

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2022-404-2275
[2025] NZHC 1017**

UNDER The Financial Markets Conduct Act 2013
BETWEEN FINANCIAL MARKETS AUTHORITY
Plaintiff
AND KOK DING CHENG
Defendant

Hearing: 1 February 2024
Appearances: I Rosic and S T Coupe for the Plaintiff
No appearance for the Defendant
Judgment: 1 May 2025

JUDGMENT OF ROBINSON J

*This judgment was delivered by me on 1 May 2025 at 11:00 am pursuant to Rule 11.5
of the High Court Rules*

Registrar/Deputy Registrar

Solicitors:
Gilbert Walker, Auckland

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Introduction

[1] Between 20 November 2020 and 30 November 2020 the defendant, Kok Ding Cheng, placed five orders to buy small parcels of shares in the NZX Limited (NZX) listed company Rua Bioscience Limited (Rua). The orders were for between 100 and 1,000 shares, for which Mr Cheng offered to pay between \$0.54 and \$0.59 per share. Mr Cheng placed each of these five orders very shortly before the market closed.

[2] When Mr Cheng placed these orders, he already held 320,000 shares in Rua. He acquired these shares between 9 and 20 November 2020. During this period Mr Cheng bought, on average, 29,000 shares at a time. His smallest purchase was of 25,000 shares. In total Mr Cheng paid \$182,457 for the shares at an average price per share of \$0.57.

[3] Between 1 and 7 December 2020 Mr Cheng sold all his shares for \$197,864.35 (\$0.6177 per share).

[4] The Financial Markets Authority (FMA) allege that Mr Cheng placed the five orders for small parcels of shares between 20 November 2020 and 30 November 2020 in breach of s 265 of the Financial Markets Conduct Act 2013 (FMCA) which prohibits conduct known as “market manipulation”. More particularly, s 265 prohibits conduct which will have, or is likely to have, the effect of creating a false or misleading appearance with respect to the extent of active trading in shares, or the supply of, demand of, price or value of shares.

[5] The FMA pleads a separate cause of action for each of the five orders Mr Cheng placed between 20 and 30 November 2020. For each cause of action the FMA seeks: declarations that Mr Cheng has contravened s 265 of the FMCA; orders that Mr Cheng pay a pecuniary penalty;¹ ancillary orders; and costs.

[6] Mr Cheng has not filed a statement of defence nor taken any steps in the proceeding. The FMA seeks judgment by way of formal proof pursuant to r 15.9 of the High Court Rules 2016 which requires a plaintiff to file affidavit evidence

¹ Financial Markets Conduct Act 2013, s 489(2)(c).

establishing each cause of action “to a Judge’s satisfaction”. The standard to which a Judge must be satisfied is “much the same as it would be if the proceeding had gone to trial”, which in this case is on the balance of probabilities.²

The evidence

[7] In support of its formal proof application the FMA has filed affidavits from:

- (a) Sinéad Lloyd of the FMA. Ms Lloyd explains the role of the FMA, the regulatory regime in respect of the New Zealand Stock Exchange, and the information obtained by the FMA in the course of its investigation into Mr Cheng’s conduct.
- (b) Aaron Leslie of ASB Securities (ASBS). As explained further below, ASBS is the broker through which Mr Cheng traded in Rua shares. In his affidavit Mr Leslie explains how ASBS’ systems work, the orders placed by Mr Cheng, and his transactions in relation to his share trading cash account.
- (c) Mitchell Bradley of NZX Regulation Limited (NZX RegCO). Mr Bradley explains how the NZX works, including the different sessions of each trading day. Mr Bradley summarises Mr Cheng’s trading in Rua shares and the findings of an investigation undertaken by NZX RegCO.
- (d) Professor Talis Putnins. Professor Putnins is a Professor of Finance at the University of Technology Sydney, a Professorial Fellow at the University of Edinburgh and a Professor at the Stockholm School of Economics. Amongst other qualifications he holds a PhD for his research into market manipulation.
- (e) An employee of the FMA’s solicitors whose affidavit attaches their correspondence with Mr Cheng.

² *Ferreira v Stockinger* [2015] NZHC 2916 at [35]; *Diners Club (NZ) Limited v District Court at Auckland* [2017] NZHC 2616, [2017] NZAR 1738 at [41].

The parties

Financial Markets Authority

[8] The FMA is an independent Crown entity established under the Financial Markets Authority Act 2011. Section 8 of that Act provides “the FMA’s main objective is to promote and facilitate the development of fair, efficient and transparent financial markets”. Section 9 sets out the FMA’s various functions. These include monitoring compliance with and enforcing specified financial markets legislation, including the FMCA. In turn, the “main purposes” of the FMCA are to:

- (a) promote the confident and informed participation of businesses, investors and consumers in the financial markets; and
- (b) promote and facilitate the development of fair, efficient and transparent financial markets.³

The defendant – Kok Ding Cheng

[9] Mr Cheng is a Malaysian national and a permanent resident of New Zealand. He moved to New Zealand from Malaysia in 2014. Prior to that he worked in property investment. He has been investing in the share market in Malaysia for over 20 years.

[10] Mr Cheng obtained residency in New Zealand under an “investor 2” resident visa. This requires an individual to invest \$1.5 million in New Zealand for a period of at least four years, following which they may obtain New Zealand residency. After moving to New Zealand in 2014, from September 2015 onwards Mr Cheng was an active investor in shares on NZX Markets. From September 2015 to November 2020, Mr Cheng:

- (a) traded in 10 listed securities (including Rua);
- (b) undertook 938 trades in NZX listed securities; and

³ Financial Markets Conduct Act, s 3.

- (c) purchased securities worth a total of \$10.7 million and sold securities worth a total of \$10.6 million.

[11] The transcript of Mr Cheng's FMA interview records him explaining that, before he purchases shares, he considers both how much he would like to see the stock grow and how much he is willing to lose on his investment. He tends to set a target price at which he would look to sell the stock. Mr Cheng's trading strategy is to purchase shares and hold them for a period of time, based on his planned target price or profit margin. When the stock price reaches that threshold, he looks to sell his entire holding in that stock.

NZX Limited – ASB Securities

[12] Although not parties to the proceeding, the activities of NZX and ASBS are relevant.

[13] NZX operates New Zealand's stock exchange. It is licensed to do so under the FMCA. It operates four trading markets, including the NZSX, which is also known as the NZX Main Board. The NZSX is the primary market for listed equity securities and funds in New Zealand.

[14] The FMCA requires NZX to establish rules to regulate market participants. The primary rules which govern this are the NZX Participant Rules (NZX Rules).

[15] Trading on the NZSX may be done through brokers who accept orders from clients to buy or sell shares and place these orders on the market. This is how retail investors, such as Mr Cheng, are able to trade on the NZSX.

[16] ASBS is a broker. ASBS provides its customers with access to an online share trading platform through which they can trade securities on markets run by NZSX. ASBS charges brokerage fees for its services.

General background

Trading on NZSX

[17] Mr Bradley explains how NZSX works, and key terminology.

[18] An “order” is an order to buy or sell shares. There are two general types of orders. “Limit orders” are orders to buy or sell shares at a specified price, better than the market price. “Market orders” are orders to buy or sell shares at the market price prevailing at the time the order is made.

[19] A “bid” is the price an investor is prepared to pay for shares. An “offer”, or an “ask”, is the price at which an investor is willing to sell shares. A “trade” is any transaction where an order to buy shares meets or is matched with an order to sell shares.

[20] Most retail investors who trade on the NZSX are allocated a “Common Shareholder Number”, or “CSN”. CSNs can be used to identify particular investors and their shareholding. Each purchase is registered to this CSN, and an investor’s holdings are held with reference to this CSN on the various share registers.

NZSX trading day

[21] The NZSX is open for trading Monday to Friday during specified hours (but closed on certain holidays). The NZSX trading day is comprised of seven different sessions:

- (a) The pre-open session, which takes place between 8:30 am to 10:00 am (Pre-Open Session).
- (b) The opening auction (or opening order match) occurs at a random time 30 seconds either side of 10:00 am (Opening Auction). The opening price for the day is determined through an algorithm which surveys all of the overlapping bids and offers at the time of the Opening Auction. Orders matching the opening price identified by the algorithmic process will trade. This sets the opening price for the shares for the trading day.

If there are no overlapping bids and offers at the time of the Opening Auction then no trades will occur in the Opening Auction. In that case, the opening price will be set by the first trade that occurs during the next trading session.

- (c) The next trading session is the normal trading session. The normal trading session (also known as continuous trading or regular trading) runs from 10:00 am to 4:45 pm (Normal Trading Session). Most trading occurs in the Normal Trading Session.
- (d) The pre-close session which takes place between 4:45 pm and 5:00 pm (Pre-Close Session).
- (e) The closing auction (or close) occurs at a random time 30 seconds either side of 5:00 pm (Closing Auction). This auction sets the official closing price for the day. Like the Opening Auction, an algorithmic process surveys the bids and offers placed during the Pre-Close Session and calculates the price at which the highest volume of trades will occur. This determines the closing price for the trading day. Orders which match the closing price will be made in the Closing Auction. If there are no overlapping bids and offers in the Closing Auction, then no trades occur and the closing price is set by the last sale that occurred in the Normal Trading Session.
- (f) The adjust session runs from 5:00 pm to 5:30 pm (Adjust Session), during which time traders can amend and cancel orders but cannot place new orders.
- (g) The enquiry session is the period from 5:30 pm until the next day's Pre-Open Session (Enquiry Session).

ASBS online share trading platform

[22] Mr Leslie explains how the ASBS online share trading platform works.

[23] ASBS is a broker that is a subsidiary of ASB Bank Limited and provides its customers with access to an online share trading platform through which they can trade shares on the NZSX. Investors who use ASBS' online share trading (OST) platform are able to log into an online account which allows them to buy or sell shares on the NZSX.

[24] ASBS customers such as Mr Cheng can place orders on the platform. ASBS then processes the order and forwards it to NZX for the order to be placed into the market. If the order trades, NZX communicates this back to ASBS, which communicates this to the customer in the online platform.

[25] Mr Leslie explains that ASBS customers, such as Mr Cheng, have access to the following information through their ASBS online account:

- (a) The shares they currently hold and the value of those shares.
- (b) The record of their trades.
- (c) The current price for shares listed on the NZX (and Australian Stock Exchange (ASX)). This includes the current buy and sell prices, opening prices, the high and low price of a share during a trading day, and the percentage change in the share price.
- (d) The volume (or quantity) of shares on the market, including how many buyers and sellers of shares there are at particular prices and the number of shares available at those prices. This information is available for orders which are active during the Closing Auction.

[26] Each ASBS customer also has a "cash management account" (CMA) connected with their share trading account. This is effectively a bank account into which customers can deposit money to be used to buy shares. When a customer sells shares, the proceeds are paid into the CMA.

[27] The balance of each customer's CMA is displayed in the online share trading platform. A customer can see their overall balance and the available funds. The

overall balance may be higher than the available funds where a customer has placed orders to buy shares which have not yet been executed. The available funds are the amount that the customer actually has available to apply to trades at any given time.

[28] Ms Rosic for the FMA points out that during his interview Mr Cheng demonstrated he was familiar with the ASBS online trading platform and the information available on it. He explained that when he logs on to the ASBS platform and views a particular stock, he can see the current price and the volume and prices of trading for the day. He can see the current bids and offers in the market, and he uses this to determine current supply and demand for a stock. Mr Cheng also confirmed that he can always see the balance of his CMA on the right hand side of the screen when he places orders, so he knows what funds he has available.

Brokerage

[29] ASBS offers a standard and a premium broking service. Mr Cheng was a premium broking customer. The premium broking service offers reduced brokerage rates and other discounts.

[30] ASBS' brokerage fees vary depending on the trade and whether the customer has a standard or premium account at the relevant time. ASBS charged premium customers brokerage fees as follows:

- (a) \$15.00 per trade for trades with a value up to and including \$1,000;
- (b) \$30.00 per trade for trades with a value between \$1,000 and \$10,000;
and
- (c) a percentage based brokerage fee for trades above \$10,000.

[31] In his FMA interview Mr Cheng explained that his "usual buying is maybe over \$5,000 because I can save a lot on commission and the brokerage...". He explained that you pay the same brokerage when you buy \$1,000 as when you buy \$5,000, meaning that "it makes more sense to buy \$5,000".

[32] ASBS have systems in place to monitor their customers' compliance with relevant rules and regulations including the NZX Rules. This includes a system of automatic checks run by ASBS software in relation to all orders placed on its trading platform. The software assesses whether an order has characteristics which indicate that it may not comply with NZX Rules or other relevant laws and regulations. The order is then assessed by an ASB operator. If ASBS identifies that an order may breach the NZX Rules ASBS will not forward the order to NZX. This means the order cannot trade.

[33] ASBS' terms and conditions provide that ASBS reserves the right to refuse to accept any instruction or order given by a customer where ASBS believes the instructions are in breach of, amongst other things, its terms and conditions, the NZX Rules or New Zealand legislation.

Mr Cheng's trading in Rua

[34] Between 9 November 2020 and 7 December 2020 Mr Cheng purchased and sold 320,300 Rua shares. Ms Rosic submits that his trading can be analysed in three phases.

[35] In the first phase, from 9 to 20 November 2020, Mr Cheng acquired the majority of his shares in Rua (320,000 shares). Every trade which occurred in acquiring these shares was made during the Normal Trading Session. As noted, the average size of the completed trades was 29,000 shares, and no trades were for less than 25,000 shares. The total price Mr Cheng paid for these shares was \$182,457, with the average price per share being \$0.57. In his interview Mr Cheng stated that he invested in Rua because he considered the company had potential for growth.

[36] In what Ms Rosic characterises as the second phase, from 20 to 30 November 2020, Mr Cheng placed five buy orders in the Pre-Close Session (Buy Orders). The FMA's case is that each of these Buy Orders was placed for the manipulative purpose of increasing the price and/or demand for Rua shares. As discussed further below,⁴

⁴ At [85] - [92].

Professor Putnins' evidence is that this did occur on one occasion and was likely to occur on the other four occasions.

[37] In the third phase, from 1 to 7 December 2020, Mr Cheng sold all his Rua shares for \$197,864.35 (\$0.6177 per share).

Mr Cheng's Buy Orders

[38] The Buy Orders, each only for small orders to buy Rua shares, were made close to the close of the market on the following days. The orders were as follows:

- (a) 20 November 2020 at 5:00:07 pm: Mr Cheng places an order to buy 1,000 Rua shares at \$0.54 per share (Order 1);
- (b) 23 November 2020 at 4:57:39 pm: Mr Cheng places an order to buy 300 Rua shares at \$0.54 per share (Order 2);
- (c) 24 November 2020 at 4:58:51 pm: Mr Cheng places an order to buy 200 Rua shares at \$0.58 per share (Order 3);
- (d) 30 November 2020 at 4:57:17 pm: Mr Cheng places an order to buy 100 Rua shares at \$0.59 per share (Order 4); and
- (e) 30 November 2020 at 4:59:17 pm: Mr Cheng places an order to buy 100 Rua shares at \$0.58 per share (Order 5).

[39] During this ten day period Mr Cheng also made several withdrawals from and deposits into his CMA.

[40] Mr Bradley gives the relevant context to each of the Buy Orders as follows.

Order 1 (20 November 2020)

[41] On Friday, 20 November 2020, Rua opened at a price of \$0.53. It traded at \$0.53 and \$0.54 for approximately the first hour of the Normal Trading Session before moving down to trade at \$0.52 and \$0.53 for the rest of that session.

[42] Soon after the start of the Pre-Open Session on 20 November 2020, Mr Cheng had cancelled an order to buy 50,000 Rua shares at \$0.52 which he had placed the previous day. He then placed several orders for Rua shares during the Normal Trading Session:

- (a) At 11:24 am, Mr Cheng placed an order to buy 29,000 Rua shares at a \$0.52 limit. The order did not trade and Mr Cheng cancelled it at 12:16 pm.
- (b) At 12:53 pm, Mr Cheng placed an order to buy 30,000 Rua shares at \$0.53 per share. This order traded immediately at that price.
- (c) At 4:53 pm, Mr Cheng placed an order to buy 32,934 Rua shares at \$0.52 per share. This order did not trade. Mr Cheng cancelled it shortly before the Pre-Close Session at 4:43 pm.

[43] There were no further trades in Rua shares during the Normal Trading Session following Mr Cheng's cancelled order. No trades in Rua shares occurred in the Closing Auction. The market closed at 5:00:14 pm.

[44] However, at 5:00:07 pm Mr Cheng placed the order to buy 1,000 shares at a price of \$0.54 per share (Order 1). The total price Mr Cheng would have paid for this order would have been \$540 plus ASBS' \$15.00 brokerage.

[45] Order 1 did not trade. Mr Leslie explains that ASBS rejected the order because it was placed at 5:00:07 pm and by the time the order could be processed the market had closed (seven seconds later at 5:00:14 pm).

[46] At the time Mr Cheng placed Order 1, the available funds in his CMA were \$17,160.05. Mr Cheng later withdrew these funds from his CMA.

Order 2 (23 November 2020)

[47] On Monday, 23 November 2020 the opening price for Rua shares was \$0.53 per share. Rua shares traded at that price until around 3:30 pm, at which point trades also occurred at \$0.54 per share.

[48] Mr Cheng did not place any orders in Rua during the Normal Trading Session.

[49] At 4:55:13 pm Mr Cheng deposited \$20.00 into his CMA. This deposit increased the available balance of his CMA from \$160.05 to \$180.05.

[50] At 4:57:39 pm, during the Pre-Close Session when orders can be entered but trades cannot occur (until the Closing Auction), Mr Cheng placed an order to buy 300 Rua shares at \$0.54 per share. The total price for the shares was \$162.00 plus ASBS' \$15.00 brokerage.

[51] Mr Cheng's order traded in the Closing Auction. This trade set the closing price at \$0.54, a value \$0.01 or 1.89 per cent higher than the last traded price in the Normal Trading Session. This trade brought Mr Cheng's total holding in Rua up to 320,300 shares.

Order 3 (24 November 2020)

[52] On 24 November 2020 the opening price for Rua shares was \$0.53. They traded at \$0.53 and \$0.54 until 2:30 pm when the price began moving upwards.

[53] Mr Cheng did not place any orders during the Normal Trading Session. However, at 4:48:07 pm he deposited \$128.00 into his CMA. This brought the available balance from \$3.05 to \$131.05.

[54] At 4:48:51 pm Mr Cheng placed an order to buy 200 Rua shares at \$0.58 (Order 3). The total price for this order would have been \$116.00 plus ASBS' \$15.00 brokerage.

[55] Order 3 did not trade. It was not processed by ASBS because it did not pass the checks ASBS runs over orders placed through its trading platform. Mr Leslie

explains that ASBS' systems identified that if Order 3 had traded it may have had the effect of pushing the price for Rua shares upwards at the close of the market. ASBS' system rejected Order 3, stating "denied: pushing up price on close". Through ASBS' platform, Mr Cheng would have been able to see that Order 3 was not forwarded to the market. However, he did not receive the system generated note explaining why the order was rejected.

Orders 4 and 5 (30 November 2020)

[56] Over the next three days, between 25 and 27 November 2020, Rua traded between \$0.56 and \$0.60. Mr Cheng did not place any orders during that time.

[57] On 25 November 2020, Mr Cheng withdrew \$130.00 from his CMA reducing the balance to \$1.05. At 11:26 am on 27 November 2020 he deposited \$10.00 into his CMA.

[58] On 30 November 2020 the opening price for Rua shares was \$0.57. The price fluctuated between \$0.56 and \$0.60 throughout the day. The last trade in the Normal Trading Session was \$0.56 per share.

[59] At 4:54:45 pm, Mr Cheng deposited \$70.00 into his CMA which brought the balance to \$81.05. At 4:57:17 pm he placed an order for 100 shares at \$0.59 per share (Order 4). Again, Order 4 did not trade. ASBS' systems identified that if traded the order may have had the effect of pushing the price for Rua shares upwards at the close of the market. ASBS' system rejected Order 4 noting "denied: orderly market – pushing up price on close". Again, Mr Cheng could have seen that ASBS had not forwarded Order 4 to the market, but he did not receive the system generated note explaining why the order was rejected.

[60] At 4:59:17 pm Mr Cheng placed a further order for 100 Rua shares at \$0.58 per share (Order 5). Order 5 did not trade. Once again, ASBS' systems rejected Order 5 with the same note: "denied: orderly market – pushing up price on close".

[61] The total price Mr Cheng would have paid for Order 4 was \$59.00 plus \$15.00 brokerage (\$74.00); and for Order 5, \$58.00 plus \$15.00 brokerage (\$73.00).

The investigation

[62] On 1 December 2020 Mr Leslie of ASBS wrote to NZRegCo raising “serious concerns” about Orders 4 and 5. Mr Leslie noted that if Order 4 or 5 had traded it would have moved the closing price for Rua shares from \$0.56 back to \$0.59, an increase of 5.36 per cent “which falls well outside of [ASBS’] comfort levels”. ASBS’ assessment was that “this appears to use a small value order (\$59.00 value) to artificially inflate a larger holding [...]”. Mr Leslie noted that Mr Cheng was the 45th largest shareholder in Rua and typically trades between 20,000 – 50,000 shares. He also noted that Mr Cheng placed Order 5 immediately after Order 4 was declined, which suggests that the orders were not a mistake.

[63] ASBS tried unsuccessfully over two days to contact Mr Cheng, and placed a “hold” on his account until it was able to do so. On 2 December 2020 an ASBS staff member contacted Mr Cheng by telephone. There is a transcript of that discussion. Mr Cheng confirmed that he placed the orders deliberately. He explained that they were smaller than his usual orders because he was trying to use up the balance of the funds still available in his CMA.

[64] After receiving ASBS’ email, NZRegCo carried out a review of Mr Cheng’s trading in Rua shares. On 19 January 2021, as a result of that review, NZRegCo referred the matter to the FMA pursuant to s 358 of the FMCA. In its letter NZRegCo expressed its opinion that “none of the small Buy Orders detailed above were genuine attempts to increase the size of Mr Cheng’s position in the stock, and instead were entered with the express purpose of setting the closing price at a higher level than the market would have done by the process of free and fair price discovery”.

[65] Following NZRegCo’s referral, the FMA commenced an investigation into Mr Cheng’s trading in Rua shares. It obtained further information from ASBS and conducted an interview with Mr Cheng. During this interview, Mr Cheng maintained that he placed the Buy Orders in order to use up the remaining funds in his CMA.

This proceeding

[66] Following its investigation the FMA issued these proceedings. As noted above, FMA alleges that each of the Buy Orders constitutes market manipulation in breach of s 265 of the FMCA. The FMA seeks declarations that Mr Cheng's conduct contravenes s 265 and a pecuniary penalty order in an amount to be determined by the Court.

[67] Whilst market manipulation can take many forms, Professor Putnins' evidence is that the unifying feature of all market manipulation techniques is that they involve trading, placing orders or releasing information for the purpose of creating a false or misleading appearance of the supply of, demand for, or price of shares.

[68] One form of market manipulation is a closing price manipulation. This involves placing buy or sell orders at, or shortly before, the close of trading to alter the closing price for shares. Manipulation of closing prices is particularly harmful because closing prices are widely followed by investors and may be used as a reference price in contracts and derivatives.

[69] The hallmark of closing price manipulation is placing orders close to the time when the market will close. The size of such orders can be large or small. A small number of shares could be purchased as a low-cost way of influencing the closing price. Closing price manipulation can either prevent the price from decreasing or increase the price for the shares.

Legal principles

[70] As noted, the main purposes of the FMCA are to promote the confident and informed participation of businesses, investors and consumers in the financial markets; and to promote and facilitate the development of fair, efficient and transparent financial markets.⁵

⁵ Financial Markets Conduct Act, s 3.

[71] An additional purposes of Part 5 of the FMCA, which concerns dealing in financial products on market and includes s 265, is to promote fair, orderly and transparent financial product markets.⁶

[72] Section 265 of the FMCA prohibits market manipulation:

A person must not do, or omit to do, anything if –

- (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 quoted financial products; or
 - (ii) with respect to the supply of, demand for, price for trading in, or value of those financial products; 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.

[73] In assessing whether an act or omission is likely to have the prescribed effect, this Court has held that the word “likely” contemplates an effect that might well happen.⁷ In this context, “likely” does not mean “more likely than not”.⁸ An assessment of whether the trade will have or is likely to have the prescribed effect is to be made in the context of the circumstances at the time, not with hindsight.⁹ It is an objective assessment. The FMA is not required to prove that any market participant was in fact actually misled.¹⁰

[74] Although the purpose of an impugned act or omission is not an element of s 265 (and was not an element of s 11B of the Securities Markets Act 1988 (SMA)), the purpose of an act or omission is an important consideration when determining whether it amounts to market manipulation.¹¹ The purpose of a trade may be the key factor which distinguishes culpable manipulation from a genuine trade.¹²

⁶ Section 229(1)(a).

⁷ *FMA v Warminger* [2017] NZHC 327 at [40]. This case concerned s 11B of the Securities Markets Act 1988 which was replaced by s 265 of the FMCA with almost identical terms.

⁸ *FMA v Zhong* [2023] NZHC 766 [*Zhong Liability Decision*] at [45].

⁹ *FMA v Warminger*, above n 7, at [39].

¹⁰ At [46] – [47].

¹¹ At [60] – [68].

¹² At [61].

[75] Purpose and knowledge can be inferred. In *Warminger*, Venning J cited the following passage from *In the Matter of Pagel, Inc*:¹³

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.

[76] Similarly, in relation to the requirement that a person knows or ought reasonably to know that the person's act or omission will have, or is likely to have, the proscribed effect, the Court held:¹⁴

Actual knowledge can be proved or inferred from [a person's] actions in the context of the particular trade in issue. [...] The second way knowledge can be established is by constructive knowledge, which is an objective standard.

[77] This Court has previously held that the placing of an order to buy or sell shares may itself constitute market manipulation in breach of s 265, notwithstanding that those offers do not lead to an actual trade. Offers to buy or sell shares can affect the appearance of supply and demand in the market for those shares.¹⁵

[78] In *FMA v Zhong* the defendants were found to have acted in breach of s 265 when they placed orders to buy shares, notwithstanding that those offers were not forwarded to the market and did not result in a trade. In one instance the manipulative order was not placed on the market due to technical difficulties. On another occasion the broker did not forward the offer to the market due to concerns regarding the offeror's compliance with NZX Rules. However, evidence established that the defendants made the offer to buy shares for the purpose of propping up the share price, and that, but for the unforeseen intervention, the offer would likely have traded and had the intended effect on the market.

[79] Similarly, in *Australian Securities Commission v Nomura International Plc* the Federal Court of Australia considered the Australian equivalent of s 265 in relation to

¹³ *In the Matter of Pagel, Inc* (8-16764) SEC Release No 22280, as cited at [71].

¹⁴ *FMA v Warminger*, above n 7, at [75].

¹⁵ *Zhong Liability Decision*, above n 8, at [43].

orders that did not trade.¹⁶ Nomura issued instructions to 10 different brokers to sell shares near to the close of trading on 26 March 1996. The brokers were instructed to place buy orders for the same number of shares on the same day. For various reasons the brokers did not comply with their instructions, but the evidence established that, if they had, the orders would have traded and Nomura would have self-traded.

[80] The Federal Court rejected Nomura’s argument that its conduct was not misleading until its strategy had been implemented. The Court found that Nomura had endeavoured to “move the close”.¹⁷ The limited success of this strategy was not for want of trying. Nomura’s conduct was likely to create a false or misleading appearance of active trading in and with respect to the price of those securities.

Formal proof

[81] I accept Ms Rosic’s submission that it is appropriate to deal with the matter by way of formal proof. Mr Cheng has not filed a statement of defence despite having been given ample opportunity to do so. There is an affidavit of service confirming that Mr Cheng was served personally with the proceedings at home on 12 December 2022. Since then he has been in email correspondence with the FMA’s solicitors. He has served them with two documents purporting to be statements of defence but he has not filed either of those documents or any other statement of defence. The purported statements of defence served by Mr Cheng do not respond to the FMA’s allegations in any event.

[82] In their correspondence with Mr Cheng the FMA’s solicitors have repeatedly informed Mr Cheng of the need to file a statement of defence. In its minute of 17 May 2023 the Court directed him to do so, but he did not.¹⁸

[83] As noted, the FMA seeks declarations and civil pecuniary penalties. It does not seek judgment by default for a liquidated demand. I am satisfied that pecuniary penalties under the FMCA may be ordered by way of formal proof, just as they have

¹⁶ *Australian Securities Commission v Nomura International Plc* (1998) 89 FCR 301, (1998) 160 ALR 246.

¹⁷ At 357.

¹⁸ *FMA v Cheng* HC Auckland CIV-2022-404-2275, 17 May 2023.

been under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.¹⁹

Application of legal principles

[84] The FMA is required to establish, on the balance of probabilities, that:

- (a) Mr Cheng placed the Buy Orders through ASBS' online trading platform;
- (b) at the time the Buy Orders were placed they had, or were likely to have, the effect of creating or causing the creation of a false or misleading appearance with respect to:
 - (i) the extent of active trading in Rua shares; and/or
 - (ii) the supply of, demand for, price for trading in, or value of Rua shares; and
- (c) Mr Cheng knew or ought reasonably to have known that his orders were likely to have that effect.

[85] Professor Putnins' evidence is that all of the Buy Orders are consistent with, and display many hallmarks of, closing price manipulation. He identifies various factors to support that conclusion.

[86] First, the timing of the orders is consistent with closing price manipulation. The Buy Orders were placed during the Pre-Close Session, so they could not trade that day except in the Closing Auction, when they could impact the Closing Price. Professor Putnins' evidence is that this timing is typical of closing price manipulation. Professor Putnins also points out that the timing of Mr Cheng's Buy Orders is inconsistent with his usual trading pattern. Trading records show that all of

¹⁹ *Department of Internal Affairs v Peng An Finance (Group) New Zealand Limited* [2017] NZHC 2363, [2018] 2 NZLR 552 at [13].

Mr Cheng's other orders for Rua shares were placed during the Normal Trading Sessions.

[87] Secondly, the quantity of shares in each order is consistent with closing price manipulation. The Buy Orders were all for unusually small quantities of Rua shares. This contrasts significantly with the size of Mr Cheng's orders when he previously accumulated Rua shares, and when he subsequently disposed of them. Professor Putnins says this is consistent with an intention to influence the closing price and inconsistent with legitimate trading given a fixed minimum brokerage fee. He describes the Buy Orders as being "abnormally small relative to the brokerage costs rendering them uneconomical and therefore inconsistent with an intention to keep accumulating shares in Rua".

[88] The evidence shows that prior to trading in Rua shares, Mr Cheng's average Buy Order was for approximately 35,498 shares, ranging in value from \$3,227.19 to \$1.18 million. From September 2015 to November 2020 Mr Cheng never ordered fewer than 1,000 shares in the companies in which he was investing. The Buy Orders are inconsistent with his previous trading in Rua, and across the NZX generally.

[89] Thirdly, after Orders 1, 3, 4 and 5 were rejected by ASBS, Mr Cheng did not attempt to place these orders during the Opening Auction or the Normal Trading Session the next day. Professor Putnins' evidence is that this is consistent with closing price manipulation, and inconsistent with a genuine purpose of acquiring shares.

[90] Fourthly, the Buy Orders were all at prices that would have met the best sell orders and led to trades that would increase the most recent share price. This is called "crossing the spread". For this reason Professor Putnins describes the Buy Orders as "aggressor" or "active" orders. He notes that orders of this type are consistent with closing price manipulation in that they cause the price impact the manipulator seeks.

[91] Professor Putnins also considers that the Buy Orders are uneconomical and inconsistent with generally accepted market practice due to the proportionately high brokerage fee. For example, when Order 2 traded on the market, Mr Cheng purchased 300 Rua shares at a price of \$0.54 for a total price of \$162.00. However, with the

additional \$15.00 brokerage, the total consideration became \$177.00, making the total purchase price for Mr Cheng \$0.59 per share. Put another way, the brokerage fee adds an additional 9.3 per cent to the total cost of the 300 shares. Due to the minimum \$15.00 brokerage, the Buy Orders became even more uneconomical as they got smaller. Orders 4 and 5 were for only 100 shares each at \$0.59 and \$0.58 per share respectively. If Orders 4 and 5 had traded, the brokerage fee would have made up approximately 25.4 per cent of the total cost. By way of contrast, when Mr Cheng was accumulating his shares in Rua between 9 and 20 November 2020 his average order size was \$17,861.63, which would have incurred a brokerage fee at a rate of 0.20 per cent. Mr Cheng was aware of this issue and usually tried to structure his investments to minimise the proportionate brokerage fee.

[92] Professor Putnins also considers the Buy Orders to have been uneconomic and inconsistent with market practice because, as noted, Mr Cheng placed the orders at prices which would “cross the spread” and trade against the best sell/ask price in the Closing Auction. This means Mr Cheng would have paid a higher price for the shares than if he had submitted orders limited to the best bid price. Professor Putnins explains that aggressive orders like this might be justified when a trader has a high level of urgency or is trading large quantities. But this was not the case with Mr Cheng’s Buy Orders.

Orders 1, 3, 4 and 5 were not forwarded to the market

[93] As previously noted, Order 2 was placed on the market and was executed. The resulting trade was for 300 shares at \$0.54 per share (\$162.00) plus \$15.00 brokerage.

[94] The other Buy Orders were not forwarded to the market so they did not trade. ASBS rejected Order 1 because it was placed at 5:00:07 pm and by the time it could be processed the market had closed. Orders 3, 4 and 5 were blocked by ASBS’ systems which noted that each of those orders was “pushing up price on close”.

[95] As noted, this Court has previously held that the placing of an order to buy shares may itself constitute unlawful market manipulation, notwithstanding that the

order does not lead to an actual trade.²⁰ As Ms Rosic points out, s 265 is expressed broadly: a person “must not do, or omit to do, anything...” if the act or omission will have, or is likely to have, the proscribed effect. The proscribed effect need not actually eventuate. The question is whether, at the time the order was made, it was likely to have the proscribed effect.

[96] For these reasons, I accept Ms Rosic’s submission that the fact Orders 1, 3, 4 and 5 were not forwarded to the market does not necessarily mean that, at the time they were placed, they were not likely to have the proscribed effect. As this case demonstrates, responsible brokers with online trading platforms will have systems in place to detect and prevent manipulative conduct. The effectiveness of those systems does not alter the manipulative nature of the conduct they detect and prevent. Again, I accept Ms Rosic’s submission that any contrary interpretation of s 265 would be overly restrictive and inconsistent with the statutory language and purpose.

[97] I turn now to consider each of the five causes of action in turn.

First Cause of Action – Order 1

[98] Mr Cheng placed Order 1 at 5:00:07 pm on 20 November 2020. In doing so, he carried out an act for the purposes of s 265.

[99] Earlier that day he had also: cancelled an unexecuted order to buy 50,000 Rua shares at \$0.52; placed an order to buy 29,000 shares at \$0.52 which he cancelled when it did not trade; placed an order to buy 30,000 shares at \$0.53 which traded immediately at that price; and placed an order to buy 32,934 shares at \$0.52 which he cancelled at 4:43:04 pm when it did not trade.

At the time Order 1 was placed, did it have or was it likely to have the proscribed effect?

[100] Order 1 did not trade. It was placed at 5:00:07 pm which, on this particular day, was seven seconds before the market closed. The closing auction took place at

²⁰ *Zhong Liability Decision*, above n 8, at [43].

5:00:14 pm. By the time ASBS could process the order, the market had closed. Mr Cheng then cancelled the order.

[101] However, as explained above, the Closing Auction takes place at a random time 30 seconds either side of 5:00 pm. At the time the order was placed, the Closing Auction might well have been later and the order could have been processed and forwarded to the market.

[102] At the time Mr Cheng placed Order 1 there were shares on the market at a best ask price of \$0.54. Professor Putnins' evidence is that if this order had been forwarded to the market it would likely have traded in the Closing Auction setting the closing price for Rua shares at \$0.54, two cents (3.85 per cent) higher than the actual closing price for the day. This would have increased the market value of Mr Cheng's Rua shares by \$6,400.00.

[103] It follows that when Mr Cheng placed Order 1, it was likely to have had the effect of increasing the price and/or demand for Rua shares.

[104] I also find that Mr Cheng placed the Buy Orders, including Order 1, for that purpose. I draw that inference because:

- (a) Order 1 was placed very late in the day at a time when it could only have traded in the Closing Auction.
- (b) The size and timing of Order 1 is very different from Mr Cheng's usual trading practices, both in terms of Rua shares and generally.
- (c) Order 1 was uneconomic, taking into account the minimum brokerage fee and Mr Cheng's willingness to meet the best sell price rather than match the best bid price. It was also inconsistent with Mr Cheng's usual strategy of minimising the brokerage across the value of the shares he traded.
- (d) After Order 1 failed, Mr Cheng did not replace the buy order during the Opening Auction or the Normal Trading Session the following day.

[105] Professor Putnins' evidence is that these are hallmarks of closing price manipulation and inconsistent with a rational strategy of profitable acquisition.

[106] In his interview Mr Cheng advised the FMA that Order 1 was much smaller than previous orders because the funds in his CMA were depleting. He also said he placed the smaller Buy Orders because he was trying to use up the funds remaining in his CMA.

[107] However, these explanations are inconsistent with Mr Cheng's use of his CMA at the time:

- (a) When Mr Cheng placed Order 1 (for \$540.00 plus \$15.00 brokerage) he had \$17,160.05 in his CMA. It was only after he cancelled Order 1 that he withdrew \$17,000.
- (b) On Monday 23 November 2020 he deposited \$20.00 into his CMA, bringing his balance to \$180.05. This was two minutes before he placed Order 2 for 300 shares at \$178.00 (including \$15.00 brokerage).
- (c) On Tuesday 24 November 2020 he deposited \$128.00 into his CMA bringing his balance to \$131.05. This was 10 minutes before he placed Order 3 for \$131.00 (including \$15.00 brokerage).
- (d) On Wednesday 25 November 2020 Mr Cheng withdrew \$130.00 from his CMA leaving a balance of \$1.05. On Friday 27 November 2020 he deposited \$10.00 leaving a balance of \$11.05.
- (e) On Monday 30 November 2020, Mr Cheng deposited \$70.00 into his CMA, bringing the balance to \$81.05. This was two-and-a-half minutes before he placed Order 4 for \$74.00 (including \$15.00 brokerage) and, when Order 4 was denied, approximately four minutes before he placed Order 5 for \$73.00 including brokerage.

[108] In these circumstances I do not accept that Mr Cheng placed the Buy Orders simply to use up the remaining funds in his CMA. On the contrary, on four occasions

he made very small deposits into his account so that he would have just enough to place the Buy Orders. In any event, this would not explain the unusual timing of the Buy Orders, their uneconomic nature, or why Mr Cheng did not resubmit Orders 1, 3, 4 and 5 the next day. Mr Cheng's explanation is fanciful and lacks any credibility.

[109] For these reasons I am satisfied that by placing Order 1 Mr Cheng did an act which was likely to have the effect of creating (or causing the creation of) a false or misleading appearance with respect to the demand for, and price of trading in, Rua shares.

Did Mr Cheng know or ought reasonably to have known that Order 1 was likely to have the proscribed effect?

[110] I am also satisfied that Mr Cheng knew or ought reasonably to have known that placing Order 1 was likely to have the effect of creating that false or misleading appearance. I have found that Mr Cheng placed Order 1 for that purpose. Mr Cheng was an experienced share trader, in New Zealand and previously in Malaysia. In his interview with the FMA he demonstrated an understanding of the NZX, including the Closing Auction. He had a good understanding of how the ASBS platform worked and the information it makes available. He could have seen the best ask price of \$0.54 and he placed Order 1 at a price that matched it.

[111] I am therefore satisfied that the FMA has established the first cause of action.

Second Cause of Action – Order 2

[112] When Mr Cheng placed Order 2 for 300 Rua shares at a price of \$0.54 per share at 4:57:39 pm on 23 November 2020, he did an act for the purposes of s 265. Order 2 traded in the Closing Auction, and resulted in Mr Cheng acquiring 300 Rua shares, bringing his total holding in Rua to 320,300 shares.

[113] Order 2 was the only trade in the Closing Auction. Profession Putnins' evidence is that Order 2 set the closing price at \$0.54, which was an increase from the previously traded price of \$0.53. If Mr Cheng had not placed Order 2 there would have been no trade in the Closing Auction and the closing price would have been set

at the last trading price of \$0.53. Order 2 therefore increased the closing price by \$0.01, or 1.9 per cent. This increased the market value of Mr Cheng's shareholding by \$3,200.

[114] For much the same reasons as those set out above, I find that Mr Cheng's purpose in placing Order 2 was not to acquire an additional 300 shares, or to use up funds in his CMA, but to increase the price and/or demand for Rua shares. Mr Cheng placed Order 2 for an unusually small quantity during the Pre-Close Session when it could only trade in the Closing Auction. Professor Putnins' evidence is that it was uneconomic, taking into account brokerage costs and the fact that when Mr Cheng placed Order 2 he "crossed the spread" to match the best ask price.

[115] Mr Cheng's explanation that he was trying to use up the balance of his CMA is entirely at odds with the fact he deposited \$20.00 into his CMA immediately before placing Order 2, without which Order 2 could not have traded.

[116] I am therefore satisfied that Order 2 did in fact have the prohibited effect of creating a false or misleading appearance of the extent of active trading in Rua shares, and of the demand for and price for trading in Rua shares. Mr Cheng's conduct indicated a demand for Rua shares at \$0.54 which did not otherwise exist, and it inflated the closing price.

[117] For the same reasons as outlined previously, I am also satisfied that Mr Cheng knew that Order 2 would have the effect of creating a false and misleading appearance concerning the price and demand for Rua shares. He deliberately placed Order 2 for that purpose.

[118] I am therefore satisfied the FMA has established the second cause of action.

Third Cause of Action – Order 3

[119] When Mr Cheng placed Order 3 to buy 200 Rua shares at \$0.58 at 4:51 pm on 24 November 2020, he carried out an act for the purposes of s 265.

[120] At the time Order 3 was placed, there were no other buyers in the market willing to pay \$0.58, but there were traders willing to sell at that price. So, if Order 3 had been forwarded to the market it would have traded in the Closing Auction and set a closing price of \$0.58. However, there was no trade in the Closing Auction, and the closing price was \$0.56. If Order 3 had been forwarded to the market and traded it would therefore have increased the closing price by \$0.2, or 3.6 per cent. The value of Mr Cheng's shareholding would have increased by \$6,406.00.

[121] For the reasons previously given I am also satisfied that Mr Cheng placed Order 3 for the purpose of increasing the price and apparent demand for Rua shares, and that he knew or ought to have known that Order 3 was likely to have that effect. As explained at paragraphs [95]-[96] above, the fact that ASBS' systems detected Mr Cheng's manipulative conduct and blocked Order 3 from the market does not save Mr Cheng. At the time he placed Order 3 his intended market manipulation may well have eventuated.

[122] I am therefore satisfied that the FMA has established the third cause of action.

Fourth Cause of Action – Order 4

[123] When Mr Cheng placed Order 4 for 100 Rua shares at \$0.59 per share at 4:57:17 pm, he carried out an act for the purposes of s 265. Once again, ASBS' systems detected and blocked Order 4, noting "denied: orderly market – pushing up price on close".

[124] At the time Order 4 was placed there were no other buyers in the market at \$0.59, but there were three traders willing to sell at this price. Professor Putnins' evidence is that Order 4 would likely have traded in the Closing Auction and set the closing price at \$0.59. In fact, there were no trades in the Closing Auction and the closing price was set at the last traded price of \$0.56. Order 4 would therefore likely have caused an increase in the closing price of \$0.03, or 5.4 per cent. The value of Mr Cheng's shareholding would have increased by \$6,409.

[125] For all the reasons previously set out I am satisfied that Mr Cheng placed Order 4 for the purpose of increasing the price of Rua shares and that he knew it was likely to have that effect. The FMA has established the fourth cause of action.

Fifth Cause of Action – Order 5

[126] When Mr Cheng placed a further order for 100 shares at \$0.58 per share at 4:49:17 pm on 30 November 2020 he did an act for the purposes of s 265. Again, ASBS' systems blocked Order 5 noting "denied: orderly market – pushing up price on close".

[127] However, Professor Putnins' evidence is that Order 5 would have probably not traded. The best sell/ask price at that time was \$0.59, but Order 5 was to buy at \$0.58. Unless new sell orders were added (or existing sell orders were amended) in the 13 - 73 seconds before the Closing Auction, there would have been no match. Unlike Orders 1 – 4, Order 5 would not have traded at the Closing Auction and would not have impacted the closing price for Rua shares.

[128] However, Professor Putnins explains that Order 5 would have increased the prevailing best bid/buy price. This would have signalled to the market that there was a buyer at a higher price than any other buyers in the market at that time. In that way, Order 5 would have conveyed an appearance of increased demand, and an increased quoted price for Rua shares. I accept Ms Rosic's submission that this falls within the scope of s 265(a)(i), which prohibits conduct which has the effect of creating a false or misleading appearance with respect to demand or the price for trading in financial products. A buyer can be manipulative without necessarily "crossing the spread" to trade.

[129] For the reasons previously outlined I am satisfied that Mr Cheng placed Order 5 not for the purpose of acquiring another 100 shares or for using up funds in his CMA, but for the purpose of increasing the apparent price and demand for Rua shares. I am also satisfied that when Mr Cheng placed Order 5 he knew this was likely to occur. The FMA has established the fifth cause of action.

Relief – Declarations

[130] The FMA seeks declarations, an order for a pecuniary penalty and ancillary orders including costs.

[131] Under s 489(2) of the FMCA, if the FMA applies for a pecuniary penalty order against a person, the Court –

- (a) must determine whether the person has contravened, or been involved in a contravention of, a civil liability provision; and
- (b) must make a declaration contravention if it is satisfied that the person has contravened, or been involved in the contravention of, a civil liability provision; and
- (c) may order the person to pay the Crown a pecuniary penalty that the Court considers appropriate if it is satisfied that the person has contravened, or been involved in the contravention of, a civil liability provision.

[132] Under s 488, a declaration of a contravention must state: the civil liability provision that has been contravened; the person engaged in the contravention; the conduct that constituted the contravention; and the issuer to which the conduct relates.

[133] For the reasons set out above I declare as follows:

- (a) On each occasion giving rise to the five causes of action against him in this proceeding, Mr Cheng has contravened s 265 of the FMCA. Conduct that constituted the five contraventions is:
 - (i) for the first cause of action, Mr Cheng’s conduct in placing an order to buy 1,000 shares in Rua Bioscience Limited at 5:00:07 pm on 20 November 2020;

- (ii) for the second cause of action, Mr Cheng's acquisition of 300 shares in Rua Bioscience Limited at 4:57:39 pm on 23 November 2020;
- (iii) for the third cause of action, Mr Cheng's conduct in placing an order to buy 200 shares in Rua Bioscience Limited at 4:58:51 pm on 24 November 2020;
- (iv) for the fourth cause of action, Mr Cheng's conduct in placing an order to buy 100 shares in Rua Bioscience Limited at 4:57:17 pm on 30 November 2020; and
- (v) for the fifth cause of action, Mr Cheng's conduct in placing an order to buy 100 shares in Rua Bioscience Limited at 4:59:17 pm on 30 November 2020.

(b) The issuer to which the conduct relates is Rua Bioscience Limited.

Relief - pecuniary penalty

[134] For the reasons set out above I am satisfied for the purposes of s 489(2)(c) that Mr Cheng has contravened a civil liability provision, s 265, and that it is appropriate he be ordered to pay the Crown a pecuniary penalty.

[135] The Court has taken a three-step approach to setting pecuniary penalties under the FMCA, including for contraventions of s 265.²¹ This requires the Court to:

- (a) first, determine the maximum penalty;
- (b) secondly, set a starting point having regard to the relevant statutory criteria; and

²¹ *FMA v CBL Corporation Limited (in liq)* [2023] NZHC 3842 at [87], citing *FMA v Zhong* [2022] NZHC 480 [*Zhong Penalty Decision No.1*] at [58] and *FMA v Zhong* [2023] NZHC 2196 [*Zhong Penalty Decision No.2*] at [21].

- (c) thirdly, adjust the starting point by applying an uplift or a reduction to reflect the defendant's personal circumstances.

Maximum amount of pecuniary penalty

[136] Section 490 of the FMCA provides that the maximum penalty for a contravention of s 265 is the greatest of:

- (a) the consideration for the transaction that constituted the contravention (if any);
- (b) if it can be readily ascertained, three times the amount of the gain made or loss avoided by the person who contravened the civil liability provision; and
- (c) \$1,000,000 in the case of an individual or \$5,000,000 in any other case.

[137] Mr Cheng's contraventions involved very small orders to buy shares, only one of which (Order 2) resulted in a trade of 300 shares for \$162.00. This trade increased the close price by \$0.01. Any gain Mr Cheng might have derived from that will have been included in the total sale price he received when he sold all his Rua shares for \$197,864.

[138] In these circumstances, the maximum penalty for each contravention is \$1 million, meaning the maximum overall penalty would be \$5 million (\$1 million per individual order).²²

Starting point

[139] In setting the starting point the Court must have regard to all relevant matters including those set out at s 492(a)-(h) of the FMCA. I deal with these in turn.

²² *Zhong Penalty Decision No.1*, above n 21, at [71].

The purposes of the FMCA

[140] The main purposes of the FMCA is set out at s 3. Part 5 of the FMCA, which includes s 265, has the additional purposes of promoting fair, orderly and transparent financial product markets, and encouraging a diversity of financial product markets to take account of the differing needs and objectives of issuers and investors.²³

[141] This Court has previously recognised that market manipulation undermines market integrity and transparency.²⁴ The Court must bear this in mind when setting an appropriate penalty.

The nature and extent of the contraventions

[142] Mr Cheng was involved in five separate contraventions carried out over seven consecutive working days. The volume was low but the conduct was repeated and sustained. His purpose was to increase the price and/or demand for Rua shares. Mr Cheng was not a professional fund manager but he is a highly experienced investor who knew what he was doing.²⁵

[143] As noted, Order 2 did trade and increased the closing price by \$0.01 or 1.9 per cent. Orders 1, 3 and 4 would have increased the closing price for Rua shares by between two and three cents, or between 3.6 per cent and 5.4 per cent, had ASBS' systems not intervened. The one cent increase is modest, and Orders 1, 3 and 4 did not in fact trade. However, they are still relevant in assessing penalty. Professor Putnins explained that closing price extortions are particularly harmful because closing prices are widely followed by investors and used in many contracts and derivatives as a reference price or benchmark.

The nature and extent of any loss or damage suffered, or gains made or losses avoided

[144] There is no evidence of third parties having suffered loss or damage as a result of Mr Cheng's conduct. As noted, each one cent increase would have increased the value of Mr Cheng's holding by \$3,200. Professor Putnins' evidence demonstrates

²³ Financial Markets Conduct Act, s 229.

²⁴ *Zhong Penalty Decision No.2*, above n 21, at [54].

²⁵ See *FMA v Warminger*, above n 7.

that it is difficult to assess any potential gains to Mr Cheng. Only Order 2 actually increased the closing price for Rua shares and this occurred 11 days before Mr Cheng began his sell down.

Compensation, reparation, etc

[145] Mr Cheng has not paid any amount by way of compensation, reparation or restitution, or taken any other steps to avoid or mitigate the effects of his contravention.

The circumstances in which the contravention took place

[146] At the time of the contraventions Mr Cheng was the 45th largest shareholder in Rua with 320,000 shares. He clearly stood to gain through increases in price and demand for those shares. I accept Ms Rosic's submission that it is also relevant that Mr Cheng acted independently and not in collusion or on the instruction of others.

[147] There is no evidence to suggest that Mr Cheng has previously been engaged in any similar conduct.

[148] Although s 492 does not expressly refer to deterrence, the Court has previously held that it is a relevant consideration when determining a pecuniary penalty under the FMCA.²⁶ The penalty must not be seen as a cost of doing business or a financially acceptable risk when compared to the gains potentially available from market misconduct. I accept Ms Rosic's submission that the penalty must be set at a meaningful level in order to deter others, as well as Mr Cheng, from engaging in similar conduct.

Previous cases

[149] Earlier decisions imposing pecuniary penalty for breaches of s 265 of the FMCA (or s 11B of the SMA) can be relevant, although the appropriate penalty in each case will turn on its own facts. Previous cases are materially different.

²⁶ *Zhong Penalty Decision No.2*, above n 21, at [18] and [66] also *FMA v Warminger*, above n 7.

[150] In *Financial Markets Authority v Henry* Mr Henry admitted six instances of market manipulation.²⁷ He faced a maximum penalty of \$6,000,000 (\$1,000,000 per contravention). The Court accepted the starting point of \$200,000 (in total) which the parties had agreed. The Court allowed a total reduction of 35 per cent (\$70,000) to reflect Mr Henry's previous good conduct and admission of liability. The final penalty was \$130,000.

[151] In *FMA v Warminger* the defendant was a professional fund manager found liable for two contraventions of the SMA.²⁸ The Court adopted a total starting point of \$500,000 and applied a 20 per cent reduction to reflect previous good conduct and personal mitigating factors including poor health. The final penalty was \$400,000.

[152] There have been two pecuniary penalty decisions in the *FMA v Zhong* litigation. The first involved two defendants who admitted breaches of the FMCA. Mr Meng was a shareholder and director of the relevant company, and an owner of the accounting firm which provided it with accountancy services.²⁹ Mr Meng admitted two contraventions of s 265 and one of s 297. Mr Qian was a shareholder of the relevant company and employed by Mr Meng's accounting firm. He admitted three contraventions of s 265. They denied any intention to manipulate the market but accepted they ought to have reasonably known that their conduct would, or would likely, have that effect.

[153] The Court set maximum penalties of \$2.2 million and \$3 million for Messrs Meng and Qian. Mr Meng's final penalty of \$180,000 was calculated by adopting a \$240,000 starting point and applying reductions of 10 per cent for not having previously breached the FMCA, 10 per cent for his admission, and five per cent for damages to his employment prospects. The Court indicated a starting point closer to \$500,000 would have been appropriate if Mr Meng had been found to have acted deliberately to manipulate the markets. Mr Qian's final penalty of \$130,000 was calculated by adopting a starting point of \$200,000 and applying reductions of 10 per cent for not having previously breached the FMCA, 20 per cent for admissions and

²⁷ *Financial Markets Authority v Henry* [2014] NZHC 1853.

²⁸ *FMA v Warminger*, above n 7.

²⁹ *Zhong Penalty Decision No.1*, above n 21.

early acceptance of responsibility, and five per cent for the personal impact on Mr Qian and his family.

[154] The second penalty decision in *FMA v Zhong* involved a married couple who were both insiders.³⁰ Mr Zhong was the managing director and CEO of the relevant company and Ms Ding was a senior manager. Mr Zhong was found to have contravened s 265 on six occasions and s 297 on three occasions. Ms Ding contravened s 265 on five occasions and s 297 on five occasions. The couple colluded to prop up the price of their shares.

[155] The Court set maximum penalties for Mr Zhong at \$48.64 million and for Ms Ding at \$48.08 million. The maximum penalties were so high because they owned millions of shares in the relevant company.³¹ The Court set starting points of \$1.4 million for Mr Zhong and \$800,000 for Ms Ding. The only reduction was of five per cent to reflect that they had not previously contravened the FMCA. The final penalties were \$1.33 million for Mr Zhong and \$760,000 for Ms Ding.

[156] Setting Mr Cheng's starting point, it is relevant that he deliberately placed the Buy Orders for the purpose of increasing the price and/or demand for Rua shares. He acted independently, not in collusion or at the direction of others. There were five contraventions carried out over seven working days. Although only one of his five Buy Orders took effect, Mr Cheng acted intentionally throughout.

[157] Mr Cheng's conduct is most akin to that of Mr Henry and Mr Qian. Both their starting points were \$200,000. However, I accept Ms Rosic's submission that Mr Cheng's misconduct was more serious than theirs. Mr Henry did not deliberately set out to breach the SMA and he was open with the Securities Commission about his trading.³² Mr Qian's misconduct involved three contraventions, two less than Mr Cheng. And Venning J noted that the starting point would have been higher had Mr Qian not been acting at the direction of others.³³

³⁰ *Zhong Liability Decision*, above n 8.

³¹ *Zhong Penalty Decision No.2*, above n 21, at [48].

³² *FMA v Henry*, above n 27, at [46].

³³ *Zhong Penalty Decision No.1*, above n 21, at [102].

[158] In setting a starting point, I have regard to the totality principle and take into account the close connection between Mr Cheng's five contraventions. In light of that, and the various factors discussed above, I adopt a starting point of \$220,000.

Reduction

[159] As discussed above, reductions have been applied in circumstances where defendants have admitted their contraventions. That does not apply here. On the contrary, Mr Cheng maintained that he was merely trying to use up the small balance in his CMA, a narrative which frankly lacks any credibility.

[160] The only reduction available to Mr Cheng is to reflect that he has not previously been found to have contravened the FMCA, or to have been before the Court in respect of any similar conduct. I allow a 10 per cent reduction in recognition of that.

[161] On that basis I make an order under s 489(2)(c) that Mr Cheng is to pay the Crown a pecuniary penalty of \$198,000.

[162] Section 493 of the FMCA requires the Court also to order that the penalty must be applied first to pay the FMA's actual costs in bringing the proceedings. I order accordingly.

Result

[163] I make the declarations set out at [133] above.

[164] I order Mr Cheng to pay the Crown a pecuniary penalty of \$198,000.

[165] The pecuniary penalty is to be applied first to pay the FMA's actual costs in bringing this proceeding.

[166] The Court has previously held that an order under s 493 does not necessarily preclude a separate award of costs.³⁴ If the FMA seeks costs it should file a memorandum.

Robinson J

³⁴ *FMA v Zhong* [2024] NZHC 2126.