

THIS JUDGMENT MAY BE MADE AVAILABLE TO THE MEDIA, BUT THE ANNEXURE TO THE FMA'S SUBMISSIONS AND THE AFFIDAVITS OF THE DEFENDANTS ARE NOT TO BE SEARCHED WITHOUT FURTHER ORDER OF THE COURT.

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-000647
[2022] NZHC 480**

UNDER	The Financial Markets Conduct Act 2013
BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	WEI (WALKER) ZHONG First Defendant
	LEI (REGINA) DING Second Defendant
	ZHONGYANG (SEAN) MENG Third Defendant
	JIASHUN (SAM) QIAN Fourth Defendant

Hearing: 10 March 2022 (by VMR)

Appearances: N R Williams, S Chapman and A Wiltshire for Plaintiff
M Heard and D Bullock for Third Defendant
R Reed QC and J Magrath for Fourth Defendant

Judgment: 16 March 2022

**JUDGMENT OF VENNING J
ON PENALTY**

This judgment was delivered by me on 16 March 2022 at 3.00pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Meredith Connell, Auckland
Lee Salmon Long, Auckland
Rice Speir, Auckland

Counsel: N R Williams, Auckland

Introduction

[1] The Financial Markets Authority (FMA) brought proceedings under the Financial Markets Conduct Act 2013 (the Act) against Wei (Walker) Zhong, Lei (Regina) Ding, Zhongyang (Sean) Meng, and Jiashun (Sam) Qian. Sean Meng and Sam Qian admitted a number of the causes of action against them prior to the case going to hearing. The FMA proceeded with its case against Mr Zhong and Ms Ding.

[2] Mr Meng admits market manipulation under s 265 of the Act and also admits that he failed to disclose that he dealt in a relevant interest in breach of s 297 of the Act. Mr Qian has admitted market manipulation under s 265 of the Act. In respect of each of them, the FMA seeks declarations of contravention under s 486 of the Act and a pecuniary penalty.

[3] The defendants maintain they had no intention to manipulate the market but accept that they ought reasonably to have known that their actions would, or likely would, have that effect.

Background – ONL and the parties

[4] The proceedings arise from the defendants' actions in relation to Oceania Natural Limited (ONL). ONL was a producer, distributor, and reseller of natural food and supplement products sourced from New Zealand and the Pacific Islands marketed primarily into China. ONL listed on the NXT market on 31 March 2016.

[5] At material times the first defendant, Mr Zhong was the executive chairman and chief executive officer of ONL. On listing he held a majority shareholding (61.69 per cent) as a trustee of the Zhong Family Trust. He was also a beneficiary of the Trust. Mr Zhong's wife, Ms Ding, was ONL's sales and marketing manager, and marketing director of ONL.

[6] Mr Meng became a shareholder of ONL on 3 June 2015 and a director on 10 December 2015. Mr Meng is a chartered accountant and remained a non-executive director of ONL until 31 March 2017. He was a majority shareholder of Meng &

Associates, an accounting firm, until 31 December 2016. During the relevant period Miao (Liz) Li, was Mr Meng's business partner.

[7] Upon ONL's listing, Mr Meng held a relevant interest, namely 8.02 per cent of ONL's shares (2,072,264). He also jointly held a significant majority shareholding as a trustee of the Zhong Family Trust. In addition, Mr Meng held a relevant interest in his friend Yun Li's ONL shares as he held power to acquire or dispose of shares on her behalf.

[8] Mr Qian was a chartered accountant employed by Meng & Associates and was a shareholder in that firm from 10 March 2016. Mr Qian is married to Weina (Lucy) Lu. Mr Qian became a shareholder in ONL on 14 August 2015 and prior to ONL's liquidation held at least 2.87 per cent of ONL's shares (in excess of 740,000 shares).

[9] Meng & Associates were accountants to Mr Zhong and Ms Ding personally and had previously acted as accountants for ONL.

[10] Mr Meng was majority owner of Meng & Associates until 31 December 2016 and a director until 6 January 2017. Mr Qian and his wife Ms Lu became the majority shareholders in Meng & Associates on 31 December 2016.

[11] Between 31 March 2016 and 30 May 2016 Meng & Associates' office was in the same premises as the ONL office, and they shared a communal lounge. During that time Mr Zhong, Ms Ding, Mr Meng and Mr Qian worked in close proximity to each other and were able to talk to each other in person during business hours.

[12] ONL was placed into liquidation on 18 June 2019.

The NXT market

[13] The NXT market is a licensed financial product market operated by the NZX Limited (NZX). It is designed for small and medium sized companies in a growth phase. It is a relatively low liquidity market. The NXT market operates between 10.00 am and 4.30 pm.

[14] The NXT market trading day has the following sessions:

- (a) a pre-opening session (usually 10.00 am to 11.00 am);
- (b) a normal trading session (usually 11.00 am to 3.45 pm);
- (c) a pre-close session (usually 3.45 pm to 4.00 pm);
- (d) an adjust session (usually 4.00 pm to 4.30 pm); and
- (e) an enquiry session (usually 4.30 pm to 10.00 am the following trading day).

[15] The opening auction involves the instantaneous matching of orders by the trading system prior to the commencement of the normal trading session. During the normal trading session orders can be entered, withdrawn or amended, and orders are matched by the system in priority by price and time of entry. Off-market trades can also be entered into and reported.

[16] During the pre-close session, which is immediately prior to the closing auction, orders may be entered, withdrawn or amended, but no orders are matched by the trading system, and no off-market trades can be entered into or reported.

[17] The closing auction involves the instantaneous matching of orders by the trading system prior to the commencement of the adjust session. During the adjust session no orders are matched by the trading system, but the volume and price of existing orders may be amended (provided the amendment does not improve the position in the market in respect of the order). Orders may be withdrawn but no new orders entered. Off-market trades can however be entered into and reported.

[18] Orders to buy or sell shares entered near or at the end of the trading day can result in trades that affect the closing price. The closing price represents the most up-to-date valuation of a security until trading commences again on the next trading day and is used by managed funds, (including KiwiSaver funds) to report their values each day, and by news organisations to broadcast closing prices to the public.

[19] All NXT-listed companies receive market making services to improve market depth and liquidity. First NZ Capital Limited (First NZ) provided market making services for ONL. First NZ agreed to provide at least one bid and one offer in the market during market making periods. Each bid and offer had to be for not less than the minimum quantity, which varied according to price. The difference between First NZ's bid and offer could not exceed the maximum spread, which varied depending on the share price. The market maker had to ensure the spread in the market was not more than the maximum spread at any time. If one of its market maker orders traded, it had to amend or replace the order within 30 seconds.

ONL's listing

[20] ONL's listing document published on 31 March 2016 recorded that Mr Zhong, Ms Ding, the Zhong Family Trust, and Mr Meng held relevant interests in ONL's shares as substantial shareholders. It also recorded Mr Zhong held a relevant interest as a director and by virtue of the power to control the ONL shares held by his associated family trust. Mr Meng was also recorded as holding a relevant interest as a director. Ms Ding was recorded as holding a relevant interest as a senior manager.

Mr Meng's involvement in market manipulation and Mr Qian's market manipulation on 7 June 2016 (sixth cause of action)

[21] On 7 June 2016 Regina Ding placed an order to sell ONL shares through the Zeng securities account (an account in her mother's name) and Mr Qian placed orders to buy and sell shares through the Qian/Lu securities account. But for system issues at ASB Securities, one of Mr Ding's sell orders and Mr Qian's buy orders would have matched and resulted in a trade that would have increased the price of ONL shares.

[22] By 13:34 on 7 June 2016 the share price for ONL had decreased from a high of \$2.60 on 17 May 2016 to a last traded price of \$2.05.

[23] At 14:01 Mr Zhong left a message for Mr Meng which referred to the share price being down by 25 cents and stated:

Um, do you think you can – I am thinking – can you ask... because... can you get someone, Sam or whoever to give a bit support, in order to make it, ... basically put up a bid immediately, otherwise it looks too bad, this... this...

this figure. Besides, I am in the middle of negotiating that... am negotiating that fund... negotiating with the investment bank.

[24] At 15:01 Mr Meng transferred \$4,000 to Liz Li who then transferred \$3,875 to Mr Qian. At 15:13 Mr Qian placed an order to buy 3,500 shares at \$2.05 and 500 shares at \$2.10 using the money that had been transferred to him by Ms Li and a further \$4,350.

[25] At 15:30 Ms Ding placed an order to sell 1,000 shares at \$2.35 on the Zeng securities account, but this order was not immediately placed to market.

[26] At 15:41 Mr Qian called Mr Meng. The call lasted one minute, two seconds. Mr Meng then called Mr Qian at 15:46. The call lasted 50 seconds. At 15:49 Ms Ding's order was entered into the market by ASB Securities.

[27] Between 15:40 and 15:49 Mr Qian refreshed the live market quotes multiple times each minute. At 15:52, during the pre-close session, Mr Qian placed orders to buy 495 shares at \$2.35 having been informed the best offer price was \$2.15. Due to the issue with ASB Securities' connection to the NZX trading system, Mr Qian's order to buy shares was not placed in time to trade on 7 June. If it had been, Mr Qian's order to buy 100 shares at \$2.35 would have matched with Ms Ding's offer at \$2.35 and increased the last traded price to that figure.

[28] At 4.00 pm Mr Qian sent Mr Meng a message:

[Master, or Sir, or Mentor, or Teacher], the orders have all been placed. However...well...ASB told me, today the NZX system was a bit slow, don't know why...well...even he was not sure whether [the orders] would go through today or not, but he said...well...the orders had definitely been placed.

Shortly after Mr Meng called Mr Qian. The call lasted just over a minute.

[29] The 7 June 2016 orders:

- (a) included buy orders that were aggressive and did not attempt to buy ONL shares at the best possible price;

- (b) comprised order volumes that were immaterial in the context of existing holdings;
- (c) were likely to increase the price of ONL shares to a higher level than would have been the case in their absence;
- (d) were likely to set the closing price of ONL shares;
- (e) resulted in trading activity that would not otherwise have occurred; and
- (f) did not reflect the forces of genuine supply and demand in the market and amounted to market manipulation.

[30] The FMA pleads and Mr Meng and Mr Qian accept that they ought reasonably to have known that the 7 June 2016 orders were likely to have the effect of creating or causing the creation of a false or misleading appearance with respect to the extent of active trading in ONL shares or with respect to the supply of, demand for, or price for trading in ONL shares.

[31] Mr Meng accepts that he was involved in market manipulation that day.

[32] Mr Qian accepts that he engaged in market manipulation that day.

[33] Mr Meng maintains that the funds he advanced on 7 June 2016 to Mr Qian were a loan which was subsequently repaid. He did not own or acquire any interest in the shares purchased by Mr Qian. He says he was not aware of the details of any trading by Mr Qian other than knowing Mr Qian wished to purchase shares in ONL. Mr Meng also says he was not aware of any communications between Mr Qian and any other defendants. Mr Meng explains the contact between the parties that day on the basis that the nature of his business relationship with Mr Zhong through ONL and Mr Qian through Meng & Associates was such they were all in frequent contact.

Mr Meng's market manipulation on 20 October 2016 (twelfth cause of action)

[34] On 19 October 2016 ONL released a market announcement regarding the introduction of authenticity verification technology on its manuka honey products being sold in China.

[35] On 20 October 2016 Regina Ding placed three orders to sell shares through Zeng securities account. Mr Meng placed three orders to buy shares using the Li securities account. Mr Zhong placed an order to buy shares through the Ding securities account. Ms Ding's second sell order matched with one of Mr Meng's buy orders and Ms Ding's third sale order matched with Mr Zhong's buy order. These resulted in trades that increased the price of ONL shares.

[36] The last trade before the pre-open session on 20 October 2016 was at \$2.50. The best bid was 1,500 shares at \$2.54 and the best offer was 3,500 shares at \$2.56.

[37] At 10.03 am and 10.04 am Mr Zhong sent two WeChat messages to Mr Meng asking if he was in and saying he would come over soon if convenient. At 11.01 am Ms Ding placed her three sell orders at \$2.70, \$2.75 and \$2.85. She already had an open offer in the market of 1,500 shares at \$2.65.

[38] At 11.06 am Mr Meng, using the Li securities account placed an offer to buy 3,000 shares at \$2.55. This executed immediately against an existing offer. Almost immediately after that Mr Meng entered another order to buy 3,500 shares at \$2.56 on the Li securities account. This executed against the market maker, First NZ's offer. At 11.07 am Mr Meng placed a third order to buy 1,500 shares at \$2.65 which executed against Ms Ding's offer.

[39] There were further communications between Mr Meng and Mr Zhong after the market closed.

[40] The 20 October 2016 orders and trades were:

- (a) in breach of the ONL trading policy;

- (b) included the layering of four sell orders, which gave an artificial impression of the level of trading interest in ONL shares;
- (c) included buy orders that were aggressive and did not attempt to buy ONL shares at the best possible price;
- (d) comprised order volumes that were immaterial in the context of existing holdings;
- (e) resulted in trading activity that would not otherwise have occurred; and
- (f) did not reflect the forces of genuine supply and demand in the market and amounted to market manipulation.

[41] The FMA pleads and Mr Meng accepts that he ought reasonably to have known that the 20 October 2016 orders and trades had or were likely to have had the effect of creating or causing the creation of a false or misleading appearance with respect to the extent of active trading in ONL shares or with respect to the supply of, demand for, or price for trading in ONL shares.

[42] Mr Meng maintains that Ms Li had authorised him to set up and use her trading account and that on several occasions, Ms Li had previously instructed Mr Meng to purchase ONL shares on her behalf, and he had done so. Mr Meng says that following the market announcement on 19 October 2016 Ms Li asked him for the available bids and he provided her with this information. He had a written power of attorney provided by Ms Li. Mr Meng maintains that on 20 October 2016 he was acting to purchase the ONL shares on Ms Li's behalf in accordance with her instructions.

[43] While he admits that he ought reasonably to have known the orders and trades had, or were likely to have, the effect of creating a false or misleading appearance and that he acquired a relevant interest under the Act, Mr Meng says the shares purchased on 20 October 2016 were purchased in accordance with Ms Li's bona fide instructions.

Mr Meng's failure to disclose relevant dealing in a relevant interest in relation to purchase of shares on 20 October 2016 (fourteenth cause of action)

[44] Under s 297 of the Act a director or senior manager of a listed issuer such as ONL is required to disclose any dealings in relevant interests in their company's shares. Mr Meng was required to have disclosed his trading on 20 October 2016. He failed to do so. The FMA pleads and Mr Meng accepts that he has contravened a civil liability provision under s 385 of the Act by failing to disclose the acquisition of a relevant interest in ONL as was required by s 297 of the Act.

Mr Qian's market manipulation on 17 May 2016 (fourth cause of action)

[45] In addition to his trading on 7 June 2016, Mr Qian engaged in further trading activity in breach of the Act both before and after that date.

[46] On 17 May 2016 the ONL share price trended downwards from \$2.90 so that by 13:40 the best bid was \$2.33. At 15:04 and 15:09 Mr Qian received two phone calls from Mr Zhang. Then, at 15:10 Ms Ding placed two orders to sell ONL shares through the Zeng securities account at \$2.50 and \$2.60 and Mr Qian placed an order to buy shares through the Qian/Lu securities account. The two orders matched, resulting in trades that increased the price of ONL shares. The trading prevented the last traded price falling by \$0.15 or six per cent.

[47] The 17 May 2016 orders and trades included:

- (a) buy orders that were aggressive and did not attempt to buy ONL shares at the best possible price;
- (b) comprised order volumes that were immaterial in the context of existing holdings;
- (c) prevented the price of ONL shares decreased by at least \$0.15 or six per cent from the last traded price;
- (d) increased the price of ONL shares to a higher level than would have been the case in the absence of the trades;

- (e) set the closing price of ONL shares;
- (f) resulted in trading activity that would not otherwise have occurred; and
- (g) did not reflect the forces of genuine supply and demand in the market and amounted to market manipulation.

[48] The FMA pleads and Mr Qian accepts he ought reasonably to have known the 17 May 2016 orders and trades had, or were likely to have had, the effect of creating or causing the creation of a false or misleading appearance with respect to the extent of active trading in ONL shares, or with respect to the supply of, demand for, or price for trading in ONL shares.

Mr Qian's market manipulation on 5 July 2016 (eighth cause of action)

[49] On 5 July 2016 First NZ changed its best bid/offer down to \$2.00/\$2.10. Mr Zhang and Ms Ding discussed the price. Ms Ding said: "... So can Sam be asked to keep bidding it up? We can give him money." There then followed a series of messages and calls between Mr Zhong and Mr Qian and Ms Ding and Mr Qian.

[50] Ms Ding placed an order to buy ONL shares through the Zeng securities account and Mr Qian placed orders to buy shares through the Qian/Lu securities account. With the market's best bid and offer at \$2.00/\$2.10 and the last traded price at \$2.35, Ms Ding's buy orders cleared First NZ's offer of 3,500 ONL shares at \$2.10, leaving the market best bid and offer at \$2.00/\$2.40. Mr Qian then placed an order to buy ONL shares at \$2.40. This traded at 15:07.

[51] Mr Qian's orders and trades on 5 July 2016:

- (a) included buy orders that were aggressive and did not attempt to buy ONL shares at the best possible price;
- (b) comprised order volumes that were immaterial in the context of existing holdings;

- (c) prevented the price of ONL shares decreasing by at least \$0.25 or 10 per cent from the last traded price;
- (d) increased the price of ONL shares to a higher level than would have been the case in the absence of the trades;
- (e) set the closing price of ONL shares;
- (f) resulted in trading activity that would not otherwise have occurred; and
- (g) did not reflect the forces of genuine supply and demand in the market and amounted to market manipulation.

[52] The FMA pleads, and Mr Qian accepts, that he ought reasonably to have known that the 5 July 2016 orders and trades had, or were likely to have had, the effect of creating or causing the creation of a false or misleading appearance with respect to the extent of active trading in ONL shares or with respect to the supply of, demand for, or price for trading in ONL.

Declarations

[53] Under s 486 of the Act the Court may make a declaration of contravention if satisfied that a person has contravened a civil liability provision or been involved in the contravention of a civil liability provision. On the basis of the admissions the Court is satisfied that Mr Meng has been involved in the contravention and that both he and Mr Qian have contravened civil liability provisions of the Act.

[54] The third and fourth defendants do not resist the declarations sought and accept that pecuniary penalties will be imposed on them. The Court is satisfied that declarations are appropriate. In respect of Mr Meng the Court declares that:

- (a) on 7 June 2016 Zhongyang (Sean) Meng was involved in the contravention of a Part 5 market provision, specifically s 385(3)(b) (market manipulation) in breach of s 265 in relation to orders in ONL shares by being directly or indirectly knowingly concerned in or party

to the contravention namely the effecting of the 7 June 2016 orders in ONL shares; further

- (b) on 20 October 2016 Zhongyang (Sean) Meng contravened a Part 5 market provision, specifically s 385(3)(b) (market manipulation) in breach of s 265 in relation to orders and trades in ONL shares by effecting the 20 October 2016 orders and trades in ONL shares; further
- (c) on 20 October 2016, Zhongyang (Sean) Meng contravened a Part 5 market provision, specifically s 385(4)(c) directors' and senior managers' disclosure obligations) in breach of s 297 by failing to comply with his disclosure obligations in relation to his trading in ONL shares on 20 October 2016.

[55] In respect of Mr Qian the Court declares that: on 17 May 2016, 7 June 2016, and 5 July 2016 Jiashun (Sam) Qian contravened a Part 5 market provision, specifically s 385(3)(b) (market manipulation) in breach of s 265 on three separate occasions in relation to the orders and trades in ONL shares by effecting the orders and trades on 17 May 2016, 7 June 2016, and 5 July 2016.

[56] If satisfied the defendants have contravened the Act, the Court has a discretion to order Mr Meng and Mr Qian to pay a pecuniary penalty to the Crown in a sum it considers appropriate. A pecuniary penalty is appropriate in this case. The issue is the quantum.

The approach to penalties under the Act

[57] In two previous cases of market manipulation *Financial Markets Authority v Warminger* and *Financial Markets Authority v Henry* this Court adopted an approach to setting the penalty analogous to that taken in determining penalties under the Commerce Act 1986 and generally in criminal sentencing matters.¹

[58] The Court proceeds by:

¹ *Financial Markets Authority v Warminger* [2017] NZHC 1471; and *Financial Markets Authority v Henry* [2014] NZHC 1853.

- (a) determining the maximum penalty;
- (b) establishing a starting point for the conduct in light of the relevant factors bearing on the contravener's culpability and by reference to the applicable maximum penalty; and
- (c) adjusting the starting point by applying an uplift or discount on the basis of considerations personal to the defendant.

[59] Section 490(1) of the Act provides that the maximum penalty for a single breach of s 265 by an individual such as Mr Meng and Mr Qian will be the greater of:

- (a) the consideration for the relevant transaction;
- (b) if it can be readily ascertained, three times the amount of the gain made, or the loss avoided by the person who contravened the provision; or
- (c) \$1 million.

[60] Pursuant to s 490(3) the maximum penalty for a breach of s 297 is \$200,000.

General principles

[61] Section 492 of the Act provides that in determining an appropriate penalty, the Court must have regard to "all relevant matters", including:

- (a) the purposes of the Act;
- (b) the nature and extent of the contravention and the defendant's involvement;
- (c) the nature and extent of any loss or damage suffered by any person, or gains made, or losses avoided by the person in contravention;
- (d) any compensation paid;

- (e) the circumstances of the contravention or involvement in it;
- (f) previous conduct;
- (g) the relationship of the parties to the transaction constituting the contravention.

[62] The main purposes of the Act are to promote the confident and informed participation in the financial markets and to promote and facilitate the development of fair, efficient and transparent financial markets. In *Financial Markets Authority v Warminger* this Court noted the effect market manipulation can have on those purposes. It:²

... distorts the market and affects the reliance investors (both domestic and international) can place on the market. Numerous commentators have identified the damage manipulation can cause markets.

[63] The Court went on to cite with approval the comments of the Alberta Securities Commission in *Re De Gouveia*:³

[27] Gouveia's misconduct was serious. As we stated in the Merits Decision:

The capital market is the forum in which market participants can implement investment decisions founded on their respective understandings and assessments of the information available. Indications that another, or multiple other, market participants are interested in buying or selling a particular security at a particular time, at a particular price and in a particular volume will form a part – a potentially crucial part – of the informational backdrop to trading and investment decisions, and thus to the operation of the market as a whole.

[28] Manipulative trading, such as Gouveia engaged in, thus undermines the integrity of the capital market. It is unfair to investors and jeopardizes the confidence in the capital market on which legitimate investor interest and capital formation depend.

² *Financial Markets Authority v Warminger*, above n 1, at [8].

³ *Financial Markets Authority v Warminger*, above n 1, at [12] citing *Re De Gouveia* [2013] ABASC 249.

[64] To similar effect are the comments of the Chairman of the Australian Securities and Investments Commission at a speech in August 2010 as to the harm caused by market manipulators:⁴

The public cost, which is the harm done to the integrity of the market and to confidence (i.e., perceptions of the integrity of the market), can lead to changes in broader market behaviour and pricing, and flow on into other adverse effects on the economy. ...

Unless they are caught and punished adequately, insider traders and market manipulators themselves do not incur much of these economy-wide costs. The conduct also creates a negative externality. Securities prices in the market are distorted, and consequently other buyers and sellers end up paying for inefficiencies in the market as a result of the offender's conduct.

[65] The explanatory note to the Financial Markets Conduct Bill stated:⁵

[t]he level of pecuniary penalties needs to be set at a sufficiently high level to deter non-compliance, encourage voluntary compliance, and punish non-compliance.

[66] That approach is consistent with the purpose of the market manipulation provision as discussed above, namely it is the proper enforcement of the laws rather than the mere existence of them which will lead to the improvement in conduct in the market.

[67] Counsel referred to the previous decisions of this Court of *Henry* and *Warminger*. They also referred to the case of *Financial Markets Authority v ANZ Bank Ltd*.⁶ In that case Muir J again emphasised that deterrence would always be a relevant consideration and may be the overriding objective.

[68] In the *ANZ Bank* case Muir J reviewed the four pecuniary penalty orders made under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and suggested they showed that starting points of 50–70 per cent of the maximum was applied to the most serious conduct, between 25 and 33 per cent for conduct involving

⁴ *Financial Markets Authority v Warminger*, above n 1, at [11] citing Tony D'Aloisio, Chairman of Australian Securities and Investment Commission "Insider trading and market manipulation" (speech to the Supreme Court of Victoria Law Conference, Melbourne, 13 August 2010).

⁵ Financial Markets Conduct Bill 2011 (342-1) (explanatory note) at 40.

⁶ *Financial Markets Authority v ANZ Bank Ltd* [2021] NZHC 399.

significant contraventions but with attempted compliance, and six to 11 per cent for inadvertent breaches.

[69] Counsel also referred to the percentages the starting points taken in *Warminger*, and *Henry* bore to the maximum penalty in those cases. As discussed during the hearing, I do not consider that a strict comparison of the percentages taken or the analysis from the *ANZ Bank* case (under different legislation) to be directly applicable to the present case and the breaches of the Act. The range of circumstances in which breaches of the Act may arise are extensive. The quantum of the appropriate penalty must depend on the particular circumstances of the case before the Court and the parties' individual circumstances.

[70] I do, however generally agree with Mr Heard that features relevant to culpability will include:

- (a) whether the conduct was deliberate;
- (b) the purpose or aim of the conduct;
- (c) the value of the transaction;
- (d) the number of occasions on which the offending occurred;
- (e) the length of time the offending occurred;
- (f) whether there was personal gain;
- (g) whether others suffered losses;
- (h) the impact on the market.

Mr Meng

[71] The applicable maximum penalty for Mr Meng is \$2.2 million made up of \$1 million for each of the two causes of action under s 265 and \$200,000 for the breach of s 297.

[72] Mr Williams submitted a starting point of between \$300,000 and \$400,000 was appropriate in Mr Meng's case, given his position within ONL. With allowance for his admission and personal circumstances an end penalty in the region of \$240,000 to \$340,000 was indicated.

[73] Mr Heard submitted that a starting point of around four per cent of the maximum penalty, namely \$88,000 should be taken, and that, after taking into account Mr Meng's admission and personal circumstances, \$48,400 was the appropriate end penalty.

[74] Mr Heard submitted Mr Meng's contraventions were at the lower end of the scale and his involvement was minor. He did not carry out the 7 June 2016 trades. His involvement in them was limited to lending a modest amount of money to Mr Qian which was repaid. He never had any interest in the shares Mr Qian purchased. Nor did he own the shares he purchased on 20 October 2016. He purchased them for his friend Yan Li. The trades involved relatively modest sums of money. While Mr Meng accepted that he was not authorised to use the ASB platform to purchase shares on Ms Li's instructions, Mr Heard submitted the purchase was bona fide, to the extent Ms Li wanted to acquire the shares.

[75] Mr Heard next submitted that no third parties were directly affected by Mr Meng's conduct. No loss was suffered. As to his failure to disclose, Mr Heard suggested that it was perhaps understandable that Mr Meng believed he did not need to disclose his trading on 20 October as he was purchasing the shares for Ms Li.

[76] Mr Heard argued that overall, Mr Meng's actions were at the lower end of the scale and minor.

[77] Both Mr Heard and Ms Reed QC referred to the case of *Henry*, noting that the Court had adopted a starting point of \$200,000 which was four to five per cent of the total maximum penalty available.⁷ Mr Heard submitted that Mr Henry's actions were more serious than Mr Meng's actions in the present case. As I indicated to counsel, I consider the references to the percentages of the maximum penalty in other cases to be of limited assistance. Further, care must be taken in relying too much on the case of *Henry*. It was the first case under the former Act and the penalty ultimately imposed was effectively presented to the Court on a consented basis, similar to the approach taken to a number of penalties imposed under the Commerce Act 1986. While the Court still had to approve and confirm the penalty, given that Mr Henry's case was the first of its kind and it was presented to the Court on that consent basis it is of limited precedential value.

[78] Counsel also referred to *Warminger*. The maximum penalty in Mr Warminger's case was \$3,845,900. The Court took a starting point of \$500,000, which counsel noted was just over 13 per cent of the maximum available.

[79] I accept that Mr Warminger's conduct and the steps he took to manipulate the market were more serious than that of either Mr Meng or Mr Qian in this case. But he was not directly involved in the companies as the present defendants are. Further, while in *Warminger* the Court took a starting point of \$500,000, a relevant factor in that decision was that Mr Warminger's employer, Milford Asset Management Limited, had paid \$1.1 million and a contribution of \$400,000 towards the FMA's costs. The Court noted:⁸

[56] While I accept that the imposition of penalty is not an arithmetical exercise, applying the same percentages used by Mr Corlett to the maximum penalty of \$3,845,000 would lead to a starting point of between \$480,000 to \$675,000.

[57] Taking account of the maximum penalty, the mandatory considerations in s 42Y, the payment made by Milford, Mr Warminger's personal culpability, the need for deterrence, considerations of totality, the mandatory ban from management, and the authorities referred to by counsel I take as a starting point for Mr Warminger a penalty of \$500,000.

⁷ *Financial Markets Authority v Henry*, above n 1.

⁸ *Financial Markets Authority v Warminger*, above n 1, at [56]-[57].

[80] While the \$1.1 million had been paid for Milford's failure under a different section of the then Act, the starting point of \$500,000 in Mr Warminger's case must be seen in that light. That is particularly so where, as here, the penalty imposed on Mr Warminger was directed to be applied first to the FMA's costs. As noted, Milford had already paid an additional \$400,000 towards those costs.

[81] Unlike Mr Warminger, Mr Meng and the other three defendants were shareholders in ONL. Mr Meng personally was a substantial shareholder. Further, and significantly, Mr Meng was a director of ONL. Mr Meng personally stood to gain from any increase in ONL's share price. Mr Meng's trading on 20 October 2016 increased the market price of ONL shares and as a result, the market value of his shareholding increased by approximately \$310,000.

[82] ONL has subsequently gone into liquidation so that Mr Meng has not actually realised that gain. While that is a relevant consideration, the absence of a realised financial gain does not negate the need for deterrence to ensure that those in Mr Meng's position do not even potentially benefit from manipulation of the market.⁹ At the relevant time Mr Meng's actions affected the perception of interest in the share price and increased trading activity in what was largely an illiquid stock.

[83] There is a difference between Mr Meng's actions, which were deliberate, and his intention and understanding of the consequences of his actions at the time. Mr Meng lent money to Mr Qian which Mr Qian used to buy shares in ONL on 7 June 2016. Then on 20 October he bought shares using another person's trading account. On the first occasion he was involved in market manipulation, on the second, his actions amounted to market manipulation. To compound the second incident, he failed to disclose his dealing. If Mr Meng was found to have deliberately acted to manipulate the market, given his personal shareholding and role as a director, a starting point closer to \$500,000 would have been appropriate.

[84] However, the FMA accept that Mr Meng did not have such actual knowledge and that the penalty is to be imposed on the basis that he ought to have known that his

⁹ *Telecom Corp of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [28].

actions would have the effect of manipulating the market. Further, he ought to have known that he had an obligation to disclose his trading on 20 October 2016.

[85] The standard Mr Meng failed to meet is an objective standard. Applying it to his actions in this case, particularly on 20 October 2016, it should have been readily apparent to him that his actions would likely have the effect of manipulating the market. It is not a case of inadvertence.

[86] Approaching the matter on that basis, namely that Mr Meng's penalty is to be assessed on the basis he ought to have known that his conduct would manipulate the market but taking account of the other relevant factors, I do not consider that anything less than a starting point of \$240,000 would sufficiently recognise the purposes of the Act in relation to Mr Meng's breaches.

[87] Mr Meng has no prior breaches of the Act. He is entitled to a reduction of 10 per cent for that.

[88] I allow a further 10 per cent reduction for the admissions. Mr Meng admitted liability but only signed the admission of facts on 15 February 2022, shortly before trial. The discount Mr Meng can expect for his admission must be less than that of Mr Qian. More would have been available if his admissions had come earlier.

[89] Mr Meng says he is now effectively unemployable as an accountant and may be forced to give up his career as it is no longer viable. I take that into account, but I note however that his affidavit does not suggest he could not pay an appropriate penalty. I apply a further five per cent discount.

[90] That provides an overall reduction of 25 per cent, which leads to an end penalty in Mr Meng's case of \$180,000.

Mr Qian

[91] The applicable maximum penalty for Mr Qian's market manipulation is \$1 million for each of the three admitted instances of market manipulation described

in the three separate causes of action, making a total maximum penalty available of \$3 million.

[92] Mr Williams submitted a starting penalty of between \$200,000 and \$250,000 was required, and after allowing deductions for Mr Qian's personal circumstances and admission of liability an end penalty of \$160,000–\$200,000 was appropriate.

[93] Ms Reed submitted the starting point should be no higher than \$125,000 and, after allowing appropriate deductions an end penalty of \$81,250 could be imposed.

[94] Ms Reed emphasised Mr Qian's position was different to the other defendants. He was not an office holder in ONL. She submitted that he was used by the other defendants and acted at their direction. He was only a relatively minor shareholder in ONL. While Mr Qian acknowledged that with the benefit of hindsight, his actions had the effect of manipulating the market, he did not have any intention to do so at the time.

[95] The FMA accepts that Mr Qian was the junior of the four defendants and acted at the direction of the four defendants. But Mr Williams submitted that Mr Qian ought to have known the intention of the other defendants was to manipulate the ONL share price and that his actions would create a false or misleading appearance in relation to the share price, demand and extent of active trading. He noted that like Mr Meng, Mr Qian is an accountant by profession.

[96] Ms Reed submitted that no third-party purchasers (with the exception of First NZ) were affected by Mr Qian's actions and that, ultimately, there was no gain to him as ONL was placed in liquidation.

[97] Ms Reed also referred to the decisions of *Henry* and *Warminger* under the analogous provisions of the former Act. She submitted that Mr Qian's actions were less serious than those of Mr Henry where the Court had taken a starting point of \$200,000. She also submitted Mr Qian's actions were far less serious than Mr Warminger's where the Court had taken a starting point of \$500,000.

[98] For the reasons given above, the decision of *Henry* is of limited assistance, and the starting point in Mr Warminger's case must be considered in the context of the payment by his employer, Milford Asset Management Limited.

[99] Further, while I accept that ONL has since gone into liquidation with the result Mr Qian has not realised any gain, unlike Mr Warminger, Mr Qian had a personal interest in the value of the shares, as he held a significant number of shares in ONL. Mr Qian's actions resulted in an increase in the price of ONL shares which in turn increased the market value of his shareholding by between \$150,000 and \$225,000 at the time. Deterrence remains a principal consideration in the circumstances.

[100] Mr Qian's actions had the potential to adversely affect members of the community who invest in the share market and also to affect the reputation of the NZX and NXT markets more generally. Market manipulation is difficult to detect.

[101] Next, this was not a one-off action. Mr Qian was involved in three separate contraventions occurring over the space of three months, shortly after ONL was listed.

[102] I take as a starting point for Mr Qian's penalty, \$200,000. A figure at that level is required to recognise that there were three separate trades and the potential impact on the value of Mr Qian's own shareholding. Were he not acting at the direction of others, it would have been higher. A starting point at that level is required to address the purposes of the Act.

[103] There are no personal aggravating features. I turn to the mitigating features. Mr Qian has no relevant convictions or history of offending of any kind. I accept that a discount in the region of 10 per cent is appropriate for his clean record. Next, while the notice of admissions was not filed until 17 November 2021, as Ms Reed noted, the summary of facts was agreed as long ago as 16 July 2021. A discount of 20 per cent is appropriate for that relatively early acceptance of responsibility for his actions.

[104] I have regard to the matters set out in Mr Qian's affidavit and note the potential impact on him and his family. A further five per cent is appropriate to take that into account.

[105] Taking a starting point of \$200,000 and applying the reduction of 35 per cent leads to an end penalty of \$130,000.

Result

[106] Mr Meng is to pay a pecuniary penalty of \$180,000.

[107] Mr Qian is to pay a pecuniary penalty of \$130,000.

[108] In each case there will be an order under s 493 of the Act that the penalty is to be applied first to pay the FMA's actual costs in bringing the proceedings.

Confidentiality

[109] This judgment may be made available to the media, but the submissions as to penalty, the annexure to the agreed statements of fact and the affidavits of the defendants are not to be searched without further order of the Court.

Venning J