

**IN THE DISTRICT COURT
AT WAITAKERE**

**I TE KŌTI-Ā-ROHE
KI WAITĀKERE**

**CRI-2018-044-000727
[2020] NZDC 26336**

FINANCIAL MARKETS AUTHORITY
Prosecutor

v

PEGASUS MARKET LIMITED
Defendant

Hearing: 16 December 2020
Appearances: J Cairney for the Prosecutor
No appearance by Defendant
Judgment: 23 December 2020

RESERVED NOTES OF JUDGE J M JELAŠ ON SENTENCING

[1] Pegasus Market Limited (Pegasus) was found guilty by me of two charges of holding out as registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the Act) knowing that it was not registered, contrary to s 12(1) of the Act. The maximum penalty for each offence is a fine not exceeding \$300,000.

[2] Pegasus has taken no steps in the prosecution process. Evidence in support of the prosecution was heard on 3 and 4 August 2020. An initial reserved decision was issued by me on 9 September 2020 recording I had found Pegasus guilty of both charges. On 19 November 2020, I issued my reserve judgment setting out the reasons for those findings.

[3] The Financial Markets Authority (FMA) have filed written submissions for sentencing dated 6 November 2020. There was no appearance by Pegasus at the sentencing hearing. Prior to sentencing, the FMA issued a notice of finding of guilt in Pegasus Limited's absence, dated 29 October 2020. The notice was sent to Pegasus' current address for service (being the Napier address).

Background facts

[4] The full circumstances and details of the offending are set out in my reserved judgment of 19 November 2020.¹ Some of the content from my reserved judgment is repeated in this decision for the ease of the reader.

[5] The Act establishes a mechanism for the regulation of financial service providers (FSPs). This includes the compulsory registration of these providers. In addition to being registered, an FSP must also be a member of an approved dispute resolution scheme if they provide financial services to retail clients. This framework has been enacted to promote the confident and informed participation of business, investors and consumers in the financial markets. Registration provided the public with readily-accessible information about FSPs. The compulsory registration scheme came into effect in December 2010.

In 2010, the Act was further amended to enable it to apply to a person who has a place of business in New Zealand regardless of where the financial service is provided. The amendment was designed to capture FSPs who provide financial services to overseas clients from a place of business in New Zealand. A consequence of this amendment was described by Moore J in *Innovative Securities Limited v Financial Markets Authority* as follows:²

However, by broadening the geographical scope of the Act's application, one unintended and unwelcome potential was created. This was that an FSP could be incorporated and registered in New Zealand without being subject to New Zealand legislative oversight. In other words, under this new statutory regime it was possible for a New Zealand registered FSP with no substantial business base or connection with New Zealand to offer financial services to offshore clients. The concern was this. The fact of registration could

¹ *Financial Markets Authority v Pegasus Markets Limited & Michael Reys* [2020] NZDC 23811.

² *Innovative Securities Limited v Financial Markets Authority* [2017] NZHC 1187, [2017] NZCCLR 25 at [21].

misleadingly provide misplaced reassurance to offshore clients that the FSP was regulated by New Zealand laws when it was not. A consequence would be the risk of damage to New Zealand's reputation as well as a well-regulated financial market.

[6] In 2014, the FMA was granted powers to direct the registrar of the FSPs registry at the Companies Office to de-register FSPs. That same year, the FMA commenced a review of the FSPs on the registry. The purpose of the review was to prevent businesses and individuals from damaging the integrity and reputation of New Zealand financial markets. Some FSPs deliberately promoted their New Zealand registration to give an *impression* that their activities were regulated by the New Zealand authorities. As was submitted at the judge alone hearing and at sentencing, registration provides a directory of FSPs; it does not mean an FSP is subject to the oversight of a New Zealand government regulator.

[7] Pegasus was registered as an incorporated company in New Zealand on 11 March 2014. Its registered office and address for service is recorded as Level 1, 1 Dickens Street, Napier, New Zealand. At the time of incorporation, it had a sole director and shareholder, Rafael Ruiz Lemonche, a resident of Spain. Contact details for Pegasus recorded in the Companies Office registrar included its trading name as Pegasus Markets Limited.

[8] On 29 June 2014, Pegasus was registered as an FSP. Pegasus also became a member of Financial Service Complaints Limited (FSCL), a Wellington-based independent dispute resolution service.

[9] On 23 June 2015, the FMA gave notice to Mr Lemonche of its intention to direct the de-registration of Pegasus from the FSPs register. The reasons for the review given to Mr Lemonche were as follows:

We consider that the registration of Pegasus Markets Limited on the FSPR is likely to have the effect of creating a false or misleading appearance of the extent to which Pegasus Markets Limited provides financial services from a place of business in New Zealand and the extent to which it is regulated by New Zealand law in relation to those services.

Our understanding is that the financial services provided by Pegasus Markets Limited are substantively provided outside of New Zealand to clients outside New Zealand. We also note that Pegasus Markets Limited is not regulated by New Zealand law in relation those financial services. In such circumstances,

when the services are provided by an entity registered in New Zealand, we believe it is likely that the appearance is created that the services are provided from New Zealand and that the New Zealand registered entity is subject to regulation in New Zealand. This view is supported by complaints made to the FMA, which show that in such circumstances clients mistakenly believe registration as a financial service provider in New Zealand means that services are provided from New Zealand and the entity is regulated in New Zealand for the services provided.

We also believe that when clients discover that a New Zealand registered financial service provider is not regulated by New Zealand law in relation to the financial services it provides that is also likely to result in damage to the integrity and reputation of New Zealand's financial markets and the law and regulatory arrangements in relation to those markets

More generally, we believe that registration as a financial service provider in New Zealand in circumstances where the registration appears to be primarily for the purpose of, or is in fact likely to create the appearance that financial services are provided from New Zealand and are regulated in New Zealand, is likely to be damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets.

[10] On 7 August 2015, the FMA gave notice to Pegasus that it intended to direct Pegasus be de-registered as an FSP. The notice included the following passage:

The FMA notes that financial services provided are substantively provided via a website controlled outside of New Zealand to clients outside of New Zealand and that no financial services relating to the substantive operations of Pegasus are provided from New Zealand.

[11] On 13 August 2015, at the conclusion of the review process, Pegasus was de-registered as an FSP. The notice of de-registration sent by the Companies Office to Pegasus included information of the offence provisions under the Act. The notice stated:

[Y]ou should be aware that it is an offence under New Zealand law to offer, or to hold yourself out as offering, a financial service from a place of business in New Zealand if you are not registered on the Financial Service Providers Register. Anyone convicted of this offence is liable to punishment in the form of imprisonment or a fine.

[12] Despite being de-registered, Pegasus held out on two separate websites (www.PGMarkets.com and www.PGBinary.com) that it was registered as an FSP in New Zealand. The offence periods for the two different websites are as follows:

(a) PGMarkets website: 13 August 2015 - 11 July 2017; and

- (b) PGBinary website: 8 September 2017 - 13 February 2018.

Proceeding in Pegasus' absence

[13] I am satisfied, having the benefit of reading the FMA's submissions, that Pegasus can be sentenced in its absence. I note that notice of my reserve decision has been given to Pegasus.

Purposes and principles of sentencing

[14] I consider the purposes and principles of sentencing that require emphasis in the present case are as follows:

- (a) A need for a sentence to provide for general deterrence. New Zealand cannot be a country where breaches of its financial markets regulatory systems can be an acceptable commercial consequence. The Court's response to breaches needs to be sufficient to ensure financial operators in the New Zealand market will incur real and meaningful consequences if they breach the regulatory framework;
- (b) A need to hold Pegasus accountable for harm done to the integrity and reputation of the New Zealand financial markets;
- (c) To promote a sense of accountability by Pegasus for the harm that it has done and denounce its conduct; and
- (d) The protection of the New Zealand financial community.

[15] I consider the aggravating factors of Pegasus' offending include the significant period of time over which the offending occurred. I accept the submission made by the FMA that this offending was not an isolated incident that was the result of inadvertence. The false and misleading representations on both of Pegasus' website continued to be available to the global financial market for a period of over two and a half years.

[16] I also consider the representations were not only misleading but were false. I consider the fact that they remained in place was for the intended purpose of portraying to others that Pegasus was subject to regulation by New Zealand's financial regulators. I consider the amendment to the websites visible in the archived websites examined by Ms Knapp (dated 20 April 2017 and 11 July 2017), evidenced by the inclusion of the New Zealand Silver Ferns logo, to be a particularly aggravating feature. Not only does this change to the website indicate that Pegasus was actively updating their website over time, but the inclusion of the Silver Fern and the words *New Zealand* was designed to further enhance the impression that Pegasus' business activities were being overseen by New Zealand regulators, when they were not.

[17] The misrepresentation and false statements were made on key pages on both websites included under tabs titled *Security First*. The placement of these false and misleading statements under the security tab would add to the readers impression that the information contained under those tabs was reliable.

[18] I accept the FMA's submission that the false and misleading statements risked undermining New Zealand's financial market regime. I also accept it is difficult to assess the direct and indirect loss, damage and harm resulting from the offending, but it is important to observe the misuse of the FSP register has been the subject of reports and other materials issued by the FMA. For example, the FMA September 2017 report titled the *Financial Service Providers Register*. The fact the FMA has written that report and other materials demonstrates the real risk of harm resulting from offending such as this.

[19] The FMA's submission that Pegasus' offending was deliberate, prolonged and harmful and is a serious example of offending of this type is entirely apt.

[20] When Pegasus was first informed by the FMA of the intention to de-register, Pegasus responded in full and in writing the following day setting out the grounds for Pegasus remaining registered. When a decision was made to de-register Pegasus and notice was given, Pegasus took no action. Notice of de-registration was given to Pegasus, not only through the FMA but also through its New Zealand agents. The fact that amendments were made by Pegasus to their website during the offence periods to

enhance a perception that Pegasus was subject to regulation by New Zealand regulators, is particularly aggravating.

[21] The FMA have set out various cases in their written submissions that have been of assistance.

[22] Pegasus' offending is serious. There is a high degree of culpability involved in the offending which was deliberate, blatant and over a lengthy period. I consider the appropriate starting point to be a fine of \$200,000.

[23] I consider that there are no mitigating factors. Pegasus, as I have stated, has taken no steps in the prosecution process.

[24] I accept Mr Cairney's submissions that the preferable approach to imposing the sentencing outcome, being a fine of \$200,000, should be by imposing the total fine on one of the charges. That total fine will properly reflect the seriousness of the offending. The division of the fine between the two charges may dilute the impression the sentencing outcome is intended to convey.

[25] Therefore, on CRN ending 0163 (being the offence directed at the PGMarkets website between the period 13 August 2015 and 11 July 2017), a fine of \$200,000 is imposed. On the remaining charge, being CRN ending 0168 (which is directed at the PGBinary website for the period 8 September 2017 to 13 February 2018), a conviction and discharge outcome is recorded.

Judge J Jelas
District Court Judge

Date of authentication: 23/12/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.