IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001727
[2017] NZHC 1471

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

Hearing: 15 June 2017

Appearances: J B M Smith QC, N R Williams and K S Graham for Plaintiff
M A Corlett QC, I Rosic and D C S Morris for Defendant

Judgment: 29 June 2017

JUDGMENT OF VENNING J
ON PENALTY

This judgment was delivered by me on 29 June 2017 at 4.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

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

[1] In a decision delivered on 3 March 2017 this Court found that Mr Warminger breached s 11B of the Securities Markets Act 1988 (the Act) on two occasions.[1] The Financial Markets Authority (FMA) seeks the imposition of a penalty for the breaches.

[2] The Court made two declarations of contravention under s 42V of the Act. The first was that Mr Warminger contravened s 11B by manipulating the market for shares in Fisher and Paykel Healthcare Limited (FPH) on 27 May 2014. He did so by increasing the offer quote and price for the shares and maintaining them at a higher level than otherwise would have been the case and then by entering a crossing for the sale of FPH shares which created a misleading appearance as the price of the crossing was influenced by his earlier trades.

[3] The second declaration was that Mr Warminger contravened s 11B of the Act by manipulating the market for shares in a2 Milk Limited (ATM) on 9 July 2014 by increasing the offer quote and price for ATM shares and maintaining them at a higher level than otherwise would have been the case. That created a misleading appearance as to the demand and/or price for ATM shares on the day.

Background and jurisdiction

[4] The background to Mr Warminger's manipulation of trading in FPH and ATM shares is set out fully in the substantive judgment. It is unnecessary to repeat it here.

[5] The Court may order Mr Warminger to pay a pecuniary penalty it considers appropriate if satisfied that his contravention(s):[2]

> (i) materially prejudices the interests of acquirers or disposers of the securities or relevant interests involved; or
>
> (ii) materially prejudices the public issuer or, if the public issuer is a body corporate, its members; or

---

1 *Financial Markets Authority v Warminger* [2017] NZHC 327, (2017) 11 NZCLC 98-050.
2 Securities Markets Act 1988, s 42T(1)(c).

(iii) is likely to materially damage the integrity or reputation of any New Zealand's securities markets; or

(iv) is otherwise serious.

[6] There is no evidence presently before the Court of material prejudice to buyers or sellers of FPH and ATM shares or of material prejudice to the public issuers themselves resulting from Mr Warminger's manipulative trading.

[7] For the purposes of this penalty hearing Mr Warminger concedes that the conduct the Court found proved was likely to materially damage the integrity or reputation of New Zealand's securities markets or was otherwise serious.[3]

[8] The concession was properly made. Such manipulation 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.

[9] As this Court noted in *FMA v Henry*:[4]

> [30] Prior to its enactment the then Minister of Commerce explained the need for the Act as follows:
>
> > 8 The term market manipulation refers to practices involving the creation of a false impression of securities trading activity or price movement or market information. Market manipulation undermines the market efficiency through distorting prices and results in an inefficient allocation of resources. Regimes regulating market manipulation are found in nearly all major foreign jurisdictions.
> >
> > …
> >
> > 12 It is important for New Zealand to satisfy international investors (and domestic investors) that our financial markets have integrity and meet international standards. …

[10] The Act has now been replaced by the Financial Markets Conduct Act 2013 (FMCA). The market manipulation provisions in the FMCA replicate those

---

3 Securities Markets Act, s 42T(1)(c)(iii) or (iv).

4 *Financial Markets Authority v Henry* [2014] NZHC 1853 at [30], citing Lianne Dalziel "Review of Securities Trading Law: Market Manipulation" (Office of the Minister of Commerce, 24 July 2003).

contained in the Act. Prior to the enactment of the FMCA the Minister of Economic Development observed:[5]

> 5. Insider trading and market manipulation issues are closely linked. Both market manipulation and insider trading are considered by some commentators to be forms of market abuse that can damage the efficiency and transparency of markets and affect market integrity and public confidence in securities trading. The procedures for detection and investigation will also be similar for both types of offences.
>
> 6. It has been argued that market manipulation harms the integrity of securities and derivatives markets by distorting prices and creating an artificial appearance of market activity. By doing this it undermines public confidence in these markets.

[11] I also note the following comments from the Chairman of the Australian Securities and Investments Commission at a speech in August 2010 as to the harm caused by market manipulators:[6]

> 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.

[12] Finally, case law also confirms the effect market manipulation may have on the integrity of the market. In *Re De Gouveia* the Alberta Securities Commission noted the effect of market manipulation as follows:[7]

> [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

---

5 Ministry of Economic Development "Reform of Securities Trading Law: Volume Two: Market Manipulation Law: Discussion Document" (May 2002) at 5.

6 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).

7 *Re De Gouveia* [2013] ABASC 249.

> 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.

The approach to assessment of the penalty

[13] In *Financial Markets Authority v Henry* the Court adopted a similar approach to that taken in relation to the imposition of penalties for breach of the Commerce Act 1986 on the basis both statutory regimes are directed at enforcing and regulating relevant markets.[8] I propose to adopt a similar approach in this case. That requires the Court to establish the maximum amount of the penalty, then fix a starting point having regard to the relevant statutory criteria before making any appropriate deductions for Mr Warminger's personal circumstances.[9]

The maximum amount

[14] Section 42W of the Act provides:

> **42W Maximum amount of pecuniary penalty**
>
> (1) The maximum amount of a pecuniary penalty for a contravention of … [a] market manipulation prohibition, … is the greater of—
>
> (a) the consideration for the transaction that constituted the contravention (if any); or
>
> (b) 3 times the amount of the gain made, or the loss avoided, by the person in carrying out the conduct …; or
>
> (c) $1,000,000.
>
> …

[15] The FMA submits that the maximum penalty is $3,845,900. It says s 42W(1)(a) applies to the FPH transactions and calculates the consideration at $2,845,900. The FMA accepts that the consideration involved in the ATM

---

8 *Financial Markets Authority v Henry*, above n 4, at [34].

9 See for example *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705.

transactions would be less than $1,000,000 so relies on s 42W(1)(c) in relation to that breach.

[16] Mr Warminger argues the consideration for the FPH transaction was less than $1,000,000, so says the maximum amount for the penalty for both contraventions is $2,000,000. The difference between the parties lies in the FMA's inclusion of the off-market crossings totalling $2,175,000 in addition to the DMA trades in FPH shares.

[17] Mr Corlett QC argued that the gravamen of Mr Warminger's misconduct in relation to the FPH transactions was his direct market access (DMA) on-market buying activity.[10] The total consideration for that on-market buying activity was $670,900. He submitted that given the punitive nature of the penalty, the Court should not adopt an unnecessarily expansive view of the transaction that constituted the contravention. Mr Corlett submitted that on the Court's finding, Mr Warminger's market buying activity would have amounted to a breach of s 11B whether or not he had entered into the subsequent off-market trades. On that basis he argued for the maximum penalty for the misconduct relating to the FPH transactions to be $1,000,000.

[18] I am unable to accept the submission for Mr Warminger as to the maximum potential penalty on the FPH trades. Under s 42W(1)(a) the focus is on the consideration for the transaction(s) that constituted the contravention. The terms of the declaration made by the Court are that Mr Warminger:[11]

> … contravened s 11B of the Act by manipulating the market for shares in FPH on 27 May 2014 by increasing the offer quote and price for FPH shares and maintaining them at a higher level than otherwise would have been the case and also by entering a crossing for the sale of FPH shares which created a misleading appearance as the price of the crossing was influenced by his earlier trades.

[19] That declaration is consistent with earlier findings in the judgment. The purpose of the DMA transactions was to manipulate the market to support the off-market crossings at a higher price level. The later crossings at that higher level,

---

10 See discussion in *Financial Markets Authority v Warminger*, above n 1, at [150].

11 *Financial Markets Authority v Warminger*, above n 1, at [329].

when reported, also had the effect of manipulating the market by further creating a misleading appearance of the market price. It is proper to take into account the value of the two crossings that followed the earlier manipulative conduct by way of the DMA trades.

[20] On that basis the maximum penalty for both contraventions (the FPH and ATM breaches) is $3,845,900.

Milford Asset Management Limited's position

[21] Before considering the specific criteria under s 42Y there is a further preliminary point.

[22] Prior to trial Mr Warminger's employer, Milford Asset Management Limited (Milford), reached a settlement with the FMA under s 46A of the Financial Markets Authority Act 2011 and paid $1,100,000 million in lieu of a pecuniary penalty together with $400,000 in costs.

[23] The settlement recorded that the FMA considered the trader's (Mr Warminger's) conduct was in contravention of s 11B. It also recorded that Milford denied liability for any alleged contravention of the Act. Milford did however acknowledge that the Milford Board had failed to ensure there was a requisite degree of monitoring of the trader's (Mr Warminger's) trading activity. The parties reached an agreement to resolve the issues relating to Milford but not the trader (Mr Warminger). Milford and its Board accepted responsibility for inadequate oversight and control of the trading conduct which was under investigation. Apart from making the payments Milford also undertook to carry out a further external review following its implementation of a number of recommendations made by an independent consultant.

[24] Milford is presumed to have Mr Warminger's knowledge at material times.[12]

[25] Mr Corlett argued that the potential breaches referred to in the Milford settlement included the trading in FPH and ATM. It followed that the $1,100,000

[12] Securities Markets Act, s 43ZB.

paid in lieu of a pecuniary penalty was paid in respect of Mr Warminger's contravening conduct. While accepting that Mr Warminger and Milford are separate legal persons with separate legal liability Mr Corlett submitted there was only one course of contravening conduct, that of Mr Warminger. The Court must therefore take into account that Milford has already paid $1,100,000 by way of penalty for that conduct. He invited the Court to adopt the approach taken in *Commerce Commission v Wrightson NMA Ltd* and *Commerce Commission v Ophthalmological Society of NZ Inc*[13] and "split" the penalty between Milford and Mr Warminger. In making that submission Mr Corlett acknowledged that he was not suggesting a simple deduction of $1,100,000 from whatever penalty might be assessed as appropriate for Mr Warminger's actions or that, at the level of penalty he suggested as appropriate, Mr Warminger should not have to pay anything.

[26] Mr Smith QC accepted that Milford's settlement was relevant to inform the starting point but noted that Milford's culpability as stated in the settlement was not for market manipulation as such. The basis of its payment was quite different to the basis for the penalty now sought for Mr Warminger's contraventions of the Act.

[27] The effect of an employer's liability for and contribution to the appropriate penalty in this context raises a number of issues. As the Law Commission noted in its report on pecuniary penalties the situation is nuanced.[14] In *Giltrap City Ltd v Commerce Commission* the Court of Appeal considered the effect of Mr MacKenzie's actions as Chief Executive Officer of Giltrap City Limited.[15] Mr MacKenzie had breached s 27 of the Commerce Act. The breach was attributed to Giltrap City by s 90(2). The Court stated:

> [52] It is necessary to examine how s90 of the Commerce Act and its counterpart, s45 of the Fair Trading Act 1986, are couched when considering whether the conduct of the director, servant or agent of a company renders the company vicariously liable, or liable by attribution as discussed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. That the liability of a company may be vicarious or attributed was noted by Lord Steyn in his speech in *Williams v Natural Life Health Foods Ltd* (supra) at 835 A-C. When liability is by

---

13 *Commerce Commission v Wrightson NMA Ltd* (1994) 6 TCLR 279 (HC) at 10; and *Commerce Commission v Ophthalmological Society of NZ Inc* [2004] 3 NZLR 689 (HC) at [47].

14 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at 14.13.

15 *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA).

> attribution there is logically less room to find that the conduct of the director, servant or agent is also that person's conduct in their personal capacity. The question to be considered is, in short, whether the director, servant or agent is acting *for* the company or *as* the company: compare Lord Reid's speech in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170. When a person is acting *for* the company it is easier to view his conduct as both his own and vicariously that of the company. When a person is acting *as* the company it is, as just noted, more difficult, at least in general terms, to regard the conduct as that of both the person so acting and the company.
>
> [53] S90(2) speaks of conduct engaged in *on behalf of* a body corporate. That mode of expression suggests the company is liable vicariously rather than by attribution. The same can be said of the use of the word "also" in the statutory direction that the conduct of the director, servant or agent "shall be deemed . . . to have been engaged in *also* by the body corporate". Not only linguistically but also in policy terms the section should be construed as making the proscribed conduct both that of the director, servant or agent and that of the company. That construction is consistent with the statement in s27 that "no person" shall enter into a proscribed arrangement.

[28] While Mr Warminger's knowledge can be attributed to Milford, Mr Warminger was not acting "as" Milford when carrying out the trades in issue. He was acting "for" Milford as a trader and portfolio manager in relation to the various funds under his control. The offending conduct was his personal conduct, the knowledge of which was to be attributed to Milford, rather than the conduct being directly Milford's conduct as such. The attribution provided for in s 43ZB is not in the same broad terms as s 90 of the Commerce Act 1986.

[29] While Mr Warminger was employed by Milford and had responsibility for the management of certain of its funds, when trading he was effectively acting personally. It was Mr Warminger who won the INFINZ awards for fund managers for his trading performance. The evidence from the substantive hearing confirmed the importance placed on the personal relationships between traders.

[30] *Commerce Commission v Wrightson NMA Ltd* and *Commerce Commission v Ophthalmological Society of NZ Inc* can both be distinguished from the present case. In the *Wrightson NMA Ltd* case when McGechan J chose to split an appropriate penalty between the company and the individual, the individual was effectively acting "as" the company.[16] In the *Ophthalmological Society* case all members of the

---

16 *Commerce Commission v Wrightson NMA Ltd*, above n 13.

Society stood to gain from the actions in question.[17] It was appropriate that the Society itself pay a substantial penalty representing as it did the interests of a number of its members who would benefit.

[31] In assessing the relevance of the $1,100,000 paid by Milford, I take into account that Milford's settlement was on the basis of its lack of oversight, and with a denial of any liability for contravention of the Act. To the extent the payment of $1,100,000 was in lieu of a pecuniary penalty, it is also relevant that it was made at a time when the claims of market manipulation were significantly more extensive than the Court ultimately found to be proved against Mr Warminger.

[32] So, while the payment made by Milford in lieu of penalty is a relevant consideration, it does not absolve Mr Warminger to the full extent of the $1,100,000 paid. Nor do I consider it particularly relevant to the appropriate starting point for Mr Warminger's contraventions of the Act as found by the Court.

Assessment of the penalty – starting point

[33] I return to the mandatory considerations under s 42Y:

> **42Y Considerations for court in determining pecuniary penalty**
>
> In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—
>
> (a) any purpose and criteria stated in this Act that apply to the civil remedy provision; and
>
> (b) the nature and extent of the contravention; and
>
> (c) the likelihood, nature, and extent of any damage to the integrity or reputation of any of New Zealand's securities markets because of the contravention; and
>
> (d) the nature and extent of any loss or damage suffered by a person referred to in section 42T(1)(c)(i) or (ii), or gains made or losses avoided by the person in contravention, because of the contravention; and
>
> (e) the circumstances in which the contravention took place; and

---

17 *Commerce Commission v Ophthalmological Society of NZ Inc*, above n 13.

(f) whether or not the person in contravention has previously been found by the court in proceedings under this Act to have engaged in any similar conduct; and

(g) the relationship of the parties to the transaction constituting the contravention.

Purpose and criteria stated in the Act

[34] The Act does not contain an express provision setting out its purposes but as Mr Corlett conceded the purpose of the Act's penalty regime is to protect the integrity and reputation of New Zealand securities markets. One way to do so is to fix a penalty which deters market manipulation.

[35] While not expressly stated in s 42Y, deterrence must be a relevant consideration. The considerations referred to in s 42Y are not exclusive. Cases under similar legislation have recognised the purposes of such legislation include deterrence of future misconduct by a particular respondent (specific deterrence) and by others (general deterrence).[18]

[36] I adopt Mr Smith's submissions, based primarily on the Canadian authorities, that the rationale for imposing a penalty sufficient to deter is:

(a) market manipulation of any sort is serious, particularly where a defendant is sophisticated and experienced;[19]

(b) detection is difficult;[20]

(c) there may be a multitude of potential victims;[21]

(d) the powerlessness of victims who may constitute the "vast majority of shareholders" who "miss out on value" being "Mums and Dads" with

---

18 *Re De Gouveia*, above n 7, at [13]; and *Re Cartaway Resources Corp* 2004 SCC 26, [2004] 1 SCR 672 at [52]–[62].

19 *Re Podorieszach* 2004 ABASC 567 at [19(a)] and [19(b)].

20 *Monetary Authority of Singapore v Tan Chong Koay* (2011) MSCLC 80-009 at [96].

21 *Director of Public Prosecutions (Cth) v Couper* [2013] VSCA 72, (2013) 41 VR 128 at [108].

relatively less information and who are "people on the outer ring of the market";[22]

(e) market participants have a privileged position in the market;[23]

(f) pricing information is fundamental and can be expected to influence other investors;

(g) market manipulation affects market integrity and investor confidence;[24]

(h) market manipulation may promote likely investor withdrawal affecting in turn prices, liquidity and cost of capital;[25]

(i) industry expectations are relevant in that the imposition of lower penalties than the industry expects lessens standards and leads the industry to think a lack of vigilance will not be taken seriously (albeit that excessive penalties reduce respect for disciplinary processes);[26]

(j) prevention, not punishment, is the regulatory aim[27] (although this may be restricted in its correctness to administrative sanctions as opposed to court ordered penalties); and

(k) prevention is achieved as a flow on effect of sufficient specific deterrent penalties focussing on the individual to set an example to the wider industry through a concomitant "deterrence message" (i.e. general deterrence).[28]

---

22 Peter McClellan "White Collar Crime: Perpetrators and Penalties" (Keynote Address to the Fraud and Corruption in Government Seminar, University of New South Wales, 24 November 2011) at 25.

23 *Re Lamoureux* (2002) ABSECCOM REA – 901950.1; *Lamoureux v Alberta (Securities Commission)* 2002 ABCA 253, 317 AR 237; and *Re Podorieszach*, above n 19.

24 *Re Podorieszach*, above n 19.

25 *Re Podorieszach*, above n 19.

26 *Investment Dealers Assn of Canada v Kasman* 32 OSCB 5729, 2009 CarswellOnt 4083.

27 *Re Lamoureux*, above n 23, at [11]-[12]; and *Re MRS Sciences Inc* 37 OSCB 5611, 2014 CarswellOnt 7794.

28 *Re MRS Sciences Inc*, above n 27; and *Re Blackmont Capital Inc* [2010] IIROC 57, 2010 CarswellNat 6316.

The nature and extent of the contravention

[37] Mr Corlett submitted that the contravention only involved limited trading during two days. The timeframes were short (in some instances minutes). He submitted such a short timeframe was an extenuating circumstance favouring a lesser penalty and could be contrasted with other cases where the manipulative conduct took place over months or even years.

[38] While I accept that the contravention was limited to the trading which occurred on two days, the Court has found it was deliberate conduct by a very experienced market trader in an attempt to take advantage of parties on the other side of the transaction. Mr Warminger has 16 years experience in equity markets and had been recognised as the INFINZ fund manager of the year for three years preceding 2014. He was trusted by Milford to conduct a substantial part of the trades for its funds. So while the breach was not ongoing as in a number of other cases, it is still serious.[29] It was in relation to two different stocks on two separate occasions and was carried out for different purposes in each case.

The likelihood, nature and extent of any damage to the integrity or reputation of the NZX because of the contravention

[39] While Mr Corlett submitted it was unlikely the two instances of contravening conduct will materially damage the reputation and integrity of New Zealand securities markets long term, he properly acknowledged that any contravening conduct has the potential to adversely affect confidence in the New Zealand market. It is inevitable that findings of market manipulation will attract publicity in the business media which will have an adverse effect on confidence in the New Zealand market both domestically and internationally.

[40] The limited number of stocks and limited capitalisation of the NZX is a further relevant factor in this case. The NZX relies on its reputation for integrity to attract overseas investors. Any adverse publicity about the market's reputation will potentially have a serious effect on such potential investment and growth.

---

[29] *Re Myatovic & Lowe* [2013] IIROC 17, 2013 CarswellNat1501; *Re Anderson* 2007 BCSECCOM 350*;* and *Visser v Financial Services Authority* [2011] UKUT B37 (TCC).

Nature and extent of any gains made by Mr Warminger because of his contravention

[41] I accept there was no particular material financial gain of any significance to Mr Warminger or to the funds under his operation from his contravening conduct. At most a gross profit of $16,000 was made on the FPH transaction. The lack of financial gain in this case may be contrasted with other cases.[30]

[42] In relation to the ATM trades Mr Warminger was under-performing against benchmark and as such was under pressure.

[43] While there may have been no significant financial gain from his conduct, there were personal gains from Mr Warminger's point of view, to the extent that he personally came out ahead as a consequence of the deals, particularly the FPH deals. As noted by the Court in its judgment:[31]

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

The circumstances in which the contravention took place

[44] Mr Corlett emphasised that the contraventions constituted a small fraction of Mr Warminger's trades over a number of years. Mr Warminger traded in the order of 250 trades a week, around 3,500 trades per year. He also suggested there was no attempt by Mr Warminger to conceal his trading. Mr Warminger believed the trades were monitored. Again the above passage from the judgment provides some

---

30 *Australian Securities and Investments Commission v Soust (No 2)* [2010] FCA 388, (2010) 76 ACSR 1; and *Re Podoriesach*, above n 19.

31 *Financial Markets Authority v Warminger*, above n 1.

explanation for the circumstances in which the trading took place. Also, as noted, he was under some performance pressure at the time of the ATM trading.

Previous similar conduct

[45] Mr Smith accepted that Mr Warminger has not been found to have contravened the Act in the past, but noted that white collar offending such as this is difficult to detect. He submitted that personal circumstances should be given less weight in cases of market manipulation unless there have been prior infractions. While there is some force in that point and a literal interpretation of s 42Y(f) might support an argument that only previous contravening conduct is a mandatory consideration, the fact Mr Warminger has never been found to have engaged in similar conduct must be relevant to the overall penalty. Even if not taken into account at this stage of the exercise, Mr Warminger should be entitled to a credit on the basis that there have been no previous adverse findings against him.

Relationship of the parties to the relevant transactions

[46] Mr Corlett criticised the actions of Goldman Sachs in relation to the FPH trading, noting they were on the other side of the so-called "ping pong" trades. That was part of the defence raised at trial. The short point is that the Court has found Mr Warminger's trading contravened the Act. It is he who is before the Court for the penalty to be assessed.

[47] While the majority of the trades and the crossings off-market were with other brokers, ultimately his actions affected a number of NZX investors.

[48] However I do not place particular weight on this consideration. It is more likely to be relevant and may significantly affect the penalty where the manipulator has a direct relationship with the shares traded, as for instance in *Re Podorieszach* where the manipulator had a major investment in the company.[32]

---

[32] *Re Podorieszach*, above n 19.

Other considerations

[49] As noted, the considerations under s 42Y are not exclusive. I also take into account that Mr Warminger will face an automatic five year ban from management (subject to leave of the Court).[33]

[50] Finally I observe that if Mr Warminger had been prosecuted, the criminal penalty for his actions would have been a maximum fine of $300,000, or five years imprisonment for each contravention.

Starting point

[51] Mr Smith submitted the Court should adopt a starting point of $1,600,000 for the contraventions in this case. He arrived at that figure by taking 50 per cent of the maximum available and reducing it to give effect to the totality principle. He submitted that was consistent with the legislative intent that penalties must act as a deterrence and also having regard to Milford's settlement.

[52] Mr Corlett submitted that, having regard to the statutory criteria and the payment by Milford, an appropriate and realistic starting point for sentence was between $250,000 and $350,000. The figures in that range equate to approximately 12.5 and 17.5 per cent of the maximum he argued for of $2,000,000.

[53] Mr Corlett supported that submission by reference to a schedule of penalties imposed in overseas jurisdictions. In Canada and Australia, the courts have imposed a number of penalties of between $60,000 and $80,000, with other penalties ranging from $20,000 to $500,000. However, in those cases the maximum penalty was at times $200,000 and was never more than $1,000,000. In the case where a $20,000 penalty was imposed, the maximum penalty was only $100,000. The quantum of those penalties can be contrasted with the penalties imposed in the United Kingdom where there is no maximum. The penalties in the United Kingdom cases range

---

[33] Securities Markets Act, s 43I.

between £290,000 and £8,000,000. A number of penalties were imposed on individuals in the range of £100,000 to £950,000.[34]

[54] Mr Corlett referred particularly to the case of *Re Anderson*, a decision of the Alberta Securities Commission.[35] Mr Anderson was a 30 year old fund manager who had been found to have been trading in a way to have resulted in artificial prices. Mr Anderson and the investigator proposed a penalty of $50,000 together with an order towards the costs of prosecution of $125,000. Mr Anderson was also barred from trading for five years. The Court emphasised the need for deterrence.

[55] There are however a number of differences between Mr Anderson's case and the present. Importantly, it was particularly relevant that Mr Anderson was a relatively inexperienced trader. Next, the maximum penalty per trade was $1,000,000. Finally, importantly, in that case the penalty was effectively agreed.

[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.

---

[34] *Financial Markets Authority v Henry*, above n 4; *Australian Securities & Investments Commission v Soust (No 2)*, above n 30; *Re de Gouveia*, above n 7; *Myatovic & Lowe*, above n 21; *Re Boock* 35 OSCB 1745, 2012 CarswellOnt 1281; *Re Nott* 2011 IIROC 26; *Re Anderson* 2007 ABASC 369; *Re Siddiqui* 2005 BCSECCOM 575; *Re Podorieszach*, above n 19; *Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch); *7722656 Canada Inc (formerly carrying on business as Swift Trade Inc) v Financial Services Authority* [2013] UKUT B2 (TCC); *Chaligné v Financial Services Authority* [2012] UKUT B21 (TCC); *Massey v Financial Services Authority* [2011] UKUT B4 (FS); *Visser v Financial Services Authority* above n 29; Financial Services Authority *Final Notice to Rameshkumar Satyanarayan Goenka* (17 October 2011); and *In the Matter of Hold Brothers On-Line Investment Services, LLC* SEC Release No. 30213.

[35] *Re Anderson*, above n 34.

Personal considerations

[58] There are no particular personal aggravating features, aside from those that have been taken into account as an aspect of Mr Warminger's culpability or under the s 42Y considerations.

[59] In relation to Mr Warminger's mitigating personal circumstances, I take into account that this is the first time he has been found to have contravened the Act.

[60] I accept that the finding Mr Warminger has manipulated the market has had a major impact on him. His entire working life of almost 20 years has been in the financial sector, either as analyst or fund manager. Given the publicity associated with these proceedings and the outcome, that career will not be open to him in the future.

[61] That however is always likely to be the situation in cases of this nature. What makes Mr Warminger's position different is that his recent medical issue has meant he is unable to carry out other employment for which he is qualified, at least for a significant period of time. I take into account his medical condition and its effect on him as disclosed in the affidavits on file.

[62] The personal mitigating factors support a meaningful reduction in the penalty. To recognise that I deduct 20 per cent or $100,000.

Result

[63] The end penalty imposed on Mr Warminger for the two contraventions is $400,000 in total. In accordance with s 42Z I direct that it is first to be applied to the FMA's actual costs.

_____

Venning J