

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

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

**CIV-2019-404-647  
[2023] NZHC 766**

BETWEEN FINANCIAL MARKETS AUTHORITY  
Plaintiff

AND WEI (WALKER) ZHONG  
First Defendant

LEI (REGINA) DING  
Second Defendant

ZHONGYANG (SEAN) MENG  
Third Defendant

JIASHUN (SAM) QIAN  
Fourth Defendant

Hearing: 22, 23, 24, 25 & 28 February 2022, 1, 2, 3, 7, 8 & 9 March 2022

Appearances: N R Williams, S Chapman and A Wiltshire for the plaintiff  
W W Zhong as self-represented first defendant  
L R Ding as self-represented second defendant

Judgment: 6 April 2023

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**JUDGMENT OF ROBINSON J**

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*This judgment was delivered by me on 6 April 2023 at 5:00pm  
pursuant to Rule 11.5 of the High Court Rules*

.....  
*Registrar/Deputy Registrar*

*Solicitors/counsel:*  
Meredith Connell  
S Chapman - FMA  
N R Williams, Britomart Chambers, Auckland

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## Introduction

[1] Oceania Natural Limited (ONL) was incorporated on 27 May 2015. It marketed New Zealand manuka honey, Cook Island noni juice and related products, primarily in China. On 31 March 2016 ONL was listed on the NXT Market. It had 25,832,838 shares on issue with a share price of \$0.64, giving it a notional market value of approximately \$16.03 million.

[2] The first defendant, Mr Zhong, was executive director and chief executive officer of ONL. The second defendant, Ms Ding, was ONL's sales and marketing manager. Mr Zhong and Ms Ding are married. As trustees (and beneficiaries) of the Zhong Family Trust, together they held 61.69 per cent of ONL's shares. At the time of listing these shares had a market value of approximately \$10.2 million.

[3] In its Second Amended Statement of Claim (2ASoC) the plaintiff (FMA) alleges that at various times between April 2016 and April 2017:

- (a) Mr Zhong and Ms Ding (together with others) manipulated the market for ONL shares in contravention of s 265 of the Financial Markets Conduct Act 2013 (FMCA) (market manipulation causes of action);<sup>1</sup> and
- (b) Mr Zhong and Ms Ding contravened s 297 of the FMCA by failing to disclose their acquisition or disposal of relevant interests in ONL shares, including the acquisitions or dispositions that are the subject of the market manipulation causes of action (non-disclosure causes of action).<sup>2</sup>

[4] Mr Zhong and Ms Ding deny the allegations against them.

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<sup>1</sup> 2ASoC: Second, Fourth, Sixth, Eighth, Tenth, Twelfth and Fifteenth causes of action.

<sup>2</sup> 2ASoC: First, Third, Fifth, Ninth, Eleventh, Thirteenth, Sixteenth and Seventeenth causes of action. The Seventh and Fourteenth causes of action are against other defendants and are not dealt with in this judgment.

## **About the defendants and other relevant individuals**

### *The defendants*

[5] Mr Zhong has a Doctoral Degree in Law from China and a Master of Business Administration (MBA) degree from Singapore.

[6] Ms Ding also has an MBA from Singapore. ONL's listing document listed her as one of two senior managers at ONL and described her as follows:<sup>3</sup>

### **Lei-(Regina) Ding – MBA – Sales and Marketing Manager**

Regina joined ONL in October 2015 after 15 years in sales and marketing roles for international corporations. Regina was the chief representative in the Far East for German listed company, Gerry Weber International AG (GWIG), and led the team responsible for supply chain management, including purchasing, sales and marketing from July 2005 to April 2011.

Regina holds an MBA degree from Singapore.

[7] Prior to ONL's listing Ms Ding had sold her business, Rich Garden Limited, to ONL. Ms Ding provided ONL with vendor finance as a result of which it owed her approximately \$459,000. Ms Ding was also the sole director and together with Mr Zhong one of two shareholders of a company with related party relationships with ONL.

### *Ms Ding's parents: Mr Ding and Ms Zeng and their ASB accounts*

[8] Ms Ding's father, Mr Ding, and her mother, Ms Zeng, live together in China. When ONL listed they each held 15,600 shares in ONL.

[9] Mr Ding and Ms Zeng each have a bank account with ASB Bank Limited (ASB). Ms Ding was authorised by ASB and her parents to use those accounts, which she did. Ms Ding had an EFTPOS card attached to her mother's account. Bank records show that between 6 August 2016 and 27 June 2017 the account was used almost daily to purchase various items around Auckland and to pay school fees. These

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<sup>3</sup> The other person listed as a senior manager was Malcolm Lindeque, the chief financial officer of ONL at the time. Mr Lindeque was a witness for the FMA in this proceeding.

payments amounted to approximately \$13,000. Ms Zeng was not in New Zealand during this time.

[10] Mr Ding and Ms Zeng also held accounts with ASB Securities Limited (ASB Securities) through which they could trade shares on the NXT Market, including ONL shares. Neither Mr Zhong nor Ms Ding were authorised by ASB Securities to use these securities accounts, but on a number of occasions they did use them to trade ONL shares. The offers and trades that Mr Zhong and Ms Ding made on Mr Ding's and Ms Zeng's accounts (respectively) are the subject of these proceedings.

[11] Mr Zhong was able to trade on Mr Ding's account because he knew and used all the details required to operate it, namely: Mr Ding's ASB securities account number; his Common Shareholder Number (CSN); his Faster Identification Number (FIN); his internet banking login name; and his birthdate. Whenever Mr Zhong telephoned ASB securities to trade ONL shares on Mr Ding's securities account he posed as Mr Ding. He made those calls on a telephone registered in the name of his daughter who was five years old at the time.

[12] Similarly, Ms Ding was able to trade on Ms Zeng's securities account because she knew and used the relevant details: Ms Zeng's account number, CSN, FIN, internet banking login name and birthdate. Whenever Ms Ding telephoned ASB Securities to trade ONL shares on Ms Zeng's securities account she posed as Ms Zeng.

[13] Mr Zhong and Ms Ding admit using Mr Ding's and Ms Zeng's securities accounts to offer and trade ONL shares, but they plead that they did so on Mr Ding's and Ms Zeng's behalf and in accordance with their instructions.

#### *Other traders*

[14] Trades in ONL shares that are the subject of this proceeding also involved other individuals known to Mr Zhong and Ms Ding. In particular, Sean Meng (Mr Meng), Sam Qian (Mr Qian) and Wenbin Zhu (Mr Zhu).

[15] Mr Meng was a non-executive director of ONL. Upon listing he held 8.02 per cent of ONL shares. He was also a trustee of the Zhong Family Trust, together

with Mr Zhong and Ms Ding and held ONL shares in that capacity. Mr Meng was a chartered accountant and a majority shareholder of an accounting business, Meng & Associates Limited (Meng & Associates).

[16] Mr Qian held approximately 2.8 per cent of the shares in ONL. He was a chartered accountant employed by Mr Meng at Meng & Associates. He became a shareholder in that company on 10 March 2016. Mr Qian is married to Ms Lu who is also an accountant. Mr Qian and Ms Lu held a joint account at ASB, and a trading account at ASB Securities (Qian/Lu securities account).

[17] During 2016 Meng & Associates operated from the same premises as ONL. Meng & Associates carried out accountancy work for ONL and related companies, and for Mr Zhong and Ms Ding personally.

[18] Mr Zhu resides in China. He is a friend of Ms Ding's. At relevant times he held approximately two per cent of the ONL shares.

#### *The NXT Market*

[19] The NXT Market was a licenced financial product market designed for small- and medium-sized companies in a growth phase. It was operated by NZX. The NXT Market was disbanded in 2019 at which time NXT issuers moved to the NXT Main Board.

[20] The NXT Market had a set of simplified listing rules and a prescribed disclosure regime. The simple set of rules was intended to ensure smaller companies without extensive legal resources understood what was required of them when operating in a publicly listed environment. The more onerous continuous disclosure obligations of issuers listed on the NZX Main Board did not apply, but statutory disclosure obligations on substantial shareholders, directors and senior managers did. Prohibitions on insider trading and market manipulation also remained.

### *How the NXT Market worked*

[21] NZX provided the systems, facilities and services for lodging quotations and orders for trading and reporting trades on the NXT Market.

[22] An order to buy a certain number of securities at a particular price is a “bid”. An order to sell a certain number of securities at a particular price is an “offer”. When a bid and an offer match there is a “trade”.

[23] The difference between the highest bid and the lowest offer at any particular time is called the “spread”.

### *NXT Trading Day*

[24] The NXT Market hours were from 10:00 am until 4:30 pm. These were shorter than the NZX Main Board hours. An NXT Market trading day comprised of: a pre-opening session (10:00 am to 11:00 am); a normal trading session (11:00 am to 3:45 pm); a pre-close session (3:45 pm to 4:00 pm); an adjust session (4:00 pm to 4:30 pm); and an inquiry session (4:30 pm to 10:00 am the following day).

[25] During a pre-opening session orders could be entered, withdrawn or amended, but no orders were matched by the trading system.

### *Market Maker*

[26] All companies listed on the NXT including ONL received market making services. These market making services were intended to give the market confidence there would be an active buyer and seller of shares in listed NXT companies, thereby providing depth and liquidity in the market for those shares.

[27] NZX appointed First NZ Securities Limited (First NZ) as a market maker on the NXT, including in respect of ONL shares. First NZ was required to provide bid and offer quotations in ONL shares in accordance with an agreement with NZX.

[28] First NZ was required to provide at least one bid and one offer in the market during certain periods each day. Each bid and offer had to be for not less than a



minimum quantity of shares. The minimum quantity varied depending on the share price at the time. When the share price was between \$1.01 - \$2.00 the minimum quantity was 7,500. When a share price was more than \$2.00 the minimum quantity was 3,500 shares.

[29] The difference between a market maker's bid and offer could not exceed a maximum spread. The maximum spread also varied depending on the share price. When the share price was between \$1.01 and \$2.00 the maximum spread was \$0.07. When the share price was \$2.01 and higher the maximum spread was \$0.10. First NZ had to ensure the spread in the market was not more than the maximum spread at any time during the market making period.

[30] When the market maker's order was matched, it had to replace that order within 30 seconds. The new order could be at a different price if the market had moved, but always had to meet the minimum quantity and maximum spread requirements during the market making period.

#### *NXT Market Rules*

[31] Companies listed on the NXT had listing agreements requiring them to comply with the NXT Market Rules.

[32] Rule 20 of the NXT Market Rules required the board of each NXT company to adopt an insider trading policy that, amongst other things, prohibited directors or employees contravening insider trading or market manipulation legislation. Directors and employees were also required to obtain company approval before trading in shares in that NXT company. The NXT company was required to notify NZX of any breach of the required policy.

#### *ONL's Trading Policy and restrictions on trading ONL shares*

[33] In advance of listing ONL the ONL Board adopted a set of governance protocols which included the NXT Financial Products Trading Policy and Guidelines. ONL's Trading Policy applied to all directors and employees, including Mr Zhong and Ms Ding. It required them to seek consent in writing before trading in ONL shares,

and to advise the Chief Financial Officer (CFO) of the trade promptly after its completion. The policy also required those to whom it applied to comply with any disclosure obligations they might have under the FMCA and the NXT Listing Rules.

[34] CM Partners helped ONL prepare for listing. They helped prepare the ONL Trading Policy and other governance documents which they discussed with the ONL Board. They also arranged a compliance and NXT workshop on 13 April 2016, shortly after listing. ONL's solicitors also gave a briefing concerning ONL's obligations under the NXT Market Rules and FMCA. In his subsequent interviews with the FMA Mr Zhong confirmed he understood he could not buy ONL shares whenever he wanted to do so, and that he could not purchase ONL shares for his friends. For her part Ms Ding confirmed she understood the Trading Policy required her to speak with the CFO before she traded in ONL shares.

[35] The Trading Policy contained examples of prohibited conduct including market manipulation. It explained:

**Market manipulation**

Engaging in behaviour which constitutes "market manipulation" is prohibited by the Financial Markets Conduct Act 2013 (FMCA). Penalties for breaching the market manipulation provisions contained in the FMCA may include criminal liability, fines and imprisonment.

It is possible to commit market manipulation inadvertently, for example, in circumstances where a person *ought to have known* that their behaviour could be construed as market manipulation. As such, directors, officers, employees and contractors of ONL should:

- (a) Familiarise themselves with types conduct [sic] which could be considered market manipulation; and
- (b) Take active steps to avoid disseminating information or trading securities in ways which could be construed as market manipulation.
- (c) The types of behaviour which could be categorised as market manipulation include:

...

- *Misleading trading*: you must not do, or omit to do, anything which will have (or will likely have) the effect of creating a misleading appearance of supply, demand, price or value of securities in ONL (or any other publicly listed entity). This could include:

1. *Wash trades*: sale and purchase of securities where there is no change in actual ownership of the security, e.g. from one person to another, where both companies are owned or controlled by the same person;
2. *Improper matched orders*: transactions where both buy and sell orders are entered at the same time, with the same price and quantity by different colluding parties;
3. *Advancing the bid*: increasing the bid for a security to increase its price;
4. *Marking the close*: buying or selling securities at the close of the market in order to affect the closing price of the security concerned;
5. *Pump and dump*: engaging in buying activity which results in increasingly higher prices for securities, followed by selling the securities at the higher prices.

If you are in doubt as to whether your communications or trading activity could be construed as market manipulation you should consult the chief financial officer or company's secretary before trading or sharing information concerning the Company with external parties.

### **Market Manipulation Causes of Action**

[36] The market manipulation causes of action against Ms Ding relate to orders and trades she made on Ms Zeng's securities account, pretending to be her.<sup>4</sup> In two causes of action the FMA claim that Mr Zhong contravened s 265 directly when he made offers and trades on Mr Ding's securities account, pretending to be him.<sup>5</sup> Three of the market manipulation causes of action against Mr Zhong are that he was involved in Ms Ding's contraventions pursuant to s 533 of the FMCA, essentially as an accessory.<sup>6</sup> Finally, in the fifteenth cause of action the FMA alleges that Mr Zhong was involved in a contravention of s 265 by Mr Qian.

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<sup>4</sup> Second, Fourth, Sixth, Eighth, Tenth and Twelfth causes of action.

<sup>5</sup> Tenth and Twelfth causes of action.

<sup>6</sup> Fourth, Sixth and Eighth causes of action.

### *Onus and standard of proof*

[37] The usual rules of Court and rules of evidence and procedure for civil proceedings apply, including the standard of proof.<sup>7</sup> The FMA has the onus of proving its allegations. The standard of proof is the balance of probabilities.

[38] In *FMA v Warminger*<sup>8</sup> Venning J applied *Z v Dental Complaints Assessment Committee* in which the Supreme Court held that “the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard”.<sup>9</sup> Whilst accepting that there is flexibility within the civil standard counsel for the FMA, Mr Williams, emphasised that the civil standard is lower than the criminal standard and that the difference is “no mere matter of words: it is a matter of critical substance”.<sup>10</sup> The degree of certainty needed to support a criminal conviction is not required.

### *Elements of the market manipulation claims*

[39] In each of the seven market manipulation causes of action the FMA alleges that Mr Zhong and/or Ms Ding breached s 265 of the FMCA which provides as follows:

#### **265 False or misleading appearance of trading**

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 and 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.

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<sup>7</sup> Financial Markets Conduct Act 2013, s 509.

<sup>8</sup> *FMA v Warminger* [2017] NZHC 327, (2017) 11 NZCLC 98-050 [*Warminger*] at [32] – [33]. In this case Venning J was concerned with s 42ZI of the Securities Markets Act 1988, which is the equivalent to s 509 of the FMCA.

<sup>9</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [102].

<sup>10</sup> *Rejtek v McElroy* [1965] HCA 46, (1965) 112 CLR 517 at 521.

[40] As such, the FMA must prove to the civil standard that:<sup>11</sup>

- (a) the relevant defendant did an act, namely placed orders for ONL shares into the trading system; and
- (b) at the time those trading 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 ONL shares; or
  - (ii) supply of, demand for, price for trading in, or value of, ONL shares; and
- (c) the relevant defendant ought reasonably to have known that their orders were likely to have that effect.

*Accessory liability*

[41] Section 533 of the FMCA provides for accessory liability as follows:

**Involvement in contraventions**

- (1) In this Act, a person is **involved in a contravention** if the person –
  - (a) has aided, abetted, counselled or procured the contravention; or
  - (b) has induced, whether by threats or promises or otherwise, the contravention; or
  - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
  - (d) has conspired with others to effect the contravention.

[42] Section 533 is in essentially the same terms as s 83 of the Commerce Act 1986 and s 43 of the Fair Trading Act 1986. Authorities in relation to these statutory provisions confirm that they are to be applied in the same way as those governing

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<sup>11</sup> See also *Warminger*, above n 8, at [37], applying s 11B of the Securities Markets Act 1988, which for present purposes is in essentially the same terms as s 265 of the FMCA.

accessory liability in the criminal law. As accessory will only be liable if he or she intentionally participates in a contravention.<sup>12</sup>

#### *Act or omission*

[43] I accept Mr Williams' submission that the placing of an order to buy or sell shares may itself be sufficient to constitute market manipulation notwithstanding that those offers may not lead to an actual trade.<sup>13</sup> Offers to buy or sell shares can affect the appearance in the market of the supply or demand for shares.<sup>14</sup>

#### *Likely*

[44] The FMA has explicitly pleaded all the market manipulation causes of action on the basis of alleged *likely* effects, as well as alleged actual effects.

[45] In *Warminger*, Venning J reviewed the authorities and concluded that in this context: "'likely' envisages an effect that might well happen, in other words that the trade might well create or cause the creation of a false and misleading appearance in the market".<sup>15</sup> I also agree with Mr Williams' submission that in the context of s 265 which has the purpose of preventing false and misleading appearances in the market "likely" does not mean "more likely than not".<sup>16</sup>

#### *Creation of a false or misleading appearance*

[46] In *Warminger* Venning J noted that "effect" appears to have a limited purpose. The section works without it.<sup>17</sup> His Honour considered that the option of the trade

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<sup>12</sup> See *NZ Bus Limited v Commerce Commission* [2008] 3 NZLR 433 (CA) at [260]; and *Specialised Livestock Imports Ltd v Borrie* CA72/01, 20 September 2002, at [155] – [157].

<sup>13</sup> *Financial Markets Authority v Henry* [2014] NZHC 1853 at [41].

<sup>14</sup> See also *Financial Conduct Authority v Da Vinci Invest Ltd* [2015] EWHC 2401 (Ch), [2015] WLR (D) 475 (Ch) at [22] concerning "layering" at "spoofing", which are manipulative trading practices where a trader places order with no genuine intention that they will be executed.

<sup>15</sup> *Warminger*, above n 8, at [40].

<sup>16</sup> *Director of Public Prosecutions (DPP) (Cth) v JM* [2012] VSCA 21, (2012) 37 VR 1 at [349]; *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission (ACCC)* [2003] FCAFC 193, (2003) 131 FCR 529 at [247]; and in the context of the Commerce Act 1986, *Commerce Commission v Port Nelson* (1995) 6 TCLR 406 (HC) at 432.

<sup>17</sup> *Warminger*, above n 8, at [41].

“causing the creation” confirms that the false or misleading appearance can be created directly or indirectly.<sup>18</sup>

[47] Venning J also rejected the proposition that a transaction is necessarily a genuine transaction if one party to it is a genuine buyer or seller.<sup>19</sup> If a trader’s purpose in offering to buy shares is to manipulate the market, the fact that the counterparty to the resulting trade has genuinely offered to sell shares does not mean that the trade is not manipulative.

#### *Active trading*

[48] Acts which convey a false or misleading appearance of increased trading activity can be manipulative and contravene s 265. Mr Solarz gave expert evidence for the FMA. He explained the extent to which a share is traded – its liquidity – is a factor that will affect investment decisions. All other things being equal, a share that is more actively traded is perceived to be a better investment than a share that is not. In turn this will impact on the relative demand, supply and price of those shares.

#### *Knew or ought reasonably to have known*

[49] The FMA must prove that each defendant either knew or ought to have known that their actions would have, or be likely to have, the effect of creating or causing the creation of the false or misleading appearance alleged. Actual knowledge can be inferred from the defendants’ actions. Alternatively, the FMA may prove constructive knowledge, which is an objective standard.<sup>20</sup>

#### *Purpose*

[50] The FMA is not required to prove intent. Nor is it required to prove the purpose behind a defendant’s trades. However, an assessment of purpose can be relevant to determining whether particular actions were manipulative. A trader’s purpose in making an offer is relevant to determining whether it has caused a false or misleading appearance of demand, supply, price and/or trading in the market. In *Warminger*

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<sup>18</sup> At [73].

<sup>19</sup> At [66].

<sup>20</sup> At [75].

Venning J observed that a trader's purpose may be the key factor that distinguishes culpable manipulation from a genuine trade.<sup>21</sup>

[51] A trader's purpose may also be relevant to assessing her actual or constructive knowledge.

### *Section 267 – Presumptions*

[52] In certain circumstances a person will be deemed to have contravened s 265. Section 267 of the FMCA relevantly provides:

#### **267 Persons treated as contravening false or misleading appearance of trading prohibition**

- (1) A person (**A**) must be treated as contravening section 265 if A is directly or indirectly a party to trading in the quoted financial products of a listed issuer from which no change in beneficial ownership results.  
  
...
- (3) A person (**A**) must be treated as contravening section 265 if—
  - (a) A has made an offer to trade the financial products of a listed issuer; and
  - (b) either A or, to A's knowledge, an associated person of A has made or proposes to make an opposite offer (the **opposite offer**) to trade financial products of the listed issuer; and
  - (c) the opposite offer substantially matches A's offer as to the number and price of the financial products.

[53] "Associated person" is defined in s 12 of the FMCA which relevantly provides:

#### **12 Meaning of associated person and related body corporate**

- (1) In this Act, a person (**A**) is **associated** with, or an **associated person** of, another person (**B**) if—  
  
...
  - (b) A and B are relatives or related bodies corporate:  
  
...
    - (e) A and B are acting jointly or concert:

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<sup>21</sup> At [61].



- (f) A acts, or is accustomed to act, in accordance with the wishes of B (or vice versa):
- (g) A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B (or vice versa):
- ...
- (i) there is another person with which A and B are both associated.

[54] Trades of the sort described in s 267(1) are colloquially referred to as wash trades. Trades of the sort described in s 297(3) are colloquially referred to as matched trades. At times these terms are used interchangeably, and their meanings can overlap. What they have in common is a false or misleading appearance of genuine transactions or market activity.

[55] The FMCA does not define beneficial ownership. I consider that term further below in the context of the twelfth cause of action in which the FMA alleges that the presumption in s 267(1) applies to a trade between Mr Zhong and Ms Ding (carried by them on each of Ms Ding's parents securities accounts).

[56] Nor does the FMCA define precisely when offers by a person and an associated person will "substantially match" for the purposes of the presumption set out in s 267(3). I accept Mr Williams' submission that the term allows for something less than an exact match and will be a question of degree in each case. As always, the phrase is to be interpreted in light of the underlying purpose of the FMCA.

## **Evidence**

### *The FMA's evidence*

[57] The FMA called Mr Keeley who was a director of ONL during the relevant period. He gave evidence about the ONL Board and the internal policies ONL implemented upon listing. Mr Keeley's evidence is that he was not aware of anyone (including Mr Zhong or Ms Ding) ever requesting permission to buy or sell ONL shares.

[58] Mr Preston of CM Partners, who assisted ONL with its listing on the NXT Market, gave evidence about ONL's providing governance documentation and compliance advice.

[59] Mr Lindeque was the CFO at ONL during the relevant periods. He gave evidence concerning Mr Zhong and Ms Ding's roles within ONL. He explained ONL's company policies concerning the trading of ONL shares.

[60] Ms Ready is a senior manager at ASB Securities. She gave evidence about the trading on the relevant ASB Securities accounts, and the suspension of the Ding and Zeng securities accounts after Mr Zhong and Ms Ding used them to trade on 19 and 20 October 2016.

[61] Mr van Amelsfort is the chief executive of NZX Regulation Limited. He gave evidence about the NXT Market and the role of the market maker.

[62] Ms Costello is a senior FMA investigator. She gave a thorough explanation of the FMA investigation and her analysis of trading data, telephone data, bank account information and WeChat communications.

[63] Another FMA witness was Ms Harris, a Senior Forensic Accountant who explained her analysis of banking transactions between Mr Zhong, Ms Ding, others associated with ONL and the accounts held in the name of Ms Ding's parents. Amongst other things she concluded that neither Mr Ding nor Ms Zeng's bank accounts were accessed by them at the relevant times.

[64] Yue Wei is an English/Mandarin translator and interpreter. He gave evidence of his translation of documents and recordings from Mandarin to English, including WeChat messages between Mr Zhong, Ms Ding, Mr Qian and Mr Zhu.

#### *FMA's expert witnesses*

[65] The FMA called two expert witnesses, Mr Solarz and Dr Aitken. Mr Solarz is an experienced equities trader. He began working on the Auckland Stock Exchange trading floor in 1986. He worked as a combined screen-based trader and sales trader

for various firms before moving to Hong Kong in 2000 where he traded equities and futures in Asian markets until 2016. He has been licensed by the Hong Kong Stock Exchange, the Hong Kong Securities and Futures Commission and the National Association of Securities Dealers in the United States.

[66] Mr Solarz returned to New Zealand in 2016. He was initially instructed in relation to this case in October 2017. In October 2018 Mr Solarz was employed by NZX and is now Head of Market Surveillance at NZX Regulation Limited.<sup>22</sup>

[67] Mr Solarz's view is that market manipulation is probable whenever there is a trade or a series of trades with no legitimate economic rationale. That is, trades that do not add to the performance of a portfolio or the value of any given shareholding, or which are not otherwise made for any legitimate reason. By way of example Mr Solarz refers to:

- (a) the sale and purchase (or attempted sale and purchase) of a small number of shares on which, after trading costs, the trader loses money; or
- (b) the purchase by a large existing shareholder of a minimal number of shares, for example to ensure a last sale stays at a particular price; or
- (c) "wash sales", where two substantially related parties simultaneously buy and sell the same stock to give the stock the appearance that it is actively trading.

[68] Having reviewed trading data relating to the offers and trades that are the subject of this proceeding, together with transcripts of phone calls to ASB Securities and WeChat messages between Mr Zhong, Ms Ding and others, Mr Solarz expresses the opinion that all their impugned offers and trades amount to market manipulation.

[69] Dr Aitken is the FMA's second expert witness. He has a PhD from the University of New South Wales in relation to his thesis concerning deregulation of the

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<sup>22</sup> Mr Solarz confirms that NZX referred this matter to the FMA before he was employed.

Australian Securities Industry. Until his retirement in 2019 he was the Chief Executive Officer and Chief Scientist of the Capital Markets Cooperative Research Centre.

[70] Dr Aitken and his colleagues designed the SMARTS Real-Time Markets Surveillance System, which is now in use in more than 50 national exchanges and regulators (including NZX) and over 100 brokerages. They have also developed trading algorithms to help identify unusual trading circumstances indicative of the elements of market manipulation.

[71] Dr Aitken used these algorithms and the SMARTS surveillance system to test the relevant trading data relied on by FMA. He then considered the contextual evidence in the form of the WeChat messages, telephone discussions with ASB Securities and telephone records. He concluded that market manipulation had occurred in all the causes of action in which it was alleged.

[72] Whilst the evidence of Mr Solarz and Dr Aitken is helpful, ultimately it is for the Court to determine whether Mr Zhong and/or Ms Ding have contravened ss 265 and/or 297 of the FMCA as alleged.

*No evidence from the defendants*

[73] Mr Zhong and Ms Ding were highly critical of the FMA's evidence. They say it is unreliable and insufficient. However, they did not give or call evidence themselves.

[74] It is convenient to deal with three of Mr Zhong's and Ms Ding's arguments concerning FMA's evidence before analysing the FMA's case against them. First, Mr Zhong and Ms Ding assert that the WeChat messages between them and their associates and relied on by the FMA have not been verified and may have been corrupted. Secondly, they complain that relevant material on Ms Ding's laptop may have been unavailable. Thirdly, they suggest that any trading they carried out on Ms Ding's parents' securities accounts was on their behalf and in accordance with their instructions.

*WeChat messages*

[75] The FMA relies on WeChat messages between Mr Zhong and Ms Ding, and between each of them and Mr Qian, Mr Meng and Mr Zhu. The WeChat messages were extracted from various devices including those owned by Ms Ding and Mr Qian. They were translated by Mr Wei.

[76] The FMA's reliance on those WeChat messages is unsurprising given their contents. As will be seen, they tend to show that Mr Zhong and Ms Ding were colluding with each other and their associates to make offers and arrange trades in ONL for the purpose of boosting the listed price of ONL shares.

[77] However, Mr Zhong and Ms Ding submit that the FMA have not proven the "legality, completeness, accuracy and authenticity" of the WeChat records it obtained. They submit that the FMA has not "cross-verified" these messages to confirm that they were sent and/or were received by both parties to the communications. They complain that Ms Costello in cross-examination was unable to explain the process of extracting the WeChat messages, and that she could not personally guarantee the WeChat messages were "legal, complete, accurate and true". As such they say that the messages might have been tampered with and are therefore unreliable. As such they say that the WeChat records and expert and other evidence based on those records should be excluded.

[78] I do not accept these submissions. For the following reasons I accept Mr Williams' submissions that the WeChat messages are reliable.

[79] First, the WeChat messages were located on electronic devices obtained during the execution of search warrants by the FMA. This included Ms Ding's device, which held her messages sent and received from Mr Zhong. In cross-examination Ms Costello explained that the FMA did not have Mr Zhong's phone because he was in China when his home was searched, and when he returned to New Zealand he had a different phone.

[80] Secondly, the cloning and extraction of the messages from the devices was performed by technical experts. Ms Costello could not reasonably be expected to

describe the extraction process herself because she is not a technical expert. However, she confirmed that standard evidence handling procedures were applied. There is no reason to doubt her evidence, and there is nothing to suggest that the process of extracting the WeChat messages was performed incorrectly. The process of extracting and cloning data from devices so as to ensure the data could not be altered during the cloning process was described in the Agreed Statement of Facts dated 4 March 2022.<sup>23</sup>

[81] Thirdly, many of the WeChat messages relied on by the FMA describe accurately what actually happened in the market for ONL shares around the time those messages were sent. In this way, the market data corroborates the WeChat messages. For example, on 5 July 2016 a WeChat message from Mr Zhong to Ms Ding complains “that sucker has cancelled the [sell] order at 2.15 and put up at 2.10...”. That message was sent shortly after the market maker had in fact reduced its sell order from \$2.15 to \$2.10.<sup>24</sup> Similarly, on 3 April 2017 Ms Ding sent a message to Mr Zhu at 12:20 pm saying “...well, now someone is offering \$1.40, 2000 shares. You help me to buy, \$1.40 x 1000 shares, bye. Thanks”. All of which describes the trading occurred on that day, both before and after the message was sent.<sup>25</sup>

[82] Mr Williams also points out that the WeChat messages are contained in the common bundle. As such they are deemed to have been sent by their apparent authors and received by their apparent addressees, unless the Court directs otherwise.<sup>26</sup> Moreover, s 137 of the Evidence Act 2006 provides a presumption of accuracy for evidence produced by a device or technical process of a kind that ordinarily does what a party asserts it to have done.

[83] It is also significant that although Mr Zhong and Ms Ding made submissions challenging reliability of their WeChat messages, neither of them gave evidence that the messages were inaccurate. In the circumstances I consider this adds weight to the FMA’s evidence.<sup>27</sup> I asked Mr Zhong in closing whether he would accept that the

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<sup>23</sup> Agreed Statement of Facts, para [2.23].

<sup>24</sup> See [139] below in the context of the Eighth cause of action.

<sup>25</sup> See [178] below in the context of the Fifteenth cause of action.

<sup>26</sup> High Court Rules 2016, r 9.5(1).

<sup>27</sup> *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153] – [154]. Further Court of Appeal decisions have applied *Ithaca*: see *Robt Jones Holdings Ltd v McCullagh* [2018]

WeChat messages, if accurate, demonstrated market manipulation. Mr Zhong did not wish to make submissions on that particular point.

*Inability to access Ms Ding's laptop*

[84] During the course of the FMA's investigation the FMA obtained various devices, including Ms Ding's laptop. While Ms Ding's laptop was in the FMA's possession it was damaged. The FMA have compensated Ms Ding for that. Ms Ding submits that this left her without evidence that might be relevant to these proceedings. She also argued that relevant data may have been withheld. She submits this is contrary to the High Court Rules and a challenge to justice in New Zealand.

[85] On 4 March 2022, an Agreed Statement of Facts was filed dealing with this and other issues. Ms Costello was also cross-examined on the point. This confirms that no data has been recovered from Ms Ding's laptop. That is because the data on it and clone made of the data on it was inaccessible without a BitLocker recovery key which could not be located, including from Ms Ding.

[86] Mr Williams points out that it was only at trial that the defendants raised for the first time the allegation that the FMA may have withheld data from Ms Ding's laptop. He submits that the evidence and the procedural history of the proceeding shows that no data has been withheld.

[87] I accept that submission. Once again I also note that Ms Ding did not give any evidence or provide any other statement explaining what exculpatory material she considers there was or may have been on her laptop.

*Trades were based on instructions from parents*

[88] Thirdly, although Ms Ding admits placing orders on the Zeng securities account, she says that she did so on behalf of and in accordance with instructions given

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NZCA 358, [2020] NZCCLR 6 at [68]; *Khan v Shariff* [2018] NZCA 583 at [34]; and *Commissioner of Police v Law* [2021] NZCA 517 at [31].

by her mother.<sup>28</sup> Similarly, Mr Zhong admits placing orders to buy ONL shares on the Ding securities account but says this was on behalf of and in accordance with Mr Ding's instructions.<sup>29</sup>

[89] At the beginning of the trial Mr Zhong and Ms Ding indicated they would call Mr Ding and Ms Zeng. However, during the course of the trial they claimed they were having technical difficulties arranging for Ms Zeng and Mr Ding to give evidence from China. They said that Ms Zeng and Mr Ding were unable to open the VMR links sent by the Registry.<sup>30</sup> By Memorandum dated 3 March 2022 Mr Zhong and Ms Ding advised that they had asked Mr Ding and Ms Zeng to try again to use the VMR link provided by the Court, but they had been unable to do so. Mr Zhong and Ms Ding advised that they had tried their best to solve the problem but "they failed due to force majeure". Ultimately Mr Zhong and Ms Ding advised that they would withdraw Mr Ding and Ms Zeng as witnesses, "for humanitarian reasons".

[90] In the end, there is no evidence to support Mr Zhong and Ms Ding's submission that Ms Ding's parents instructed them to place orders and trade on their securities accounts. Mr Zhong and Ms Ding's decision not to give evidence about this is significant in light of the strength of the FMA's evidence; the absence of any documentary evidence to support their pleaded position; and their decision in the end not to call Mr Ding or Ms Zeng.

#### *Powers of Attorney*

[91] In their pleadings and submissions, Mr Zhong and Ms Ding referred to powers of attorney which, on their face, purport to give Mr Zhong and Ms Ding authority to trade on Mr Ding's and Ms Zeng's securities accounts. respectively. However, neither Mr Zhong nor Ms Ding ever provided the powers of attorney to ASB Securities. They never obtained a formal authority from ASB Securities to trade on Mr Ding's or Ms

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<sup>28</sup> The Second, Fourth, Sixth, Eighth, Tenth and Twelfth causes of action relating to trading and/or offers by Ms Ding on 18 April 2016, 17 May 2016, 7 June 2016, 5 July 2016, 19 October 2016 and 20 October 2016.

<sup>29</sup> The Tenth and Twelfth causes of action relating to offers and trades on 19 October 2016 and an offer to buy ONL shares on 20 October 2016.

<sup>30</sup> Mr Zhong and Ms Ding suggested these links may be inoperable in China, but as I explained to them witnesses in other matters have been able to give evidence remotely from China without difficulty.



Zeng's account in the same way Ms Ding had authority to operate Ms Zeng's bank account. They did not refer to the powers of attorney when they telephoned ASB Securities to trade on Mr Ding's and Ms Zeng's securities accounts. Instead they simply pretended to be Mr Ding or Ms Zeng.

[92] FMA denies that Mr Zhong and Ms Ding were dealing with her parents' securities accounts in accordance with the powers of attorney. Mr Williams points out that FMA located two versions of Ms Zeng's powers of attorney in Ms Ding's favour. They are in identical terms. One is dated 22 March 2016, the other is dated 1 July 2016. Mr Williams submits that if the 22 March 2016 Power of Attorney was valid there would have been no need for the 1 July 2016 version.

[93] Once again it is significant that neither Mr Zhong nor Ms Ding gave evidence to support their pleaded position, particularly in the absence of evidence from Ms Ding's parents. I accept Mr Williams submission that the evidence undermines the alleged validity of the powers of attorney. In any event, the existence of valid powers of attorney would not seem to assist Mr Zhong and Ms Ding. Mr Zhong and Ms Ding do not dispute trading on Ms Ding's parents' securities accounts as alleged.

[94] I turn to consider each of the various causes of action.

***Trading on 18 April 2016 (Second Cause of Action)***

[95] On 18 April 2016 Ms Ding used the Zeng securities account to sell 1,000 ONL shares for \$2.30 per share. On the same day Mr Qian used the Qian/Lu securities account to buy 1,000 ONL shares at \$2.30 per share. The FMA allege that this was a matched trade for the purposes of s 267(3) of the FMCA which is therefore presumed to contravene s 265. Alternatively, the FMA submit the trade between Ms Ding and Mr Qian had all the elements of a manipulative trade in contravention of s 265.

[96] Prior to 18 April 2016, ONL shares had last been traded on 13 April 2016 at a price of \$2.26.

[97] At 2:52 pm on 18 April 2016 Ms Ding called ASB Securities pretending to be Ms Zeng. Ms Ding placed an order to sell 1,000 ONL shares at an ask price of \$2.30. ASB Securities entered the offer into the market at 2:56:50 pm.

[98] At that time Ms Ding had another offer in the market to buy 500 ONL shares at a bid price of \$2.25. Once again, Ms Ding had made this offer on Ms Zeng's securities account.

[99] At 3:38:30 pm Mr Qian called ASB Securities and placed an order to sell 500 ONL shares at \$2.30 on the Qian/Lu securities account. This made Mr Qian's offer to sell shares the second best offer in the market, behind Ms Ding's offer to sell 1,000 shares for the same price approximately 42 minutes earlier.

[100] At 3:45:40 pm, Mr Qian called ASB Securities and cancelled the unexecuted offer he had made seven minutes earlier. He asked for details of the best offer. He was told of Ms Ding's offer to sell 1,000 shares at \$2.30.

[101] Mr Qian placed an order to buy all of those shares. At 3:50 pm he transferred \$2,330.00, being the cost of the share purchase plus a \$30.00 brokerage fee, into his cash management account. ASB Securities entered his order into the market at 3:51:04 pm. At 4:00 pm Mr Qian's bid matched in the closing auction against Ms Ding's offer. This was the only trade on 18 April 2016. It increased the share price by \$0.04 or 1.8 per cent. This increased the market value of the Zhong Family Trust's shareholding by approximately \$640,000 and Mr Qian's shareholding by approximately \$30,000.

### *Discussion*

[102] As noted, Mr Qian worked for Meng & Associates in the same building as ONL. As will be seen, in the context of subsequent trades, he was in direct contact with Mr Zhong concerning the trade of ONL shares. Mr Williams submits that it was highly unusual for Mr Qian, who held 740,000 ONL shares, to change from being a seller of 500 shares to a buyer of 1,000 shares at the same price (\$2.30) within eight minutes. Dr Aitken agrees.

[103] Mr Williams also points out that when Mr Qian did change his mind seven minutes later, his order to buy shares exactly matched the offer Ms Ding had made to sell shares less than one hour earlier.

[104] Mr Williams also relies on later evidence of coordination and collusion between the defendants and Mr Qian as propensity evidence under s 40 of the Evidence Act 2006.<sup>31</sup> In particular:

- (a) Mr Qian and Ms Ding's trading activity on 7 June 2016,<sup>32</sup> together with Mr Zhong's WeChat message to Ms Ding that day as follows:

Had a look at that share today, um, it's now at \$2.05, down 25 cents... can you get someone, Sam [that being Mr Qian] or whoever to give it a bit of support... basically put up a bid immediately, otherwise it looks too bad... besides I am in the middle of negotiating... with the investment bank.

- (b) The WeChat communications between Mr Zhong and Ms Ding on 5 July 2016 including:

Mr Zhong: "That sucker has cancelled the order at 2.15 and put up 2.1, the good news is out today, [but] he insists on selling."

Ms Ding: "So can Sam [Mr Qian] be asked to keep bidding it up? We can give him money."

Mr Zhong: "We indeed have the money, but need to find someone to buy at 2.4".

[105] In the circumstances I am satisfied on the balance of probabilities that when Ms Ding and Mr Qian placed their offers on 18 April 2016 they were associated pursuant to s 12 of the FMCA: either because they were acting jointly or in concert directly; or because they are both associated with Mr Zhong. I am also satisfied for the purposes of s 267(3)(b) that Mr Qian and Ms Ding knew that the other made or proposed to make an opposite offer. Those offers substantially matched for the purposes of s 267(3). As such I am satisfied Ms Ding is deemed to have contravened s 265 by participating in this trade.

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<sup>31</sup> *Solicitor-General v Rudd* [2009] NZCA 401 at [27].

<sup>32</sup> See discussion on Sixth cause of action at [124].

[106] Even without the presumptive contravention I am satisfied that Ms Ding contravened s 265 on 18 April 2016. In reaching this conclusion I take into account the WeChat messages referred to above and the later evidence of collusion between Mr Zhong, Ms Ding and Mr Qian. I am satisfied that Ms Ding was colluding with Mr Qian for the purpose of boosting ONL's share price. That appears to have been the purpose of their trading such a small (but matched) parcel of shares. Ms Ding's suggestion of a remarkable coincidence is simply not credible, particularly in the absence of evidence from her or Mr Qian. I am satisfied that Ms Ding's offer had, and was likely to have, the effect of creating a false or misleading appearance with respect to the supply of and price for trading in ONL shares, and that Ms Ding knew that her offer had or was likely to have that effect.

***Trading on 17 May 2016 (Fourth Cause of Action)***

[107] On 12 May 2016 ONL announced a private placement of new shares at a price of \$2.295, raising new capital of \$828,000 with shares to be allotted on 24 May 2016. ONL also announced it was in discussion for a further private placement of capital. There was only one trade that day at \$2.90. That was between the market maker and an unrelated customer. There was one trade the next day, 13 May 2016, also at \$2.90 between the market maker and an unrelated customer.

[108] On 16 May 2016, ONL announced that further new capital had been placed which would be used for working capital and to grow ONL's bulk honey inventories. There were no trades that day.

[109] On 17 May 2016 the market opened at \$2.90. Mr Qian had an outstanding bid for 791 shares at \$2.33. This was the residual of his earlier bid for 4,291 shares at \$2.33 that had traded with the market maker's offer to sell 3,5000 shares at that price on 20 April 2016.

[110] At 11:00 am and 12:40 pm there were trades of 3,500 shares each at a price of \$2.75 and \$2.55 respectively. The market maker was the buyer on each of these trades. As such the market price had fallen 12 per cent from \$2.90 when the market opened to \$2.55 by 12:40 pm.

[111] Between 12:41 pm and 1:40 pm the market maker amended both its bid and offer prices downwards further. As at 1:40 pm the best bid for ONL shares was Mr Qian's bid for 791 shares at \$2.33; the best offer was the market maker's offer to sell 3,500 shares at \$2.40; and the last traded price was \$2.55. The next sale would be at either \$2.40 or \$2.33, which would be down 17 per cent or 20 per cent for the day since the market opened.

[112] Telephone and banking records show what happened next:

- (a) At 3:04 pm Mr Qian called Mr Zhong. They spoke for one minute and 26 seconds with the call ending at 3:05:35 pm.
- (b) At 3:05:58 pm Mr Qian called his wife Ms Lu. They spoke for one minute and seven seconds, with the call ending at 3:07:05 pm.
- (c) At 3:07:41 Mr Qian called Ms Lu again for one minute and six seconds, with the call ending at 3:08:47 pm.
- (d) At 3:09:12 pm Mr Qian called Mr Zhong. They spoke for 45 seconds with this call ending at 3:09:57 pm.
- (e) At 3:10 pm Ms Lu transferred \$11,000 into her and Mr Qian's securities account.
- (f) At 3:10:39 Ms Ding called ASB Securities and placed orders to sell two parcels of 500 ONL shares on the Zeng securities account – one for \$2.50 and one for \$2.60. ASB Securities placed these two orders into the market at 3:17 pm.
- (g) Two minutes later, at 3:19 pm Mr Qian called ASB Securities. He cancelled his bid of 791 shares at \$2.33 and placed an order to buy all the shares that were available up to \$2.60. This order was entered into the market at 3:24 pm and resulted in the following three trades:

- (i) Mr Qian bought 3,500 shares at \$2.40 (market maker's offer) = \$8,400;
- (ii) Mr Qian bought 500 shares at \$2.50 (Ms Ding's offer) = \$1,250;  
and
- (iii) Mr Qian bought 500 shares at \$2.60 (Ms Ding's offer) = \$1,300.

[113] The total settlement value of these trades (including \$30.00 brokerage) was \$10,982.85. Significantly, this almost exactly matches the \$11,000 Ms Lu transferred into her and Mr Qian's securities account even *before* Ms Ding's offers on the Zeng securities account had been placed into the market. This is strong evidence of collusion between Mr Zhong, Ms Ding and Mr Qian.

[114] It is also significant that when Mr Qian placed these orders with the ASB Securities broker he was not logged in to view the quotes on ASB Securities, but appeared to know what they were. The relevant transcript of his discussion with the ASB Securities broker is as follows:

SQ: What is the next? How many I can buy at the moment, I want to buy some more. I want to buy 4,500

ASB: So that is the total you are wanting to buy?

SQ: Yes, yes, yes. Probably at a price of \$2.60, right

ASB: So that is the maximum that you want to pay?

SQ: Yes, yes. OK, so yeah you should be able to get all of that up to 2.60. OK?

ASB: Yes

SQ: So I will put that order on to buy 4,500 ONL at \$2.60

[115] So although Mr Qian was not logged into his ASB securities account, and although Ms Ding's offers to sell two parcels of 500 shares had only been placed on the market for two minutes, Mr Qian seems to have known that in order to purchase 4,500 shares he would need to pay up to \$2.60 per share. And he knew in advance how much he would need to pay to get all the shares available up to that price.

### *Discussion*

[116] I am satisfied that this was a matched trade for the purpose of s 267(3) and as such is presumptively a breach of s 265. I take into account: the timing of the various phone calls; Ms Ding and Mr Qian's matching offers; and Mr Qian's knowledge in advance of the price of the shares on the market and how much he would have to pay to uplift them.

[117] I also accept Mr Solarz's evidence that a reasonable buyer of 4,500 shares would not have initially agreed to pay more than \$2.40 for which Mr Qian was able to purchase the first 3,500 shares. A reasonable buyer would have left their bid for the last 1,000 shares at that level for a period of time before agreeing to increase it to \$2.50 and then \$2.60.

[118] Again, putting to one side the presumption arising out of the matched trade between these associated persons, I am satisfied Ms Ding's actions contravened s 265. At a time when the market price for ONL shares had declined and appeared to be about to decline further, Ms Ding offered to sell shares at a higher price and Mr Qian then offered to buy them. I am satisfied that Ms Ding's purpose in offering to sell these ONL shares was to prop up the market price, giving a false and misleading appearance as to the demand for and price of ONL shares, and the extent of trading in them. Ms Ding knew her offer was likely to have that effect, which it ultimately did.

[119] Although Mr Zhong was not directly involved in Ms Ding's contravention, I am also satisfied by Mr Zhong's telephone discussions with Mr Qian throughout these dealings, and subsequent evidence of communications between Mr Zhong and Mr Qian, that Mr Zhong was, at the very least knowingly, concerned in the transaction. Again, Mr Zhong did not give evidence to support his contention of a remarkable coincidence.

### ***Trading on 7 June 2016 (Sixth Cause of Action)***

[120] Between 18 May 2016 and 2 June 2016 there were eight trades in ONL shares. There were no trades on 3 June 2016 and the market was closed on 6 June 2016.

[121] The most recent trade of ONL shares before the market opened on 7 June 2016 was of 705 shares at a price of \$2.30.

[122] Between 10:59 am and 1:20 pm on 7 June 2016 ONL shares traded at \$2.20, then \$2.10, then \$2.05. That is a decline of almost 11 per cent.

[123] As at 1:34 pm the best bid was for 3,500 ONL shares at \$1.95; the best offer was 3,500 shares at \$2.05. The price fell further.

[124] At 2:01 pm Mr Zhong sent a WeChat to Mr Meng which said:

Had a look at that share, today, um, it's at \$2.05, down 25 cents. Um, 9,700 shares have been transacted, nearly 10,000 shares, wondering who dumped it. Um, do you think you can – I am thinking – can you ask... because... can you get someone, Sam or whoever to give a bit support [sic] in order to make it... basically put up a bid immediately, otherwise it looks to bad, this... this... this figure. Besides, I am in the middle of negotiating... with the investment bank.

[125] The evidence shows that between 3:01 pm and 3:56 pm the following dealings took place which, but for an NZX system issue within ASB Securities, would have resulted in Mr Qian purchasing 100 shares from Ms Ding for \$2.35, thereby increasing the last traded ONL share price by 15 per cent from the price at which they had previously traded (\$2.05):

- (a) At 3:01 pm Mr Meng transferred \$4,000 to Miao Lee who then transferred \$3,875 to the Qian/Lu joint ASB account at 3:04 pm.
- (b) At 3:12 pm Mr Qian made two transfers from the Qian/Lu joint ASB account to the Qian/Lu securities account of \$4,350 and \$3,875, a total of \$8,225.
- (c) At 3:13 pm Mr Qian called ASB Securities. He was told that ONL shares were down 0.25 cents for the day, having last traded at \$2.05. After being told that buyers were offering to pay \$1.95, and sellers were offering to sell at \$2.05 Mr Qian placed an order to buy 3,500 at \$2.05 and 500 shares at \$2.10. Mr Qian's buy order traded immediately against the market maker's offer to sell 3,500 shares at \$2.05, and an



unrelated customer's offer to sell 500 shares at \$2.10. The value of this trade (excluding brokerage) was exactly \$8,225. As noted above, this was exactly the same amount that Mr Qian had transferred from his and Ms Lu's ASB account to their ASB securities account, the funds Mr Meng had transferred to them via Ms Lee one hour after Mr Zhong's WeChat message to Mr Meng.

- (d) On the same call ASB Securities confirmed to Mr Qian that he had acquired the 4,000 shares, he placed an order to sell 2,000 shares at \$2.35. ASB Securities entered this order at 3:20 pm.
- (e) At 3:28 pm Mr Qian called ASB Securities again and cancelled the order to sell shares at \$2.35. ASB Securities cancelled that order at 3:29 pm.
- (f) At 3:30 pm Ms Ding called ASB Securities and placed an order to sell 1,000 shares at \$2.35 on the Zeng securities account. (That order was not put on the market until 3:49 pm because of delays with ASB Securities' connection to the NZX trading system.)
- (g) At 3:35 pm Mr Qian transferred \$265.00 to the Qian/Lu securities account. Significantly, this is the amount required to buy 100 of the ONL shares Ms Ding had offered just five minute earlier to sell at \$2.35, together with ASB Securities' \$30.00 brokerage fee.
- (h) At 3:37 pm, Mr Qian tried to call ASB Securities, but the call went to voicemail. At 3:38 pm Mr Qian called Lucy Lu for six seconds. He then called ASB Securities, but it went to voicemail once again.
- (i) At 3:38 pm the market maker increased its offer to purchase shares to \$2.05, and entered an offer to sell 495 shares at \$2.15.

- (j) At 3:41 pm Mr Qian called Mr Meng. The call lasted one minute and two seconds. At 3:46 pm Mr Meng called Mr Qian. The call lasted 50 seconds.
- (k) The data that FMA obtained from ASB Securities shows that during this time Mr Qian was logged into the ASB Securities online system (from an IP address registered to Camseng Trading Limited, a wholly owned subsidiary of ONL). Between 3:32 pm (two minutes after Ms Ding had telephoned ASB Securities to place the order to sell 1,000 ONL shares at \$2.35) and 3:49 pm (when Ms Ding's order appeared in the market) Mr Qian refreshed the live market information screen 74 times.
- (l) At 3:52 pm Mr Qian called ASB Securities again. The call lasted seven minutes and 47 seconds. He said he wanted to buy ONL shares (24 minutes after he had cancelled his order to sell ONL shares). He was told that the shares last traded at \$2.10 per share, the lowest sale offer was \$2.15, and the highest bid was \$2.05. Mr Qian placed an order to purchase 595 shares at \$2.35. He clarified that he wished to take all of the shares available at \$2.15 and purchase as many as he could for \$2.35. During the call Mr Qian transferred \$1,064.25 to the Qian/Lu securities account. That is the price of 495 shares at \$2.15. His earlier transfer of \$265.00 was made at 3:35 pm, before the market maker offered to sell 495 at \$2.15.

[126] Because ASB Securities was having difficulties connecting to the NZX trading system at the time, Mr Qian's order to buy 595 shares at up to \$2.35 was not placed in time to trade that day. If it had been, Mr Qian would have bought 100 of the shares Ms Ding had offered to sell at \$2.35. This would have been the last trade of the day and would have represented an increase of 15 per cent from the price at which the market had last traded before Mr Qian entered the market that day.

[127] At 4:00 pm Mr Qian left Mr Meng a WeChat voice message:

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

[128] At 4:01 pm after the market closed, Mr Meng called Mr Qian. The call lasted one minute and seven seconds.

[129] At 10:26 am the next day, during the pre-opening session, the market maker placed an offer to sell another 3,500 shares at \$2.15. At 11:00 am Mr Qian's order to buy 595 shares was placed on the market and traded against the market maker's offers to sell 495 shares and 3,500 shares at \$2.15. At 11:42 am the market maker increased the volume of its offer to sell ONL shares at \$2.15 from 3,400 shares to 3,500 shares. There was no further market activity that day.

[130] At 3:25 pm on 9 June 2016, the market maker deleted its offer to sell 3,500 shares at \$2.15. A few seconds later First NZ placed an order to buy 100 shares at \$2.35. This traded immediately against Ms Ding's offer to sell 1,000 at \$2.35 that she had placed on 7 June 2016. This increased the last price from \$2.15 to \$2.35.

### *Discussion*

[131] I am satisfied that the orders Ms Ding placed on 7 June 2016 were the result of collusion and coordination by Mr Zhong and Ms Ding (amongst others). Trading on this day began with Mr Zhong's request to Mr Meng to get Mr Qian to give the share price "a bit of support" because "it looks too bad". Mr Meng then funded Mr Qian's account and coordinated the attempted trade between Mr Qian and Ms Ding.

[132] I accept Mr William's submission that the fact the trade between Ms Ding and Mr Qian did not eventuate due to ongoing system issues is not significant. Section 265 of the FMCA prohibits actions that are, amongst other things, "likely to have the effect of creating a false or misleading appearance". Ms Ding's purpose in placing the orders was to prop up the ONL share price. With Mr Qian playing his part Ms Ding's order was likely to have that effect; and but for the unforeseen technical glitch it would have. The effect of a false and misleading appearance does not need to have actually occurred.

[133] Once again, I am satisfied that Mr Qian knew Ms Ding's order to sell was coming. He was looking out for it. Similarly, I am satisfied that Mr Qian's transfer of \$265.00 to the Qian/Lu securities account was consistent with an intention to purchase 100 ONL shares at \$2.35 (plus \$30.00 brokerage) even before Ms Ding's offer to sell shares for that amount had been placed on the market.

[134] I do not consider Ms Ding or Mr Qian had a genuine commercial rationale for the orders they entered on that day. Mr Qian was simply doing what he had been asked to do. Mr Qian at this time already held more than \$1.5 million worth of ONL shares. In those circumstances he cannot have had any genuine urgent need to purchase an additional \$235.00 worth of shares at a price of approximately 12 per cent higher than that at which they had last traded.

[135] I am also satisfied that Mr Zhong was involved in Ms Ding's contravention. The manipulative events of the afternoon got underway when Mr Zhong noticed that the market price for ONL shares had declined by \$0.25 during the morning. He sent a WeChat message to Mr Meng asking him to get "Sam or whoever" to give it a bit of support by putting up a bid immediately. That is precisely what occurred. The WeChat message shows that Mr Zhong was concerned the share price looked bad, particularly when he was negotiating with an investment bank.

[136] Although there is no evidence of telephone discussions or other communications between Mr Zhong and Ms Ding, there is no dispute that they worked in the same office at desks only a few metres apart. I have no doubt that they were working together to coordinate the trades on 7 June 2016.

***Trading on 5 July 2016 (Eighth Cause of Action)***

[137] On 5 July 2016, no ONL shares had been traded since 16 June 2016 when the last traded price was \$2.35. On 5 July 2016 ONL released an interim update announcing, amongst other things, that it was in discussion with New Zealand honey suppliers to explore opportunities to purchase bulk honey volumes. ONL announced that it would need access to additional working capital to finance these purchases and was investigating ways of securing debt finance to support these purchases. ONL also

announced that it was reviewing distributions strategies in China including having discussions with strategic partners and potential investors.

[138] When the market opened on 5 July 2016 the highest bid was to purchase 3,500 shares at \$2.05. The lowest offer was to sell 3,500 shares at \$2.15. In each case the offeror was the market maker.

[139] At 11:24 am the market maker moved its bid and its offer down \$0.05 cents, so that its offer was to sell 3,500 shares at \$2.10. This prompted the following text exchange between Mr Zhong and Ms Ding:

WZ (12:01 pm): That sucker has cancelled the order at 2.15 and put up at 2.1, the good news is out today, [but] he insists on selling

RD (12:02 pm): So can Sam be asked to keep bidding it up? We can give him money

WZ (12.02 pm): We indeed have the money but need to find someone to buy at 2.4.

[140] Mr Zhong and Ms Ding did find someone to buy at \$2.40. By the end of the day Mr Qian had purchased 450 ONL shares at that price. This was the closing price for the day, 14 per cent above the \$2.10 opening price.

[141] Once again, the FMA's case is that the orders and trades that led to that price increase were the result of collusion and coordination by Mr Zhong and Ms Ding, together with the assistance of Mr Qian; and that their actions created a false or misleading appearance with respect to: the supply of, demand for and price of trading ONL shares; and the extent of active trading in ONL shares.

[142] The FMA points to the following communications:

(a) At 12:44 pm Mr Zhong sent a WeChat message to Mr Meng, asking: "Is that securities account of yours ready?"

(b) At 1:07 pm Mr Qian called Mr Zhong. They spoke for one minute.

- (c) At 2:21 pm Mr Qian called his wife Lucy Lu and they spoke for one minute and 42 seconds.
- (d) At 2:22 pm Ms Ding sent a WeChat message to Mr Zhong: “Need to buy?”, to which Mr Zhong responded: “I will contact Sam first”.
- (e) At 2:27 pm Ms Ding sent Mr Zhong a WeChat message: “Tell me when you are all done”.
- (f) At 2:30 pm Ms Lu transferred \$1,000 to the Qian/Lu securities account. This brought the available balance to \$1,119.56.
- (g) At 2:39 pm Mr Zhong tried to call Mr Qian. At 2:20 pm Mr Zhong sent a WeChat message to Mr Meng, asking “Is Sam in a meeting?”.
- (h) At 2:42 pm Mr Qian called Mr Zhong. They spoke for 21 seconds. Mr Zhong then sent a WeChat message to Ms Ding which said “Sam has been notified. You move first, once your end is done, the transaction completed, notify Sam immediately”.
- (i) At 2:44 pm Ms Ding replied: “Ok”.
- (j) At 2:47 pm Ms Ding called ASB Securities and placed an order to buy 3,500 shares at \$2.10 on the Zeng securities account. ASB Securities entered that order into the market at 2:50 pm. It traded immediately with the market maker’s offer to sell at that price. This left the best bid to buy 3,500 ONL shares at \$2.00 and the best offer to sell 3,500 shares at \$2.40.
- (k) At 2:52 pm, less than two minutes after Ms Ding had taken out the market maker’s offer to sell shares at \$2.10, Ms Ding called Mr Qian for 13 seconds.

- (l) At 2:51 pm and 2:52 pm Ms Ding sent the following WeChat messages to Mr Zhong “I have already put it up. Bought 3500 \* 2.1. Already shown. Quickly take action at your end. I have already rang Sam”.
- (m) At 2:52 pm Mr Zhong called Mr Qian for eight seconds. Mr Zhong then sent WeChat messages to Ms Ding: “Notified. I have rang him too, haha.”
- (n) At 2:52 pm Mr Qian telephoned ASB Securities. After being told the offer price was \$2.40 he placed an order to buy 450 shares.
- (o) At 3:56 pm ASB Securities first entered the order at a price of \$2.10. This was in accordance with ASB Securities obligations under NZX Participant Rules requiring it to maintain an orderly market. An immediate move in price from \$2.10 to \$2.40 would have been an increase of 14 per cent and NZX’s trading system does not always accept orders that would result in a price move of this magnitude. Instead, orders need to be placed at incrementally higher prices.
- (p) Between 2:56 pm and 2:59 pm Mr Zhong and Ms Ding exchanged WeChat messages discussing why it was taking so long for Mr Qian’s order to be entered on the market:

WZ: Why is the response so slow at his end, still not showing yet

RD: It’s probably the anz [sic] system.

RD: You ask.

- (q) Mr Zhong also asked Ms Ding whether she had asked Mr Qian to buy shares at \$2.35. This appears to be because at 2:57 pm ASB Securities amended the price of Mr Qian’s buy order to \$2.35:

WZ: Did you get him to put up at 2.35?

WZ: Damn, why is the operation always failing?

RD: Not me

RD: I didn’t even talk

RD: All I said was that it's done at my end

WZ: I rang him, and before I could talk, he said he already knew

WZ: I'll do it. I will get him to cancel. Put it up at 2.4.

(r) At 3:02 pm Mr Zhong sent a WeChat message to Ms Ding: "first you ask him if he has put it up at 2.35? He is not replying on WeChat".

(s) At 3:02 pm Ms Ding called Mr Qian for four seconds. A few seconds later Mr Qian telephoned Ms Ding. They spoke for 30 seconds.

(t) At 3:03 pm Mr Qian telephoned ASB Securities again. He asked if the order in the market to buy at \$2.35 was his. ASB Securities confirmed it was. Mr Qian cancelled that offer and increased his offer to buy as many shares as he could at \$2.40.

(u) At 3:07 pm ASB Securities amended the order to \$2.40. This traded with an unrelated party.

(v) Between 3:09 pm and 3:10 pm Mr Zhong and Ms Ding exchanged further WeChat messages:

RD: [thumbs up emoji]

WZ: Ok, so annoying

RD: Don't be annoyed, as long as the matter is sorted

RD: Some banks can be quite weird

(w) At 4:42 pm Mr Zhong and Ms Ding exchanged the following WeChat message:

WZ: Mal, when coming back to the office today, told me excitedly that the shares had gone up, I didn't say a word [giggle]

RD: Haha

[143] As noted, ONL closed the day at \$2.40, 14 per cent above its \$2.10 opening price.



### *Discussion*

[144] I am satisfied that on 5 July 2016 Mr Zhong and Ms Ding contravened s 265 as alleged.

[145] Ms Ding's acquisition of 3,500 shares at \$2.10 was motivated by her and Mr Zhong's wish to take out the market maker's offer to sell shares at that price, thereby making way for Mr Qian to accept the next lowest offer to sell shares for \$2.40. In this way Ms Ding's acquisition of 3,500 shares at \$2.10 was likely to have, and did have, the effect of creating a false or misleading impression as to the extent of active trading in ONL shares; the supply and demand for ONL shares; and the price of ONL shares.

[146] Ultimately, Mr Qian's acquisition of 450 shares at \$2.40 on 5 July 2016 was the result of collusion and coordination by Mr Zhong and Ms Ding. That transaction arose out of Mr Zhong and Ms Ding's motivation to support the price of ONL shares, rather than any genuine demand by Mr Qian for 450 more shares.

[147] I am also satisfied that Mr Zhong was involved in Ms Ding's contravention. The WeChat messages and timing of the telephone calls show that he procured the contravention; was knowingly concerned in it; and conspired with others to effect the contravention.

### ***Trading on 19 October 2016 (Tenth Cause of Action)***

[148] The FMA allege that on 19 October 2016 Mr Zhong placed orders to buy ONL shares at \$2.50 and \$2.65, which would have matched with offers by Ms Ding to sell ONL shares entered onto the market approximately four minutes earlier (and ten minutes after they had spoken). Ultimately this was unsuccessful because ASB Securities did not enter Mr Zhong's orders exactly as per his instructions out of concern to comply with their obligations under the NZX Participant Rules. Nevertheless, the FMA allege that Mr Zhong's and Ms Ding's offers contravene s 265.

[149] The FMA relies on evidence of the parties communicating and trading in ONL shares set out below:

- (a) On 13 October 2016, at 9:53 am \$20,000 was transferred from Ms Zeng's ASB account to Mr Ding's bank account. At 10:35 am \$20,000 was transferred from Mr Ding's ASB account to his ASB securities account. There were no funds in Mr Ding's ASB securities account prior to that transfer.
- (b) When the market opened on 19 October 2016 the most recent trade in ONL shares was two days earlier at \$2.28 per share. The market maker had the best bid and offer prices at \$2.28 and \$2.38 respectively, each for parcels of 3,500 shares.
- (c) At 12:40 pm \$3,000 was transferred from Mr Ding's ASB account to his ASB securities account.
- (d) At 2:48 pm Ms Ding called Mr Zhong. They spoke for 40 seconds.
- (e) At 2:49 pm Ms Ding called ASB Securities and placed an order to sell 1,500 shares at \$2.50 and 1,500 shares at \$2.65 on the Zeng securities account. These orders were \$0.22 and \$0.37 higher than the last traded price. ASB Securities entered these orders onto the market at 2:55 pm.
- (f) At 2:59 pm Mr Zhong called ASB Securities. He used his daughter's mobile phone and pretended to be his father-in-law Mr Ding. Using Mr Ding's securities account Mr Zhong said he wanted to buy ONL shares and asked what was currently available. He was told the current offers to sell were 3,500 at \$2.38, 1,500 at \$2.50, and 1,500 at \$2.65. Mr Zhong asked ASB Securities to purchase all of the shares up to \$2.50 (that being 3,500 at \$2.38 from the market maker and 1,500 shares at \$2.50 from Ms Ding).
- (g) At 3:03 pm ASB Securities entered Mr Zhong's order as a bid to buy 5,000 shares at \$2.38. However, it did not enter the offer to purchase everything up to \$2.50 as Mr Zhong had instructed.

- (h) Immediately Mr Zhong's bid traded with the market maker's offer to sell 3,500 shares at \$2.38. This left Mr Zhong's bid to buy 1,500 shares that ASB Securities had entered at \$2.38; and Ms Ding's offer to sell 1,500 shares at \$2.50. If ASB Securities had entered Mr Zhong's offer in accordance with his instructions, his bid to buy 1,500 shares at \$2.50 would have matched with Ms Ding's offer to sell shares.
- (i) At 3:24 pm the market maker increased its bid to \$2.38. At 3:25 pm the market maker entered an offer for 3,500 at \$2.45.
- (j) At 3:28 pm Mr Zhong left a voice message for Ms Ding as follows:
- Someone is offering at \$2.45, offering 3500 shares, I assume its Market Maker. Then you get [zhu/piglet] to... um, if not bought yet... gets [him/her] to buy at \$2.45, 3500 shares, buy it all.
- (k) At 3:40 pm Ms Ding's friend in China, Mr Zhu, placed an order to buy 3,500 shares at \$2.45. This traded immediately against the market maker's offer. Once again, this left Ms Ding's offer to sell at \$2.50 and Mr Zhong's offer to buy at \$2.38. This required the market maker to increase its bid or make an offer in order to reduce the spread to \$0.10 or less.
- (l) At 3:40 pm the market maker increased its \$2.38 bid to \$2.40. A few seconds later the market maker entered an offer for 3,500 shares at \$2.50. This came later than Ms Ding's offer and so sat behind it in the market.
- (m) At 3:41 pm the market maker increased its bid again to \$2.50, as a result of which it purchased 1,500 shares from Ms Ding and 2,000 from itself. However, the second trade with its own offer was immediately cancelled. Unsurprisingly, self-trading is not permitted.
- (n) At 3:41 pm the market maker removed its offer of \$2.50 and placed a bid of 3,500 shares at \$2.48. At 3:42 pm the market maker placed a new offer of 3,500 shares at \$2.54 and increased its bid to \$2.49.

- (o) At 3:45 pm Mr Zhong called ASB Securities, once again using his daughter's mobile phone and pretending to be Mr Ding. He asked if his order had been filled. When he was informed that it had not, he complained that ASB Securities had not followed his instructions. The ASB Securities broker explained that his order was:

... not allowed by the market... because it will cause market turbulence... That's why even if you are willing to offer a very high price, the order isn't necessarily able to be filled... they don't allow you to buy the high price, simply because of the concern that the share price will raise to quickly, therefore, you are not allowed to buy at a very very high price.

Mr Zhong replied:

As long as I am willing to offer a price, you are not the Securities Association, nor are you the stock exchange. How could you behave like this? ... They have good news, why cant I buy?! What nonsense!

- (p) Mr Zhong then asked for his bid to be increased up to \$2.54, which would have met the market maker's offer. At 3:52 pm ASB Securities amended Mr Zhong's order as instructed. However, the trade did not match immediately because by this time the market was in its pre-close session.
- (q) At 3:53 pm the market maker increased its offer to sell to \$2.56 and increased its bid to buy to \$2.51.
- (r) There were no trades in the closing auction. When the ASB Securities broker told Mr Zhong that the market had closed and his order could not trade until the next day, Mr Zhong said he would make a complaint about the broker.
- (s) Mr Zhong's purchase of 3,500 was settled on 21 October 2016. The total settlement value was \$8,360 and was funded by the transfer from Ms Zeng's ASB account on 13 October 2016.

## *Discussion*

[150] I am satisfied that on 19 October 2016 Mr Zhong and Ms Ding worked together to increase the price of ONL shares from \$2.28. That was Ms Ding's purpose and intent when she called ASB Securities just one minute after she had spoken with Mr Zhong and placed orders to sell two parcels of 1,500 ONL shares at \$2.50 and \$2.65. It was also Mr Zhong's purpose and intent when he called ASB Securities four minutes after those orders were placed on the market and made his bid to buy 5,000 shares at a price of up to \$2.50.

[151] Mr Zhong's bid cleared the market maker's offer and increased the last sale price from \$2.28 to \$2.38. If ASB Securities had placed Mr Zhong's bid as he instructed, it would also have matched Ms Ding's offer to sell at \$2.50.<sup>33</sup> Dr Aitken noted that in any event, Mr Zhong's acquisition at \$2.38 left a \$0.12 spread, until just three minutes later when the market maker entered a new offer to sell at \$2.45. One minute after that Mr Zhong left a message for Ms Ding asking her to get Mr Zhu to buy all those shares, which he did just 12 minutes later. The market maker then increased its bid to \$2.50 and bought the 1,500 shares Ms Ding had offered to sell at that price.

[152] The upshot is that Mr Zhong's bid and Ms Ding's offers, together with the bid Mr Zhu made at their request, had the effect of increasing the last sale price from \$2.28 to \$2.50, an increase of 9.6 per cent. I am satisfied that these orders and trades did not reflect genuine supply or demand for ONL shares, but were the result of collusion and coordination by Mr Zhong and Ms Ding for the purpose of falsely and misleadingly increasing the apparent supply, demand and price of ONL shares, and the apparent level of trading in ONL shares. Without Mr Zhong and Ms Ding's manipulative offers none of these trades would have occurred.

[153] Mr Zhong and Ms Ding submitted that the FMA had no direct evidence to prove that they traded for the purpose of giving these false and misleading

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<sup>33</sup> This would have been a matched trade for the purposes of s 267(3) such that Mr Zhong and Ms Ding must be treated as having contravened s 265. Mr Zhong and Ms Ding are "associated persons" for the purposes of s 267(3)(b); and their opposite offers would have substantially matched.

appearances. But once again the FMA's circumstantial evidence (the timing of phone calls; the timing and amounts of the relevant offers), together with Mr Zhong's message to Ms Ding concerning Mr Zhu, combines into a strong case against them.

[154] For completeness I note that in their interviews with the FMA both Mr Zhong and Ms Ding suggested that an announcement that afternoon was positive news that may have affected the market. The announcement referred to an agreement with a Chinese insurance company to develop a scanning system to protect consumers from counterfeit products. In their submissions and cross-examination of the FMA witnesses they also suggested that announcement was (or may have been) the reason Mr Ding wanted to acquire shares and Ms Zeng saw an opportunity to sell shares profitably. As I have noted there was no evidence to support that submission, or the proposition put to witnesses. In any event, the lack of independent and genuine market activity following the announcement is consistent with Mr Solarz's evidence that, having seen thousands of market announcements, ONL's announcement on 19 October 2016 was not of the sort that would move the market for a company's shares.

***Trading on 20 October 2016 (Twelfth Cause of Action)***

[155] Following on from 19 October 2016, when the market opened the next day, the last trade was at \$2.50; the best bid was Mr Zhong's bid to buy 1,500 shares at \$2.54; and the best offer was the market maker's offer to sell 3,500 shares at \$2.56. The FMA allege that the following activity amounted to a further contravention of s 265 by Mr Zhong and Ms Ding:

- (a) At 10:03 am and 10:04 am Mr Zhong sent two WeChat messages to Mr Meng: "Morning, are you in the company?" and "I will come over soon if you are convenient [sic]".
- (b) At 10:42 am Forsyth Barr placed an offer for 3,000 shares at \$2.55.
- (c) At 11:01 am Ms Ding called ASB Securities and placed three orders to sell 1,000 ONL shares each on the Zeng securities account at \$2.70, \$2.75 and \$2.85 respectively. Ms Ding's order to sell 1,500 shares at \$2.65 remained in the market from the previous day.

- (d) At 11:05 am and 11:06 am ASB Securities placed Ms Ding's offers to sell 1,000 at \$2.70 and \$2.75 onto the market.
- (e) At 11:05 am Mr Meng placed an order to buy 3,000 shares at \$2.55. This traded immediately with Forsyth Barr's offer to sell 3,000 shares at that price.
- (f) At 11:06 am Mr Meng entered another order to buy 3,500 shares at \$2.56. This traded immediately with the market maker's offer.
- (g) At 11:07 am Mr Meng placed an order to buy 1,500 shares at \$2.65. This offer matched immediately against Ms Ding's offer that she had entered on 19 October 2016.
- (h) At 11:07 am ASB Securities entered Ms Ding's third offer to sell 1,500 shares at \$2.85. At this point the best bid was Mr Zhong's offer to buy 1,500 shares at \$2.54; and the best offer was Ms Ding's offer to sell 1,000 shares at \$2.70.

[156] The market maker was now obliged to place an offer and a bid, and also to reduce the spread from \$0.16 to no more than \$0.10. However, at 11:21 am the market maker advised NZX that it had removed its quotes in ONL because this recent activity amounted to Extreme Market Conditions under its Market Making Agreement with NZX. The market maker advised NZX that it would monitor activity over the day and resume quotes when appropriate.

[157] This left Mr Zhong as the only bidder (1,500 at \$2.54) and Ms Ding as the only seller (1,000 at \$2.70, 1,000 at \$2.75 and 1,500 at \$2.85).

[158] At 11:10 am Mr Meng called Mr Zhong. They spoke for 12 seconds.

[159] At 1:56 pm an unrelated investor placed an offer for 300 shares at \$2.69. At 2:54 pm Mr Zhu placed an order to buy 300 shares at \$2.69. This traded immediately with the unrelated individual investor.

[160] At 2:54 pm Mr Zhu placed another order to buy 1,000 shares at \$2.70. This traded immediately against Ms Ding's order to sell 1,000 shares at that price placed earlier in the day.

[161] At 3:03 pm Mr Zhong telephoned ASB Securities, once again using his daughter's phone and pretending to be his father-in-law. He placed an order to buy 1,000 shares at \$2.75. ASB Securities placed this order at 3:07 pm. It traded immediately against Ms Ding's offer on the Zeng securities account.

[162] At 3:08 pm Mr Zhong sent Ms Ding a photograph of a quote screen, taken at 3:07 pm, showing the quotes and last sale as described above.

[163] I note that this was the point at which matters began to unravel. An ASB Securities dealer observed that the buyer and seller accounts on that trade (ostensibly Mr Ding and Ms Zeng) had very close client numbers. Upon reviewing the trade the ASB Securities staff discovered Mr Ding and Ms Zeng were husband and wife; that the two had also traded the same stock on 19 October 2016; and that a person understood to be Mr Ding (but who was in fact Mr Zhong) had called up to query why his order on 19 October had not traded and why ASB Securities had not executed his order up to \$2.50.

[164] ASB Securities immediately cancelled the 20 October 2016 trade between Mr Ding and Ms Zeng. It also cancelled Ms Ding's remaining offer to sell 1,500 shares at \$2.85 and Mr Zhong's bid to buy 1,500 shares at \$2.54. ASB Securities suspended both of these accounts and reported the matter to NZX, who in turn referred the matter to the FMA on 12 December 2016.

### *Discussion*

[165] When Ms Ding made her three offers to sell at \$2.70, \$2.75 and \$2.85 they were much higher than the last traded price (\$2.50) and the best offer (\$2.55). However, these became the only offers in the market after Mr Meng's and Mr Zhu's bids cleared the better (lower) offers. Mr Zhong then traded with his wife, thereby increasing the price from \$2.50 at the beginning of the day to \$2.75 at the end of it.



[166] I accept Mr Williams' submission that neither Mr Zhong nor Ms Ding were entering genuine bids or offers. Instead, they were working together to move the price upwards. I accept Mr Solarz's evidence that the trading on 19 and 20 October 2016 increased the mark-to-market value of the Zhong Family Trust's shareholding by approximately \$7.5 million. I do not accept Mr Zhong and Ms Ding's suggestion that the increase in market value on those days might be attributed to the market announcement relating to QR codes on packaging to prevent counterfeits, or other matters.

[167] I accept Mr Williams' submission that it is irrelevant for present purposes that ASB Securities subsequently cancelled Mr Zhong's and Ms Ding's trade. I am satisfied that each of their acts of entering the orders were likely to, and did, create a false or misleading appearance of the extent of active trading; and the supply, demand and price of ONL shares. I am also satisfied that they each knew their offers would have or were likely to have that effect. That was the purpose of their coordinated dealings. I am therefore satisfied that Mr Zhong and Ms Ding have contravened s 265 of the FMCA.

[168] FMA submit in the alternative that pursuant to s 267(1) the trade between Mr Zhong and Ms Ding of 1000 ONL shares at \$2.76 must be treated as having contravened s 265 because they were parties to a trade from which no change in beneficial ownership results.

[169] Unhelpfully the FMCA does not define "beneficial ownership". Mr Williams referred to cases in other contexts which suggest that beneficial ownership requires more than simply a beneficial interest in property, and imports a requirement of some control.<sup>34</sup> Counsel submits that in the context of the FMCA and in light of its purpose "beneficial owner" should be interpreted consistently with s 5 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:

**Beneficial owner** means the individual who –

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<sup>34</sup> *Kent v SS "Maria Louisa" (2)* (2003) 130 FCR 12; *Medway Drylock and Engineering Co v Owners of the MV "Andrea Ursula"* [1973] QB 265; *Commissioner of Taxation (Cth) v Linter Textiles Australia Ltd (in liq)* (2003) 129 FCR 42; *Wood Preservation Ltd v Prior (Inspector of Taxes)* [1969] 1 WLR 1077.

- (a) has effective control of a customer or person on whose behalf a transaction is conducted; or
- (b) owns a prescribed threshold of the customer or person on whose behalf a transaction is conducted.

[170] Mr Williams submits Mr Zhong and Ms Ding were treating Ms Ding's parents' shares as their own, and they worked together in the operation of their ASB securities accounts. He says that this high degree of control and collusion amounts to beneficial ownership by each of them over both securities accounts, so that the trade between Mr Zhong and Ms Deng did not result in any change in beneficial ownership.

[171] I agree that beneficial ownership will include effective control. I also agree that Mr Zhong and Ms Ding were working together; in part that is why I have found them to have been acting in contravention of s 265. However, it should not be necessary to establish that parties to a trade are colluding in order to establish that there has been no change in beneficial ownership as a result of the trade. To a large extent that would defeat the purpose of the presumption in s 267(1). I also note that because Mr Zhong and Ms Ding were working "jointly or in concert" they were "associated persons". As such this was a matched trade as described in s 267(3) of the FMCA so they must be treated as having contravened s 265 of the FMCA.

[172] For present purposes I consider it would be somewhat artificial to also hold that there was no change in beneficial ownership arising out of the trade that Mr Zhong and Ms Ding carried out on her parents' accounts in part because they were colluding together to control those accounts when they did so. Section 267(1) must be intended to apply to trades that are not also matched trades between associated persons for the purposes of s 267(3), and to conduct that is not demonstrably in breach of s 265 in any event. Given my finding for FMA in that regard it is unnecessary for me to make a finding in relation to s 367(1).

***Trading on 15 February 2017 and 3 April 2017 (Fifteenth Cause of Action)***

[173] FMA's case in its fifteenth cause of action is that Mr Zhong and Ms Ding used Mr Qian and Mr Zhu as proxies to manipulate the price of ONL shares. By this time Mr Zhong and Ms Ding were unable to trade on her parents' accounts because they had been suspended. There were only nine trades in ONL shares in the nearly four-

month period between 21 October 2016 and 12 February 2017. The last trade had been on 30 January 2017 at \$1.94.

[174] On 13 February 2017, at 3:58 pm, Mr Zhu placed an order to buy 3,000 ONL shares at \$1.33. That order traded against the market maker's offer to sell 7,500 shares at that price. This left the market maker with the best bid at \$1.26 for 7,500 shares, and also with the best offer of \$1.33 for 4,500 shares.

[175] On 14 February 2017:

- (a) At 10:12 am the market maker increased the volume and price of its offer to 7,500 at \$1.35 and its bid price from \$1.26 to \$1.28.
- (b) At 10:16 am Mr Zhu placed an order to buy 2,000 shares at \$1.33.
- (c) At 11:03 am the market maker increased its bid price from \$1.28 to \$1.30, and its offer price from \$1.35 to \$1.37.
- (d) At 1:43 pm Mr Zhu deleted his order to buy 2,000 shares at \$1.33. One minute later he entered a new order to buy 1,000 at \$1.37. This traded immediately against the market maker's offer.
- (e) At 4:02 pm Mr Zhong sent a message to Mr Qian: "Sam, 50,000 has been transferred for the time being, please ask your dad to check for receipt, thanks".

[176] On 15 February 2017:

- (a) At 9:18 am Mr Qian's father transferred \$9,890 into Mr Qian and Ms Lu's ASB joint account. As at 15 February 2017, the CNY/NZD conversion rate was \$0.20303; RMB 50,000 was NZD \$10,151.50.<sup>35</sup> The bank statement records that the transfer was made for living expenses.

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<sup>35</sup> CNY is the international code for Chinese yuan. Renminbi, code RMB, is another name for Chinese yuan.

- (b) At 1:05 pm Mr Zhong called Mr Qian.
- (c) At 1:19 pm Mr Qian transferred \$10,375 from his and Ms Lu's ASB joint account to the Qian/Lu securities account. This left their ASB joint account overdrawn by \$231.56.
- (d) At 1:20 pm Mr Qian called ASB Securities and placed an order to buy 7,500 shares at \$1.37. That order traded immediately against the market maker's offer to sell 7,500 shares at \$1.37.
- (e) At 1:23 pm the market maker increased its bid price from \$1.30 to \$1.36. At 1:24 pm it entered a new offer to sell 7,500 shares at \$1.43.
- (f) At 1:27 pm Mr Qian emailed a spreadsheet to his wife Ms Lu containing the following information:
- (i) Walker transfer 50,000 RMB to Miaokang (Mr Qian's father);
  - (ii) Miaokang received 49,350 RMB "includes all China fee";
  - (iii) Mr Qian calculated the cost of buying 7,500 ONL shares at \$1.37 to be \$10,275, with brokerage of \$30.83, giving a total cost of \$10,305.83;
  - (iv) NZ \$9,890 of "Walker money" would pay for 7219 shares;
  - (v) NZ \$385 of "Sam's own money" would pay for 281 of those shares; and
  - (vi) Sam would "hold share for Walker".
- (g) At the same time, at 1:27 pm, Ms Ding sent a WeChat message to Mr Zhu saying:
- Its 1.43 now. Can you check how much money you have at hand, buy 1.43\*100

1.43\*1000

- (h) Mr Zhu responded: “I’m here, give me 20 minutes”.
- (i) At 1:35 pm Ms Lu sent a WeChat message to Mr Qian: “received 9890”.
- (j) A few seconds later Ms Lu sent a WeChat message to Mr Qian “we’ve sold 10375”.
- (k) At 1:37 pm Ms Lu transferred \$400.00 to her and Mr Qian’s ASB joint account, bringing it to a credit balance of \$168.44. Ms Lu then sent a WeChat message to Mr Qian:  
  
[It’s] an advance for the time being, and will swap back on next purchase.
- (l) At 1:59 pm Mr Zhu sent a screen shot to Ms Ding showing that he had placed an order to buy 1,000 at \$1.43. That order traded immediately with the market maker’s offer and set a new price of \$1.43.
- (m) At 2:29 pm Ms Ding sent a WeChat message to Mr Zhu saying “done, thanks”. Ms Ding then asked Mr Zhu “how much money do you have left at hand?” to which he replied, “there are still \$3000 in the shares account”.

### *3 April 2017*

[177] On 3 April 2017 an Edison Research Report was released. This noted ONL had slightly increased sales but at a lower margin than expected. It also noted that since listing on the NXT on 31 March 2016 ONL’s share price had more than doubled since listing, although at that stage it was just over half its October 2016 high.

[178] There had been no trading in ONL shares since 15 February 2017. The following events occurred during the course of 3 April 2017:

- (a) At 10:36 am an unrelated customer placed a bid for 1,000 shares at \$1.25. When the market opened this immediately traded against the market maker's offer, setting a new price of \$1.25 down from \$1.43 (a 12.6 per cent decrease).
- (b) At 11:00 am the market maker amended its bid to \$1.26.
- (c) At 11:00 am Mr Zhong called Mr Qian. They talked for 53 seconds. First NZ entered an offer to sell 100 shares at \$1.40.
- (d) At 11:02 am Mr Qian called ASB Securities. At 11:04 am ASB Securities entered two orders to sell 1,000 shares at \$1.40 and \$1.50 for Mr Qian.
- (e) At 11:14 am Mr Zhong left a WeChat message for Mr Qian stating:
- Sam, how are you doing? About that, don't know. Err, maybe someone else placed \$1.40. So if you think its convenient for you, cancel the \$1.40, which means you only need to place the \$1.50, that'll suffice. Because \$1.40... don't know perhaps someone else set the price, he/she... he/she placed it. Ok.
- (f) At 12:20 pm Ms Ding sent Mr Zhu a WeChat message stating:
- Holiday, day off, yeah? Resting at home? Well, hey, after you get up, go online. Well, now someone is offering at \$1.40, 2000 shares. You help me to buy, \$1.40 x 1000 share, bye.
- (g) At 1:15 pm Mr Zhu replied: "Roger, will deal with it immediately".
- (h) At 1:23 pm Mr Zhu placed an order to buy 1,000 shares at \$1.40. This traded immediately with the market maker's offer. This left the best bid at \$1.26 and the best offer being Mr Qian's at \$1.40.
- (i) Around the same time Mr Zhu sent a WeChat message to Ms Ding: "Done". She replied with a smiley face emoji.
- (j) At 1:25 pm Mr Zhong called Mr Qian. The call lasted four seconds. Mr Zhong called Mr Qian again at 1:52 pm, also for four seconds.

- (k) At 1:31 pm Mr Zhu sent another message to Ms Ding asking:
- How about I put up 100 shares at \$2 to try, what do you think? To see if there is any bidder!
- (l) Between 1:38 pm and 1:41 pm Ms Ding sent Mr Zhu three replies: “Just a moment.”; “I will ask”; and “Forget it, just give it a rest”.
- (m) At 1:45 pm Mr Zhu and Ms Ding messaged each other as follows:
- Mr Zhu: Only buying and no selling makes it suspicious
- Ms Ding: Don’t worry, a loyal shareholder!
- (n) At 10:20 pm Mr Qian received a WeChat message from Mr Zhong:
- Good evening, sorry to bother you at night, if its convenient for you at work tomorrow, please cancel the 1000 shares at \$1.40. Have no idea of who might have placed [*an order*].
- (o) At 10:21 pm Mr Zhong left Mr Qian another WeChat message:
- Wonder who placed \$1.40, and the transaction appears to have completed. I don’t know if it was yours, or his/hers. If your transaction hasn’t been completed, then just place it... err, cancel it, and leave the \$1.50 there. Thanks
- (p) At 10:22 pm Mr Qian called Mr Zhong. They spoke for 31 seconds.

*4 April 2017*

[179] At 1:20 pm on 4 April 2017 Mr Qian called ASB Securities and cancelled his \$1.40 offer of 1,000 shares, leaving his \$1.50 offer. This was in accordance with Mr Zhong’s WeChat message the night before.

#### *Discussion*

[180] I am satisfied that the trading on 15 February 2017 and 3 April 2017, ostensibly by Mr Qian and Mr Zhu, was orchestrated and coordinated by Mr Zhong and Ms Ding. The evidence shows that on 14 and 15 February 2017 Mr Zhong provided money to Mr Qian via Mr Qian’s father and instructed him to purchase 7,500 ONL shares. Mr Qian transferred those funds to the Qian/Lu securities account and purchased those

shares 15 minutes after speaking with Mr Zhong. Mr Qian then sent his wife a spreadsheet which said, amongst other things: “hold shares for Walker”. I am satisfied that Mr Qian acquired those shares on Mr Zhong’s behalf and held them to his order.

[181] Mr Qian’s acquisition for Mr Zhong cleared the market maker’s offer of a \$0.95 spread which the market maker reduced by increasing its bid to \$1.36 and reducing its offer to \$1.43. Four minutes later Ms Ding instructed Mr Zhu to purchase 1,000 ONL shares at \$1.43, which he did.

[182] As a result of Mr Qian and Mr Zhu’s offers and trades on 14 and 15 February 2017 it increased the price of ONL shares from \$1.33 to \$1.43.

[183] On 3 April 2017 the market price had dropped from \$1.43 to \$1.25 after a trade between the market maker and an unrelated party. Less than 25 minutes later Mr Zhong was on the phone to Mr Qian. Two minutes after that Mr Qian offered to sell 1,000 shares at \$1.40 and 1,000 shares at \$1.50. While he was on the phone to ASB Securities the market maker also offered to sell 1,000 shares at \$1.40. Ten minutes later Mr Zhong suggested that Mr Qian cancel his order to sell at that price.

[184] An hour later Ms Ding asked Mr Zhu to purchase 1,000 shares for \$1.40, which he did. The trading on this day had the effect of increasing the market price by 12 per cent from \$1.25 to \$1.40.

[185] The evidence satisfies me that offers and trades on 15 February 2017 and 3 April 2017 were intended by Mr Zhong and Ms Ding to create, and did create, a false and misleading appearance in terms of the price; as to the extent of active trading in ONL shares; and the supply of, demand for and price for trading in those shares.

[186] Although they did not make those offers, Mr Zhu and Mr Qian did so on their instructions. I am satisfied Mr Zhong and Ms Ding procured the orders and trades on 15 February 2017 and 3 April 2017; were directly or indirectly knowingly concerned in them; and were conspiring together and with others to contravene s 265.



## **Non-Disclosure Causes of Action**

[187] The FMCA imposes disclosure obligations on directors and senior managers of listed issuers. These are set out in Subpart 6 of Part 5 of the FMCA. Section 296 sets out the purpose of disclosure by directors and senior managers:

### **296 Purposes of Subpart**

- (1) The purposes of this Subpart are to promote good corporate governance, and to deter, and to assist in the monitoring of, insider conduct and market manipulation, by –
  - (a) ensuring that information about directors' and senior managers' trading activities in listed issuers is available to participants in financial product markets; and
  - (b) enabling the dates of trades to be checked against the dates at which material information became generally available to the market.

[188] Section 297(1) of the FMCA provides that a director or senior manager of a listed issuer who has a relevant interest in a quoted financial product of that listed issuer must disclose that fact, in accordance with ss 299 and 300, within five trading days of: the listing of the listed issuer; or the person's appointment as a director or senior manager.

[189] Section 297(2)(b) of the FMCA requires any director or senior manager of a listed issuer who acquires or disposes of a relevant interest in a quoted financial product in the listed issuer to disclose that fact in accordance with ss 299 and 300, within five trading days after the acquisition or disposal.<sup>36</sup>

*Ms Ding*

[190] In its first cause of action the FMA alleges that Ms Ding was a senior manager of ONL when it listed, and that she breached her statutory obligation to disclose her relevant interest in the Zeng shares when ONL listed on 31 March 2016.

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<sup>36</sup> Section 297(2)(a) of the FMCA sets out in certain circumstances in which disclosure is not required for 20 working days, but none of those apply in this case.

[191] In its third, fifth, ninth and thirteenth causes of action the FMA allege that Ms Ding contravened her obligation under s 297(2)(b) to disclose her acquisition or disposal (as the case may be) of a relevant interest in ONL shares issued in Ms Zeng's name on 18 April 2016; 17 May 2016; 5 July 2016; and 19 and 20 October 2016 respectively. The relevant acquisitions or disposals are those that I have found amount to market manipulation as alleged by the FMA in each of the second, fourth, eighth and twelfth causes of action respectively.

*Mr Zhong*

[192] In its eleventh cause of action the FMA alleges Mr Zhong breached his obligation to disclose his acquisition of 3,500 shares on the Ding securities account on 19 October 2016. That is the acquisition I have found contravened s 265 as alleged by the FMA in the tenth cause of action.

[193] In its sixteenth cause of action the FMA alleges that Mr Zhong breached an obligation under s 297 to disclose his acquisition of a relevant interest in the 7,500 shares Mr Qian purchased on Mr Zhong's instructions and held to his account on 15 February 2017. That is the acquisition that I have found amounted to market manipulation by Mr Zhong in the fifteenth cause of action.

[194] Mr Zhong and Ms Ding deny all the non-disclosure causes of action. Mr Zhong denies having any relevant interest in the ONL shares he acquired on the Ding securities account. He denies having any relevant interest in the shares Mr Qian acquired on 15 February 2017. Similarly, Ms Ding denies having any relevant interest in the ONL shares she dealt with on the Zeng securities account. She also denies being a senior manager for the purposes of the disclosure obligations set out at s 297.

[195] The relevant issues are:

- (a) did Mr Zhong or Ms Ding have a "relevant interest" in the shares they acquired (or of which Ms Ding disposed) on the Ding and Zeng securities accounts;

- (b) did Mr Zhong have a “relevant interest” in the shares Mr Qian acquired on his instructions and held to his order on 15 February 2017; and
- (c) was Ms Ding a senior manager for the purposes of s 297.

*Did Mr Zhong and Ms Ding have a “relevant interest”*

[196] Sections 235, 236 and 237 of the FMCA define the term “relevant interest”. It is defined very broadly.<sup>37</sup> Section 235 provides that:

- (1) In this Act, a person has a **relevant interest** in a financial product if the person—
  - (a) is a registered holder of the product; or
  - (b) is a beneficial owner of the product; or
  - (c) has the power to exercise, or to control the exercise of, a right to vote attached to the product; or
  - (d) has the power to acquire or dispose of, or to control the acquisition or disposal of, the product.
- (2) Section 235(1) applies regardless of whether the power or control is express or implied, direct or indirect, legally enforceable or not, related to a particular financial product or not, exercisable presently or in the future, or exercisable alone or jointly with another person or persons...

[197] This broad definition of “relevant interest” is similar to the definition at s 5 of the Securities Amendment Act 1988. Heron J considered that definition in *Securities Commission v Honor Friend Investment Limited* holding that:<sup>38</sup>

This definition nets any person who has by whatever means power over the disposition of the security and power over voting rights which attach to the security. In combination, the breadth of the interests affected by the Act and the requirement to notify in accordance with the Act ensures a deep well of public information about the true owner, or those who might act as owner, of a relevant security. One of the purposes of the Act is to provide an informed marketplace. Section 5(4) provides that any power of the kind referred to in s 5(1) above is of the widest possible variety and does not depend on enforceability for its operation as a component of a relevant interest in this Act.

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<sup>37</sup> Financial Markets Conduct Act 2013, s 235(1).

<sup>38</sup> *Securities Commission v Honor Friend Investment Ltd* (1991) 5 NZCLC 67,512 (HC).

[198] The Court of Appeal has confirmed that this broad definition focuses on whether, in practice, a person has a right or power to control what happens in relation to securities.<sup>39</sup> This is consistent with the purpose of this subpart of the FMCA which is to ensure that information about directors' and senior managers' trading activities is available to other market participants.<sup>40</sup> The focus of the inquiry is on substance rather than form.

[199] I accept Mr Williams' submission that from at least 19 October 2016, when Mr Zhong traded ONL shares on the Ding securities account, Mr Zhong had the power to acquire or dispose of, or to control the acquisition or disposition of ONL shares issued in Mr Ding's name. He knew Mr Ding's name, birthdate, account number, CSN and FIN. With that information he had the power to acquire ONL shares. On 19 October 2016 that is what he did. In the context of these statutory disclosure requirements, I do not consider it assists Mr Zhong that he had to pretend to be Mr Ding while trading on Mr Ding's securities account. Mr Zhong was still dealing in ONL shares. Similarly, even if the power of attorney was valid Mr Zhong would still have held a relevant interest in the shares for the purposes of s 297.

[200] For the same reason I am satisfied that Ms Ding held a relevant interest in the shares she held on the Zeng securities account. She had sufficient information to acquire and dispose of shares on those accounts, which she did.

[201] I am also satisfied that Mr Zhong held a relevant interest in the shares Mr Qian acquired on 15 February 2017. Mr Qian acquired those shares on Mr Zhong's instructions, and with money provided by Mr Zhong. Mr Qian emailed his wife brief details of the acquisition in which he said he would "hold shares for Walker". As such Mr Zhong had the power to control the acquisition or disposal of those shares.

[202] Mr Zhong was therefore obliged pursuant to s 297(2)(b) to disclose that acquisition of shares. By failing to do so he contravened a civil liability provision, as alleged in the sixteenth cause of action.

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<sup>39</sup> *Ithaca (Custodians) Ltd v Perry Corporation*, above n 27, at [12].

<sup>40</sup> Financial Markets Conduct Act 2013, s 296(1)(a).

*Was Ms Ding a senior manager?*

[203] Section 6(1) of the FMCA defines a senior manager as meaning a person who is not a director but who occupies a position that allows that person to exercise significant influence over the management or administration of the company. The definition refers by way of example to a chief executive or a chief financial officer.

[204] For the following reasons I am satisfied that Ms Ding was a senior manager in a position to exercise significant influence over the management of the company.

[205] As I have noted, ONL's listing document described her as one of two senior managers and set out her experience and qualifications. At the relevant times, Ms Ding's employment contract described her position as "sales and marketing manager" and, from 28 July 2016, "marketing director". She had sold a business to ONL, in relation to which it remained indebted to her.

[206] Other insiders gave evidence concerning Ms Ding's role within ONL. Mr Lindeque described Ms Ding as being "one of the key persons at ONL". This is consistent with a report prepared for ASB describing Ms Ding as holding the sales and marketing portfolio and "looking to grow sales opportunities within China and other markets and assisting Walker [Zhong] with growth and supply chain management/relationships". In response to the question: "are there any key people in the business that a driving strategy and growth?" the report stated: "Walker and Regina are key for setting the strategy and growth within China".

[207] Mr Williams also points out that in Mr Zhong's interview with the FMA when asked whether Ms Ding had a significant role in helping him run the company Mr Zhong replied: "I don't know how to define the significant role, but she is a senior manager".

[208] In reaching that conclusion I take into account the purposes of the disclosure obligations the FMCA imposes on senior managers, which are in part to ensure market transparency of dealings in company shares by insiders with knowledge of and influence over the company's affairs.

[209] Ms Ding argued that she was not a senior manager because she did not attend board meetings or otherwise report to the board. However, I accept Mr Williams' submission that an employee does not need to report directly to the board in order to be a senior manager. Directors and managers have different functions: directors direct; managers manage.<sup>41</sup> The FMCA is intended to apply to both, provided that in each case the manager has significant influence over the management and administration of the company.<sup>42</sup> I am easily satisfied that Ms Ding had significant influence over the management and administration of ONL to be a senior manager for the purposes of the FMCA.

[210] For completeness I note that Ms Ding refers to the written disclosure made when ONL listed on 31 March 2016. In that disclosure Mr Zhong and Ms Ding as trustees of the Zhong Family Trust disclosed their substantial shareholding in ONL in accordance with s 297(1). That disclosure also provided:

**Disclosure has effect for purposes of directors' and senior managers' disclosure**

Wei Zhong is also a director of Oceania Natural Limited. This disclosure also constitutes disclosure for the purposes of the directors' and senior managers' disclosure obligations.

[211] ONL's solicitor certified this disclosure. Ms Ding submits that this confirms she had no additional disclosure obligations as a senior manager. I do not agree. The solicitor certifies the disclosure on behalf of those by whom it was made. He did not certify that Ms Ding was not a senior manager.

[212] I am therefore satisfied that:

- (a) Mr Zhong was obliged pursuant to s 297(2)(b) to disclose his acquisition of ONL shares of 19 October 2016 and 15 February 2017. By failing to do so he contravened a civil liability provision as alleged in the eleventh and sixteenth causes of action respectively.

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<sup>41</sup> *R v Moses*: HC Auckland CRI-2009-004-1388, 8 July 2011, at [74].

- (b) Ms Ding was obliged pursuant to s 297(2)(b) to disclose her acquisition and disposition (as the case may be) of ONL shares on 18 April 2016; 17 May 2016; 5 July 2016; and 19 and 20 October 2016. By failing to do so she contravened a civil liability provision as alleged in the third, fifth, ninth and thirteenth causes of action respectively.

*First cause of action – Ms Ding*

[213] In its first cause of action the FMA alleges that when ONL listed on 31 March 2017 Ms Ding had a relevant interest in the Zeng shares which, as a senior manager of ONL, she was required to disclose. The FMA alleges that Ms Zeng had a relevant interest in those shares at that time because she had the power to dispose of them, or to control the disposition of them.

[214] I have found that Ms Ding had a relevant interest on those shares on 18 April 2016 (and following) when she used her mother's personal details, CSN and FIN to trade on the Zeng securities account. The evidence that Ms Ding in fact traded the shares supports that conclusion. However, I do not consider the evidence is quite sufficient to prove to the requisite standard that Ms Ding had all that information, and therefore the power to control the disposition of shares in her mother's name, when ONL's shares were listed on 31 March 2016<sup>43</sup>.

*Seventeenth cause of action*

[215] In its seventeenth cause of action the FMA alleges that Mr Zhong and Ms Ding breached their obligations under s 297(2)(b) to disclose acquisitions and/or disposals of ONL shares on the Ding securities account and the Zeng securities account at various other times. The acquisitions and/or disposals of relevant interests that are the subject of the seventeenth cause of action are not the subject of any market manipulation causes of action in the proceeding.

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<sup>43</sup> As noted, one of the powers of attorney Ms Ding claimed to have from her mother was dated 22 March 2016. However, the FMA disputes the validity of that power of attorney, in my view for good reason.

[216] Ms Ding admits placing the orders alleged, but submits once again that she was not a senior manager and was acting on her mother's instructions. For reasons already given I do not accept those submissions.

[217] For his part Mr Zhong says he has insufficient knowledge of the alleged acquisition by him of 500 ONL shares on the Deng securities account on 13 October 2016. However I am satisfied from FMA's evidence of relevant transactions that this transaction occurred.

[218] I therefore find Mr Zhong and Ms Ding contravened a civil liability provision by failing to comply with their disclosure obligations under s 297 of the Act, as alleged in the seventeenth cause of action.

*Mr Zhong and Ms Ding's additional arguments*

[219] I have already dealt with Mr Zhong and Ms Ding's arguments concerning: the WeChat messages; Ms Ding's laptop; and their pleaded position that they were acting on behalf and on the instructions of Ms Ding's parents.<sup>44</sup> For completeness I also deal with three other arguments they raise in their defence.

[220] First, Mr Zhong and Ms Ding pointed out their share trading on Ms Ding's parents' securities account of relatively low value. Mr Zhong's trades on Mr Ding's securities account were valued at \$8,330. Ms Ding's trades on the Zeng securities account were valued at \$21,565. They seem to suggest this renders the trading insignificant.

[221] I do not agree. I accept Mr Williams' submission that a manipulative trade can occur regardless of its dollar value. Indeed, Mr Solarz's evidence was that trading a smaller amount of shares relative to a large existing shareholding can itself be an indication of manipulation; for example when a small transaction influences the price of a stock thereby increasing the market value of a larger shareholding. In my view that is precisely what has occurred here.

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<sup>44</sup> At [75 - 93].



[222] Secondly, Mr Zhong and Ms Ding submit that they did not ultimately benefit from the trades carried out on Mr Ding and Ms Zeng's securities account, and nor did that trading cause harm to any third parties.

[223] There is no requirement for the FMA to prove that Mr Zhong and/or Ms Ding's manipulation benefited them or harmed others. But in any event, I do not accept their submission. The Court has previously emphasised the negative impact that market manipulation has on market integrity.<sup>45</sup> Moreover, as Mr Solarz pointed out, each time the ONL share price was supported by manipulative trades, the book value of the Zhong Family Trust's shareholding increased, sometimes substantially. Mr Zhong and Ms Ding as trustees may not have sold or encumbered those shares, but this increase was nevertheless of benefit to them. Mr Lindeque's evidence was that Mr Zhong wanted to attract additional investors, and a higher share price could assist with that. That is also consistent with Mr Zhong's WeChat message to Ms Ding on 7 June 2016 expressing concern about the declining share price while he was negotiating with an investment bank.

[224] Thirdly, Mr Zhong and Ms Ding complain that the market maker also manipulated the market. Their argument seemed to be that the market maker's bids to buy and offers to sell ONL shares did not genuinely reflect the demand or supply of ONL shares. As such, these bids and offers themselves gave a false and misleading appearance of the demand for, supply of and price for ONL shares. Mr Zhong submitted that for the FMA to rely on the market maker's offers to prove its case against him and Ms Ding was "like using lies to prove truth".

[225] I do not accept that submission. The market maker's role was to improve liquidity in the market for shares in smaller companies. That was the only purpose of its bids and offers. Although the market maker's activity may have had an impact of the supply of, demand for or price of trading in ONL shares, or the extent of the active trading, it did not make those offers for the purpose of giving a false or misleading appearance about those matters. As Venning J noted in *Warminger*, a trader's purpose can distinguish a manipulative trade from a non-manipulative trade.<sup>46</sup> The market

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<sup>45</sup> See, for example, *Financial Markets Authority v Warminger* [2017] NZHC 1471 at [8].

<sup>46</sup> *Warminger*, above n 8, at [68].

maker's role was essentially passive. It was Mr Zhong and Ms Ding's activity that moved the market maker's bids up, thereby moving the share price up. As I have noted, on 20 October 2016 the market maker withdrew its quotes from the market because it was concerned about the extreme market conditions arising out of Ms Ding's and Mr Zhong's market activity.

## **Relief**

[226] Sections 265 and 297 are civil liability provisions of the FMCA.<sup>47</sup> The Court may make a declaration of contravention of a civil liability provision if it is satisfied that a person has contravened a civil liability provision, or has been involved in the contravention of a civil liability provision.<sup>48</sup> A declaration of contravention must state the matters referred to in s 488 of the FMCA.

[227] The FMA seeks declarations that Mr Zhong and Ms Ding have contravened ss 265 and 297, and that Mr Zhong has been involved in contraventions of s 265, as alleged in the 2ASoC.

[228] The FMA has also applied for pecuniary penalties against Mr Zhong and Ms Ding in relation to each of their alleged contraventions of the ss 265 and 297, and Mr Zhong's involvement in contraventions of s 297. As such, the Court must make a declaration of contravention, and may order payment of a pecuniary penalty, if it is satisfied that either Mr Zhong or Ms Ding has contravened ss 265 or 297 or been involved in such a contravention.

## **Result**

[229] The Court is satisfied that:

- (a) Mr Zhong and/or Ms Ding have each contravened s 265 or been involved in a contravention of s 265 as alleged in each of the second, fourth, sixth, eighth, tenth, twelfth and fifteenth causes of action pleaded in the 2ASoC.

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<sup>47</sup> FMCA, s 385.

<sup>48</sup> Section 486.

- (b) Mr Zhong and/or Ms Ding have each contravened s 297 as alleged in each of the third, fifth, ninth, eleventh, thirteenth, sixteenth and seventeenth causes of action pleaded in the 2ASoC.

[230] In each case the Court makes declarations accordingly. The parties have leave to file memoranda within 20 working days as to the precise terms of those declarations.

[231] Further submissions and probably a hearing are required to deal with penalties and costs. The parties should file memoranda within 10 working days as to how to progress those matters.

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Robinson J