

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

**CIV 2017-404-2026  
[2017] NZHC 2059**

BETWEEN FINANCIAL MARKETS AUTHORITY  
Plaintiff

AND PRINCE & PARTNERS TRUSTEE  
COMPANY LIMITED  
Defendant

Hearing: 21 and 25 August 2017

counsel: N Williams for Plaintiff  
M R Heron QC, J N Bierre and D MacRae for Defendant

Judgment: 25 August 2017

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**JUDGMENT OF VAN BOHEMEN J**

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*This judgment was delivered by me on 25 August 2017 at 5.00pm  
pursuant to Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

Solicitors:  
Meredith Connell, Auckland  
Morgan Coakle, Auckland

Counsel:  
M R Heron QC, Auckland

## **Introduction**

[1] In 2014 the Financial Markets Authority (FMA) instituted proceedings under s 34 of the Financial Markets Authority Act 2011 (FMA Act) against the respondent, Prince & Partners Trustee Co Ltd (Prince) concerning Prince's conduct as trustee for Priority Investments Limited, whose name later changed to Viaduct Capital Limited (Viaduct). In taking these proceedings, the FMA was acting in the place of the investors in Viaduct who lost most of their investments when Viaduct was put into receivership, and of the Crown which had indemnified investors in Viaduct under a Crown Deed of Guarantee dated 13 November 2008 until that Guarantee was withdrawn. As explained more fully below, s 34 of the FMA Act allows the FMA to exercise rights of action that private persons may have under financial markets legislation.

[2] The hearing of the case was due to begin on Monday, 21 August 2017. In the weeks preceding the hearing, Prince discontinued its proceedings against the five third parties. Accordingly, the only remaining parties were the FMA and Prince.

[3] On 18 August 2017, the parties reached a settlement and subsequently notified the Court. The scheduled five-week hearing was vacated. Counsel for the parties filed memoranda dated 23 August 2017 (on behalf of FMA) and 24 August 2017 (on behalf of Prince) explaining the basis of the settlement and attaching a draft Settlement Agreement for the consideration and approval of the Court.

[4] Section 41 of the FMA Act provides:

**41 Proceedings must not be settled, compromised, or discontinued without approval**

No proceedings commenced or taken over under this subpart may be settled, compromised, or discontinued without the approval of the High Court.

[5] The FMA and Prince therefore seek the Court's approval of the terms of settlement.

[6] This is the first case in which the High Court has been required to examine a case instituted under s 34 of the FMA Act and required to approve settlement under s

41 of that Act. I therefore set out below the basis on which I have approached this task and the overarching reasons I have decided to approve the settlement agreed between the parties.

### **Approach to Approval**

[7] Section 41 does not provide the Court with guidance as to the basis on which approval should be given or otherwise. It sits in some contrast, therefore, to other enactments under which a statutory body or the Crown must seek the Court's approval for settlement.<sup>1</sup> The FMA Act nonetheless provides a framework against which the settlement may be assessed.

[8] Central to the understanding of any statute is its purpose.<sup>2</sup> Section 3 of the FMA Act states in clear terms that the purpose of the Act is to establish the FMA and provide for its main purposes, objectives and powers.<sup>3</sup> The FMA's main objective is provided for in s 8:

#### **8 FMA's main objective**

The FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets.

[9] The FMA's functions are set out in s 9:

#### **9 FMA's functions**

(1) The FMA's functions are as follows:

- (a) to promote the confident and informed participation of businesses, investors, and consumers in the financial markets, including (without limitation) by—
  - (i) collecting and disseminating information or research about any matter relating to those markets:
  - (ii) issuing warnings, reports, or guidelines, or making comments, about any matter relating to those markets, financial markets participants, or other persons engaged in conduct relating to those markets

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<sup>1</sup> See, for example, s 95 of the Criminal Proceeds (Recovery) Act 2009.

<sup>2</sup> Interpretation Act 1999, s 5(1).

<sup>3</sup> Financial Markets Authority Act 2011, s 3(a), (b) and (c) [FMA Act]. Section 3(d) states a collateral purpose of the FMA Act: to disestablish (and thereby replace) the Securities Commission and the office of the Government Actuary.

(including in relation to 1 or more particular persons):

- (iii) providing information about its functions, powers, and duties under this Act and other enactments (including promoting awareness by investors that all investments involve risks and that it is not the role of the FMA to remove those risks):
  - (iv) providing, or facilitating the provision of, public information and education about any matter relating to those markets:
  - (v) stating whether or not, or in what circumstances, the FMA intends to take or not take action over a particular state of affairs or particular conduct (for example, to give a person some level of certainty that the FMA will take no further action in relation to a matter):
- (b) to perform and exercise the functions, powers, and duties conferred or imposed on it by or under the financial markets legislation and any other enactments:
- (c) to monitor compliance with, investigate conduct that constitutes or may constitute a contravention or an involvement in a contravention of, and enforce—
- (i) the Acts referred to in Part 1 of Schedule 1 (and the enactments made under those Acts); and
  - (ii) the Acts referred to in Part 2 of Schedule 1 (and the enactments made under those Acts) to the extent that those Acts or other enactments apply, or otherwise relate, to financial markets participants:
- (d) to monitor, and conduct inquiries and investigations into any matter relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct relating to those markets:
- (e) to keep under review the law and practices relating to financial markets, financial markets participants, and other persons engaged in conduct relating to those markets:
- (f) to co-operate with—
- (i) any other law enforcement or regulatory agency (including under section 30):
  - (ii) overseas regulators (including under section 30 or 31).

- (2) Subsection (1)(b) and (c) do not limit the functions, powers, and duties conferred or imposed on any other person in respect of financial markets legislation.
- (3) The fact that some other person has functions, powers, and duties in respect of financial markets legislation does not limit or restrict the FMA's functions, powers, and duties in respect of that legislation.
- (4) Except as expressly provided otherwise in this or any other Act, the FMA must act independently in performing its statutory functions and duties, and exercising its statutory powers, under—
  - (a) this Act; and
  - (b) any other Act that expressly provides for the functions, powers, or duties of the FMA (other than the Crown Entities Act 2004).

[10] The legislation emphasises the FMA's public function. That is also reflected in s 34, under which the proceedings in this case were instituted. Sub-sections (1), (3) and (5) of s 34 ensure that the FMA's decision to institute proceedings on behalf of private persons with rights of action is made with the broader interests of the public and the market in mind:

**34 FMA may exercise person's right of action**

- (1) If, as a result of an inquiry or investigation carried out by the FMA, *the FMA considers that it is in the public interest for it to do so*, the FMA may, in accordance with this subpart,—
  - (a) exercise the right of action that a person (**person A**) has against a person who is or has been a financial markets participant by commencing and controlling specified proceedings against the person who is or has been a financial markets participant; or
  - (b) take over specified proceedings that have been commenced by a person (**person A**) against a person who is or has been a financial markets participant for the purpose of continuing the proceedings.
- ...
- (3) In exercising a power under this section, *the FMA must act in the public interest*, but (subject to that duty) may take into account the interests of—
  - (a) person A; and
  - (b) the shareholders, members, and creditors of person A; and

- (c) if person A is an issuer, any product holders of financial products issued by person A.

...

- (5) The FMA must, *when considering whether exercising a power under this section is in the public interest*, have regard to—
  - (a) its main objective under section 8; and
  - (b) the likely effect of the proceedings on the future conduct of financial markets participants in connection with the financial markets; and
  - (c) whether exercising the powers is an efficient and effective use of the FMA's resources; and
  - (d) the extent to which the proceedings involve matters of general commercial significance or importance to the financial markets; and
  - (e) the likelihood of person A commencing the proceedings (if those proceedings have not yet been commenced) and diligently continuing the proceedings; and
  - (f) any other matters it considers relevant.

(Emphasis added)

[11] While public interest in a fairly and properly conducted market is the broader concern of the FMA under this section, as subsection (3) makes clear, the FMA may also take into account the interests of private persons but subject to the wider public interest duty.

[12] It is against these purposes and functions of the FMA Act and the FMA that I consider the settlement proposed in this case.

### **Reasons for Approving Settlement**

[13] Below I comment on the key terms and then state some overarching reasons for my approval of the settlement.

#### *Admissions*

[14] Prince makes the admissions set out in Schedule A to the Agreement and which are summarised in paragraph 1 of the Agreement. In brief, these are that

Prince failed to carry out its responsibilities as trustee in connection with a major transaction entered into by Viaduct (called the Acquisition Transaction in the Settlement Agreement) and in connection with the withdrawal of the Crown guarantee.

[15] I consider it is the public interest that these admissions are made and are known. This demonstrates that trustees are accountable in carrying out their responsibilities and can be held to account.

#### *Settlement Sum*

[16] The terms of the settlement require Prince to pay the FMA \$4.5 million. The appropriateness of this sum has to be assessed against the sums the FMA was seeking in its proceedings which were:

- (a) Losses to investors in relation to the Acquisition Transaction: \$6,989,249.00 plus interest; or, in the alternative
- (b) Losses of investors in relation to the loss of the Crown Guarantee: \$5,305,683.00 plus interest.

[17] I accept the submissions in the memorandum of counsel for the FMA that the payment of \$4.5 million is in a range commensurate to the losses caused by Prince's conduct and is a reasonable level of compensation for the losses suffered by investors and by the Crown. I also accept that the sum of \$4.5 million reasonably represents the litigation risk inherent in any trial, having regard to the positive defences advanced by Prince and the arguments expected to be advanced by Prince regarding the scope of trustees' duties. As noted in the memorandum, the settlement has also prevented the need for the FMA to expend further resources on a trial scheduled for five weeks.

#### *Confidentiality and Publicity*

[18] The Settlement Agreement provides the fact and terms of the Agreement are not confidential and may be disclosed. It records that, following the Court's

approval, the FMA may make a public announcement that the settlement has been reached and may post a copy of the Agreement on its website.

[19] I agree that disclosure of the Agreement is in the public interest and accords with the purpose of the FMA Act.

*Overarching Reasons*

[20] In conclusion, I consider the settlement as set out in the Settlement Agreement should be approved for the following reasons:

- (a) As submitted by counsel for the FMA, the content of the admissions by Prince, the publishing of them and the payment of \$4.5 million fulfil the objective of holding Prince to account, raising awareness of the standard of care expected of licensed supervisors, demonstrating the FMA will take action where supervisors fail to meet their obligations, and promoting investor confidence.
- (b) The terms of the settlement should appropriately deter companies and persons in roles such as that held by Prince from behaving as the respondent did in this case.
- (c) The settlement highlights the standard of care, diligence and skill expected of licensed supervisors. It informs the New Zealand financial markets, in particular supervisors, of the duty of care and standard of care owed by them to investors. It will provide guidance to supervisors and help to ensure they understand their responsibilities.
- (d) The public nature of the order, and the likelihood that it will receive publicity, further the FMA's main objective "to promote and facilitate the development of fair, efficient, and transparent financial markets".<sup>4</sup> The terms of settlement are recorded in plain and clear language that

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<sup>4</sup> FMA Act, s 8.

is accessible to those members of the public who have an interest in the financial markets.

- (e) The settlement agreement should promote confidence in the FMA and in the regulation of financial markets in New Zealand generally.

**Disposition**

[21] I make an order approving the terms of settlement between the Financial Markets Authority and Prince & Partners Trustee Co Ltd.

[22] In accordance with the terms of settlement, costs are to lie where they fall.

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van Bohemen J