr Coe called Mr Warminger. They spoke for 16 seconds. At 10:03:20 UBS reported a crossing for 100,000 XRO shares at $34.00. Mr Warminger was the seller. Between 10:03:20 and 10:57:26 the price of XRO shares decreased to $33.41.

- At 10:58:37 Mr Warminger entered a DMA order to buy 10,000 XRO shares at $33.50, which he amended to $33.55 at 11:18:25 and which resulted in him acquiring 10,000 XRO shares for $335,348.75 at a VWAP of $33.5348.

- Mr Warminger also bought a further 118,140 XRO shares between 12:31:32 and 15:33:33 at a VWAP of 32.9333 in crossings with Craigs, First NZ and UBS.

[264] The highest traded price for XRO shares that day was $34.00.

[265] The FMA says Mr Warminger manipulated the market for XRO shares on 15 May 2014 in that his buy orders increased the offer, quote and prices for XRO shares; maintained the offer, quote and price at a higher level than otherwise would have been the case; did not reflect genuine demand; and were for the purposes of

increasing or maintaining at a higher level the offer, quote and price for XRO shares. It says his actions resulted in trading activity that otherwise would not have occurred and created a false or misleading appearance regarding the extent of active trading and with respect to the supply of, demand for or price for XRO shares. The crossing created a misleading appearance as its price was influenced by the DMA trades.

[266] The FMA's claim is based on the proposition that Mr Warminger learned from Mr Coe that UBS had a potential buyer of XRO shares. It says that on learning of the potential to sell the shares at a higher price than had recently been trading, Mr Warminger amended the existing bid he had placed before his first call with Mr Coe and then also bid the stock up so the price in his subsequent sale would be higher.

[267] The focus in this cause of action is on the trades before the crossing. Mr Solarz did not suggest that Mr Warminger manipulated the opening price. Mr McMahon also conceded that under cross-examination.

[268] Apart from the calls between Mr Coe and Mr Warminger, there was also a number of calls on 15 May 2014 between Mr Coe and Mr Copley (Mr Coe's client), the timing of which is relevant.

[269] The call data records Mr Coe calling Mr Copley at 9.15 am and later at 10.03 am and 10.40 am. Two other calls were not answered. As neither were called as witnesses it is impossible to say when Mr Copley confirmed his instructions to Mr Coe that he was a buyer of XRO.

[270] Mr Warminger and Mr Coe spoke for almost six minutes at 9.48 am. Three to four minutes after the end of the call with Mr Coe, Mr Warminger amended his market bid for 10,000 shares down to 5,000 shares but increased the bid price to $34.00. Subsequently, three trades not involving Mr Warminger raised the price from $33.55 to $33.60 after which Mr Warminger bid again for a further 5,000 shares at $34.00, lifting the available stock to that level from $33.80, $33.90 and $34.00. There then followed a second short 16 second phone call between Mr Coe and Mr Warminger at 10:02:21.

[271] The FMA says the 16 second call was too short for Mr Warminger to have changed from having been positive about the stock as a buyer to deciding to sell. The FMA says that Mr Coe must have told Mr Warminger about Mr Copley's buy interest in the longer call at 9.48 am. It says Mr Warminger engaged in uneconomic trading, buying and selling at the same price of $34.00 for the shares on the same day, and notes the price reversion shortly after the crossing.

[272] Mr Warminger denied that he was aware of Mr Copley's buy interest. He said that he thought UBS might have wanted the XRO shares for its principal book. He explained the change to his opening bid on the basis that he realised $32.50 was too low to acquire the shares that he wanted in the opening given the MSCI announcement.

[273] The FMA concedes the factual question of when Mr Coe told the defendant about the likely transaction is an important issue on this cause of action. Again, in the absence of Mr Coe, the Court is left to draw an inference from the timing of the calls and Mr Warminger's actions, weighing that against Mr Warminger's explanation.

[274] Mr Warminger's explanation for the trading was that after the major announcement that XRO was to be included in the MSCI index, which was a very positive announcement, he was interested in acquiring some further XRO shares. He says he reduced the bid volume but increased the price when he saw between 9.43 am and 9.55 am that there were bids for just under 17,000 shares at prices above his offer price. Mr Warminger says that the first time he and Mr Coe discussed the buying opportunity was during the call at 10.02 am. Mr Warminger said that he thought the price of XRO shares would probably break through the $34.00 level and he decided to try to acquire 10,000 shares at under $34.00 if he could. His trading is consistent with that.

[275] Mr Solarz conceded that his conclusion that the trading this day involved market manipulation was based on Mr Coe informing Mr Warminger of the Copley buy opportunity during the first telephone call at 9.48 am.

[276] There were other reasons for Mr Warminger and Mr Coe to have spoken at 9.48 am this day. They called each other regularly each day before the market opened. They talked daily about various things including news flow research and overnight market moves. Mr Warminger said specific trading opportunities tended to be discussed during market hours. When Mr Rutherford was asked generally about broker practice, he accepted that he would not recommend selling stock to any client before the market opened.

[277] Professor Aitken said that if Mr Warminger did know he could sell to UBS at $34.00 there was little point in moving the price beyond $33.90 as the spread would have been $33.90 to $34.00 on 1250 units allowing the crossing to take place at $34.00 without needing to bid the remaining 3,750. In his view the transaction was more consistent with the second bid for 5,000 shares being an attempt to complete the original order for 10,000.

[278] As noted, again neither Mr Coe nor Mr Copley were called to give evidence. The Court is left with Mr Warminger's direct evidence and explanation of the events and for the trading. It is plausible and I am not able to reject it. On that basis the FMA is not able to make out its case for manipulative trading on this cause of action.

Xero Limited – 30 June 2014 (COA8)

[279] As at 30 June 2014 XRO shares amounted to 4.2 per cent of the NZ Superannuation Fund and 4.7 per cent of the Milford NZ Equities Wholesale Fund. At the same date XRO's NZX 50 weighting was 3.387 per cent. Mr Warminger's funds remained overweight in XRO stock.

[280] The closing price for XRO on Friday 27 June 2014 was $26.00.

[281] The opening price for XRO on Monday 30 June 2014 was $25.51. From opening until 14:06:43 the traded price of XRO shares fluctuated from a low of $25.51 to a high of $26.13.

[282] On 30 June 2014 Mr Warminger entered the following orders and trades in XRO shares:

- Between 11.08 am and 14.06:43 Mr Warminger entered 10 DMA bids for a total of 59,000 XRO shares at prices ranging from $26.00 to $26.13. Mr Warminger bought the 59,000 XRO shares at a VWAP of $26.0176.

- At 13:08:40 First NZ reported a crossing for 20,000 XRO shares. Mr Warminger was the buyer.

- Between 14:16:57 and 15:43:29 the traded price of XRO shares generally decreased from $26.00 to $25.40 fluctuating between a high of $26.00 and a low of $25.01.

- At 15:43:29 and 15:49:31 Mr Warminger entered two DMA bids for 5,000 and 2,315 XRO shares at $25.63 and $25.66 respectively.

- At 16:00:23 Mr Warminger amended the bid price on the residual volume of these two buy orders to $25.78. These bids resulted in Mr Warminger buying 2,535 XRO shares between 15:43:29 and 16:18:15.

- Between 16:18:36 and 16:36:55 Mr Warminger entered DMA buy orders for XRO shares in eight orders ranging between 298 and 2,198 shares at bids between $25.89 and $25.99.

- From 16:38:16 Mr Warminger entered another five DMA buy orders just prior to and in the pre-close phase of between 9,999 and 10,000 at prices between $25.99 and $26.00. The closing auction resulted in a closing price of $25.99. Of Mr Warminger's purchases of XRO shares on 30 June 2014 90,364 were purchased up to 4.45 pm and 42,856 were purchased during the closing auction.

[283] The FMA pleads and Mr Warminger admits that he dominated the day's trading volume on month's and quarter's end, and dominated the trading volume in the closing auction on month's and quarter's end.

[284] XRO shares opened at $25.63 on 1 July 2014 and closed at $25.75. The highest price at which XRO shares traded on 1 July was $25.81.

[285] The FMA alleges Mr Warminger manipulated the market in XRO shares in that his DMA buy orders increased the offer, quote and price for XRO shares and maintained them at a higher level than would have been the case in the absence of the buy orders. The FMA says Mr Warminger's trades did not reflect genuine demand for XRO shares but rather were for the purpose of increasing and maintaining at a higher level the offer, quote and price for XRO shares at 30 June 2014 and resulted in trading activity that otherwise would not have occurred.

[286] The FMA's case on this cause of action is based on the fact that Mr Warminger dominated the trading and set the close. His trading for the day accounted for 68.9 per cent of on-market trades (65.5 per cent excluding crossings). He accounted for 71 per cent of pre-4.45 pm trades (excluding crossings he was not involved in). His buy orders were 75.2 per cent of trading volume in the closing auction.

[287] The FMA says Mr Warminger's trades were excessive for what is a relatively liquid stock, let alone at month and quarter year end. Mr Warminger was away from the market for a period of time during which time the price drifted lower. When Mr Warminger returned to the market he entered five large buy orders close to or during pre-close phase.

[288] Both Mr McMahon and Mr Solarz are of the opinion that Mr Warminger marked the close this day. Professor Aitken agrees that Mr Warminger's orders increased the price of the closing match. Professor Aitken described Mr Warminger's actions as "measured in aggressiveness".

[289] Mr McMahon notes there was price reversion the next day although given XRO was reasonably volatile he does not place undue significance on that. Mr Solarz placed emphasis on Mr Warminger's trade at 16:34:42. Mr Warminger could have lifted his bid and waited to get filled but instead entered an order for a thousand shares at $25.99. His trading held the quotes at $25.99 until both bids were filled at

16:37:44. Mr Solarz noted that Mr Warminger accounted for 78 per cent of the volume and moved the stock up 2.4 per cent from $25.40 to $25.99 between 3.45 pm and 4.45 pm when the market stopped trading for the pre-close phase.

[290] Mr Warminger's response is that he had no particular reason to mark the close. It was of no benefit to him. Mr Warminger said that he wanted to buy a decent number of shares at around $26.00 because he saw value at that price. He was interested in buying XRO stock and continued to buy after 30 June 2014. He was overweight in XRO stock which showed he had a positive view of the stock and thought it would outperform the market. It had dropped from $46 to about $34 and he considered it was a good time to be buying.

[291] Mr Heron submitted that there was no significance in the fact it was a month or quarter end. The end month closing price for XRO shares had no material impact on the performance measure of the funds managed by Mr Warminger, the performance fees paid to Milford or Mr Warminger's remuneration. In the absence of that explanation no real significance attached to the day end price. Mr Heron submitted there was no basis to conclude Mr Warminger had an improper purpose in trading as he did.

[292] Professor Aitken noted that Mr Warminger's final bid in the closing auction was entered two minutes and eighteen seconds before the actual close which gave the market some time to react if it saw fit.

[293] Mr Solarz accepted that Mr Warminger's explanation that he thought the stock was underpriced and that it was a good time to be buying was a possibility. It was also relevant that Mr Warminger purchased good volumes during the course of the day on 30 June 2014, not simply at or near the close. It took some time for a number of Mr Warminger's orders to fully execute and some did not fully execute.

[294] Mr Solarz also accepted that on numerous occasions Mr Warminger sat on a bid waiting to execute and was providing liquidity to the market. Offers were coming and meeting his bid and it took some time for his orders to fully execute.

[295] Under cross-examination Mr McMahon accepted that one possibility was that Mr Warminger was testing the market by putting his orders on and giving the market a chance to respond to see whether latent sellers came in. Such activity does not breach any NZX rule or guidance.

[296] The FMA case for manipulation here really rests on Mr Warminger having an underlying purpose of marking the close given the month and quarter end. That raises the issue of why he would do that.

[297] The rationale underlying the alleged improper purpose in this claim is that Mr Warminger (or Milford) had something to gain from marking the close (or window dressing as it is referred to when a fund manager seeks to increase a quarter or year end price).

[298] Mr Warminger's evidence is that the end of month closing price of XRO shares had no material impact on the performance fees paid to Milford or Mr Warminger's remuneration. Of the funds under Mr Warminger's management, only the two smallest of them, the Waikato Community Trust and the Trust Investments - Sustainable NZ Share Fund, had performance fee periods as at 30 June. The objective of the Waikato Community Trust is to outperform the benchmark index by four per cent per annum over a rolling three year period net of fees and gross of tax. The Trust Investments - Sustainable NZ Share Fund objective is to exceed the benchmark by two per cent per annum over a rolling 12 month period. The performance fee for the Waikato Community Trust was 15 per cent of the amount the portfolio exceeded the benchmark and in the case of the Trust Investments - Sustainable NZ share Fund, 10 per cent of the amount the portfolio exceeded the benchmark return plus two per cent.

[299] Mr Warminger's evidence, which on this aspect he set out in a spreadsheet, shows that the enhancement to Milford's performance fees (and consequential impact on his remuneration bonus) was minimal. The effect of the XRO trading against the benchmark for the month was $277. As the funds were actually behind the benchmark, no performance fees were payable. The evidence does not support the underlying rationale suggested for Mr Warminger's trading. In the absence of

such a purpose, Mr Warminger's explanation for his trading is plausible. The FMA does not make out its case on this claim.

Wynyard Group Limited – 31 July 2014 (COA9)

[300] As at 31 July 2014 Wynyard Group Limited (WYN) had approximately 118,413,170 shares outstanding. WYN's market capitalisation was approximately $243 million. As at 31 July 2014 Milford held more than five percent of all WYN shares outstanding. The funds in total held approximately 6.9 million WYN shares. WYN shares amounted to 2.1 per cent of the NZ Superannuation Fund and 2.1 per cent of the Milford NZ Equities Wholesale Fund. As at the same date WYN's NZX weighting was 2.413 per cent.

[301] WYN's shares closed at $2.01 on 30 July 2014. Mr Warminger had not traded in WYN shares that day.

[302] On 31 July 2014 Mr Warminger entered the following orders in WYN shares:

- At 10:10:57 Mr Warminger entered a DMA buy order for 10,000 WYN shares at $2.05. This resulted in the first trade of the day for WYN shares. At the time Mr Warminger entered the buy order the spread was $2.01–$2.03. His trade cleared 2,497 shares at $2.03 and some of the 16,500 shares at $2.05. His order left the quotes at $2.01–$2.05. The next two orders at $2.05, to which Mr Warminger was not a party, resulted in five trades at relatively low volumes.

- At 12:01:51 250 shares traded at $2.01. Mr Warminger was not a party to the trade.

- At 12:06.26 Mr Warminger entered a buy order for 5,000 WYN shares at $2.06. This trade cleared the residual volume on offer at $2.05 and some of the 14,265 shares offered at $2.06. His order left the last traded price of WYN shares at $2.06 and the quotes at $2.01–$2.06.

- Between 12:06:26 and 15.24:41 seven trades to which Mr Warminger was not a party occurred between $2.00 and $2.02.

[303] At 3.22 pm Mr Coe and Mr Warminger spoke by telephone. Mr Warminger instructed Mr Coe to buy WYN shares on his behalf. Mr Warminger says he instructed Mr Coe to buy the shares over the rest of the day at best price.

- At 15:24:41 the last traded price of WYN shares was $2.00 and the quotes were $2.00–$2.05.

- At 15:39:10 UBS entered a buy order on Mr Warminger's behalf at $2.05 crossing a five cent spread $2.00–$2.05. As there were more than 2,000 shares on offer this left the quotes unchanged but the last traded price moved from $2.00 to $2.05.

- At 15:46:57 a trade to which Mr Warminger was not a party took place at $2.00 which moved the last traded price down to $2.00.

- At 15:57:03 UBS entered a second buy order for Mr Warminger for 2,000 shares at $2.05 crossing a five cent spread. This trade left the quotes unchanged but the last traded price moved back from $2.00 to $2.05.

- At 16:02:17, a trade to which Mr Warminger was not a party took place at $2.00 which moved the last traded price back down to $2.00 and the quotes to $2.00–$2.04.

- At 16:14:03 UBS entered a third buy order for Mr Warminger for 1,001 shares at $2.00.

- At 16:14:12 UBS entered a fourth buy order for Mr Warminger for 4,000 WYN shares at $2.04, clearing all the volume on offer at that price. The trade moved the last traded price to $2.04 and the quotes to $2.00 to $2.05.

- At 16:19:56 two trades resulted from a sale order entered by First NZ. The first trade, to which Mr Warminger was not a party, was for 426 WYN shares at $2.00. The second trade was a buy order entered by UBS for 574 WYN shares at $2.00. These trades moved the last traded price to $2.00 and quotes to $2.00–$2.04.

- At 16:24:07 First NZ reported a crossing for 23,000 WYN shares at $2.00 for a value of 47,000. Mr Warminger was the buyer in that crossing.

- At 16:26:12 UBS entered a fifth buy order for Mr Warminger for 2,000 WYN shares at $2.05 leaving the last traded price to $2.05.

- At 16:26:16 UBS entered a sixth buy order for Mr Warminger for 1,001 shares at $2.00 which resulted in Mr Warminger buying 1,426 WYN shares at $2.00 at 16.44:05.

- At 16:47:09 UBS entered a seventh buy order for Mr Warminger for 4,000 WYN shares at $2.05 which resulted in Mr Warminger buying 4,000 WYN shares at $2.05 in the closing auction. Mr Warminger's last buy order on 31 July only partially cleared the volume on offer at $2.05 leaving the closing price of WYN shares at $2.05. The closing price of WYN shares at $2.05 was an increase of 1.99 per cent compared to the closing price on 30 July 2014. The NZX Scitech Index increased by 0.53 per cent and the NZX 50 by 0.18 per cent over the same period.

[304] The FMA pleads that in effecting those trades in WYN shares on 31 July 2016 Mr Warminger accounted for a significant portion of the trading volume on month's end and dominated the trading volume close to and in the closing auction on month's end. It says Mr Warminger's trading and the UBS trading on his behalf marked the closing price at $2.05.

[305] The FMA notes that WYN was an illiquid stock with small market capitalisation. Mr Warminger's and UBS' trades on his behalf effectively upticked the stock at month end on 31 July 2014. Mr Warminger and Mr Coe spoke 11 times over the phone during the course of the day.

[306] The FMA alleges that the trades were market manipulation in that the 31 July WYN trades by or on behalf of Mr Warminger increased the offer, quote and price for WYN shares and maintained them at a higher level than would have been the case in the absence of his DMA buy orders. The 31 July WYN trades did not reflect genuine demand but were instead for the purpose of increasing and maintaining at a higher level the offer, quote and price for WYN shares and the trades resulted in trading activity that would not otherwise have occurred and created a false or misleading appearance.

[307] Mr Coe's orders to meet Mr Warminger's instructions amounted to 100 per cent of the trading volume during the closing auction. Without those orders the closing price would have been $2.00. The combined effect of Mr Warminger's DMA trading and Mr Coe's trades on his behalf was to increase the WYN share price by 2.5 per cent.

[308] Mr McMahon concludes that Mr Warminger attempted to ramp the price during the day and mark the close. Mr McMahon considered that if Mr Warminger's instructions to Mr Coe were to execute at best prices, he butchered it. Mr Coe's VWAP was over two cents above the VWAP for the period.

[309] Mr Solarz focused on two trades at 10:10:57 and 12:06:26 when Mr Warminger paid through the offer. In his opinion, if Mr Warminger had been genuinely buying WYN, Mr Solarz would have expected him to buy the 2497 shares offered at $2.03 in the first trade. He would also have expected him to buy all the shares offered at $2.06 at the second trade, thus buying approximately 10,000 shares (rather than the 5,000 he did). In Mr Solarz's opinion Mr Warminger was trying to get the share price as high as possible without having to buy too much stock. He considered in particular Mr Warminger's last entry into the market was to move the market.

[310] Mr Warminger's explanation is that he simply intended to acquire WYN shares at a price he considered attractive. While his DMA buy orders crossed the spread and most of Mr Coe's orders also crossed the spread Mr Warminger explains that he bought WYN shares in various ways during the course of the day. He said that he gave Mr Coe an order to buy shares at best price over the rest of the day, with the instruction careful discretion $2.05 limit.

[311] Mr Warminger accepted Mr Solarz's point that he had missed some buying opportunities but said while he could not specifically recall why he did not take those buying opportunities he might have wanted to see how the market went during the day, and might have thought the price could move lower. Also he might have been content with the volume he had purchased at the time and not want more. He also said he might well have been away from his desk. Mr Warminger said that the reason he instructed Mr Coe to buy a number of shares at best price over the rest of the day was because he was due to be out of the office. Mr Warminger himself did not make any more trades on the market after that call to Mr Coe at 3.22 pm.

[312] Mr Coe's bid for 4,000 shares at 16:47:09 was aggressive in crossing a five cent spread. Against that it was placed early in the auction period which would have allowed some time for the market to respond, even in a relatively illiquid stock such as WYN. Notably however it would have been obvious to him that he would not have got the order filled entirely.

[313] Mr Heron made the point that the FMA's case was effectively that Mr Coe was effectively acting in breach of the NZX rules and s 11B himself. Mr Coe stood nothing to gain from doing so. His commission on the trade would have been $100 and none of that would go to Mr Coe personally.

[314] The end of July was not a period where performance fees were calculated or paid. WYN shares were a very small percentage of Mr Warminger's funds, about 2.1 per cent. An increase in the closing price of 2.5 per cent would have resulted in a $230.55 theoretical increase in performance fees for Milford. In fact as the funds were performing one per cent behind benchmark as at 30 June there were no performance fees payable at all. The increase in price would have made a negligible

0.02 per cent difference to the fund performance. There was no logical reason or purpose for Mr Warminger to seek to manipulate the market.

[315] Again the Court does not have the benefit of Mr Coe's direct evidence. His trading on the day had unusual features. However, while there are grounds for suspicion about the trading by and on behalf of Mr Warminger, as the evidence stands I am not able to find the claim proved on the balance of probabilities.

Skellerup Holdings Limited – 30 April 2014 (COA10)

[316] As at 30 April 2014 there were approximately 194,753,340 Skellerup Holdings Limited (SKL) shares outstanding. Its capitalisation was $347 million. As at 30 April 2014 Milford held more than five per cent of all SKL shares outstanding. SKL's NZX 50 weighting was 0.570 per cent. The funds in total held approximately 13.7 million SKL shares. The SKL shares amounted to 3.4 per cent of both the NZ Superannuation Fund and the Milford NZ Equities Wholesale Fund. Mr Warminger's funds were heavily overweight in SKL.

[317] SKL opened on 30 April 2014 at $1.75. The price remained at that level until 11:56:54.

[318] During 30 April 2014 Mr Warminger made the following trades:

- At 9.38 am Mr Warminger sent an order to Mr Coe of UBS on a spreadsheet marked MOC.

- At 10.20 am Mr Warminger sent an update to the order, including an order to buy 57,642 SKL shares. The spreadsheet was marked MOC.

- At 11:56:54 ANZ Securities reported a crossing for 34,500 SKL shares at $1.78. Mr Warminger was not a party.

- At 12:01:43 First NZ reported a crossing for 222,526 SKL shares at $1.78. Mr Warminger participated by selling 100,000 SKL shares.

- At 12:07:51 First NZ reported a crossing for 25,000 SKL shares at $1.78. Mr Warminger was the seller. Following these crossings nine trades, to which Mr Warminger was not a party, occurred between 12:45:25 and 13.54:03. The SKL share price moved down to $1.73.

- At 15:22:48 Mr Warminger entered a DMA buy order for 70,000 shares at $1.74 resulting in four buy trades for 59,604 shares at $1.73 and $1.74. This trade cleared all the volume on offer at prices up to $1.74 and moved the quotes to $1.74–$1.77.

- Between 15:29:27 and 16:59:48 four on market orders (to which Mr Warminger was not a party) totalling 3,836 SKL shares traded at $1.77 and $1.78 prior to the pre-close session.

- At 16:47:31 UBS entered a bid for Mr Warminger for 57,642 SKL shares at $1.82 during a pre-close phase. This bid resulted in three trades in which Mr Warminger acquired 57,640 SKL shares at $1.78 in the closing auction. The closing auction resulted in a SKL share closing price of $1.78. On 1 May the opening price for SKL was $1.78 and the closing price $1.77.

[319] The FMA alleges that Mr Warminger's actions on 30 April in relation to SKL amounted to market manipulation. Mr Warminger's market on close order with Mr Coe accounted for 86 per cent of the closing match volume and resulted in a closing price of $1.78. Combined with the effect of Mr Warminger's prior DMA order UBS was forced to pay a higher price to enable its MOC order to be fully transacted with the result that Mr Warminger was responsible for marking the close by at least two cents and possibly as much as four cents. Mr Warminger's DMA order and the UBS order were large at 53.1 per cent and 85.6 per cent of market and closing volume respectively. At the time Mr Warminger placed his DMA order the share price was drifting lower to $1.73. His DMA buying cleared sufficient sale volume for the UBS order to have greater effect than it otherwise would. The FMA says he should have been aware when placing his DMA buy order that the combined effect of that order and the market on close order would result in upward pressure on the closing price.

[320] Mr Warminger's explanation was that he was overweight in SKL. While he was buying shares throughout the day he instructed Mr Coe to purchase various shares because a new sum of money was coming in to Milford NZ Equities Wholesale Fund that night. For that reason he sent an email to Mr Coe updating the number of shares to be acquired to 57,642 at 10.20 am. Shortly before noon Mr Warminger was contacted by Mr Somervaille of First NZ looking to purchase 100,000 SKL shares at $1.78. Mr Warminger agreed and the trade was reported at 12:01:43. Mr Somervaille then sent an email offering to buy an additional 25,000 shares. At 12.06 pm Mr Warminger agreed to that second trade. The crossing was reported at 12:07:51.

[321] After that the price of SKL moved downwards. Mr Coe entered a bid for 57,642 SKL shares at $1.82. Mr Coe's bid was filled from the shares sold by FNZ at $1.78.

[322] Mr Solarz concluded there was insufficient evidence to draw any conclusion that Mr Warminger created a false and misleading appearance in trading in SKL that day. Professor Aitken concluded the trading did not and was not likely to create a false and misleading appearance.

[323] Mr McMahon however considered Mr Warminger's actions amounted to market manipulation. He noted that Mr Warminger's order was a sizable order.

[324] But the trades in issue were conducted at different times by different people. There is no evidence to suggest that Mr Warminger co-ordinated his dealings with Mr Coe. Notably Mr Coe's order was entered very early in the closing auction. When looked at separately there is nothing wrong in the actions of Mr Coe and Mr Warminger. There is no evidence of any collaboration.

[325] The FMA cannot establish that Mr Warminger acted with the purposes of increasing and maintaining at a higher level the offer, quote and price for SKL shares. This claim must also fail.

Result

[326] The FMA has satisfied the Court on the balance of probabilities that Mr Warminger manipulated the market in breach of s 11B of the Securities Market Act 1988 in relation to FPH (COA 1) and in relation to ATM on 9 July (COA 3).

[327] The FMA however has failed to satisfy the onus on it to prove in relation to the other causes of action that Mr Warminger manipulated the markets as alleged. While the trading raises a number of issues, in relation to some causes of action in particular, on the evidence before the Court and given Mr Warminger's explanation for those transactions, the Court cannot be satisfied that the trades amounted to market manipulation. The FMA's claim in relation to each of those causes of action is dismissed.

Declarations

[328] As the Court has determined that Mr Warminger has contravened a civil remedy provision, it must make a declaration of contravention.[44]

[329] This Court declares under s 42V of the Act that Mr Warminger has contravened s 11B of the Act by manipulating the market for shares in FPH on 27 May 2014 by increasing the offer quote and price for FPH shares and maintaining them at a higher level than otherwise would have been the case and also by entering a crossing for the sale of FPH shares which created a misleading appearance as the price of the crossing was influenced by his earlier trades.

[330] This Court also declares under s 42V of the Act that Mr Warminger has contravened s 11B of the Act by manipulating the market for shares in ATM on 9 July 2014 by increasing the offer quote and price for ATM shares and maintaining them at a higher level than otherwise would have been the case and has also created a misleading appearance as to the demand and/or price for ATM shares on the day.

---

[44] Securities Markets Act 1988, s 42T.

Pecuniary penalty and costs

[331] That leaves the issue of whether the Court should make a pecuniary penalty, the quantum of such penalty, and costs.

[332] Counsel are to file a joint memorandum setting out the process to advance the matter from here. The memorandum should be filed within 20 working days of delivery of this decision.

_____

Venning J