**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA617/2015**
**[2016] NZCA 197**

| | | |
|---|---|---|
| BETWEEN | | FINANCIAL MARKETS AUTHORITY<br>Appellant |
| AND | | VIVIER AND COMPANY LIMITED<br>Respondent |

| | |
|---|---|
| Hearing: | 10 February 2016 |
| Court: | Randerson, Winkelmann and Kós JJ |
| Counsel: | M T Scholtens QC and C R Allan for Appellant<br>A N Riches and J I Taylor for Respondent |
| Judgment: | 13 May 2016 at 12.30 pm |

---

**JUDGMENT OF THE COURT**

---

**A The appeal is allowed.**

**B The direction by the appellant that the respondent be deregistered from the Register of Financial Service Providers is restored.**

**C The respondent must pay costs to the appellant for a standard appeal on a band A basis, together with usual disbursements.**

---

**REASONS OF THE COURT**

(Given by Kós J)

[1] Vivier and Co Ltd (Vivier), a New Zealand incorporated company, is registered as a financial services provider (FSP) under the Financial Services Providers (Registration and Dispute Resolution) Act 2008 (the Act). But the

financial services it provides are to clients outside New Zealand. Mostly in Europe. The Financial Markets Authority (FMA) considered Vivier's New Zealand registration to be misleading. Particularly as to the extent its services were provided in or from New Zealand or regulated by New Zealand law. It said that was potentially damaging to the reputation of New Zealand's financial markets. The FMA directed that Vivier be deregistered as a FSP.

[2] Vivier appealed its deregistration to the High Court. Brewer J allowed the appeal.[1] He found the FMA had insufficient evidence that Vivier's registration was misleading. And it had acted in breach of natural justice.

[3] The FMA appeals. The primary question before us is what evidential threshold applies before an FSP may be deregistered. Is it sufficient that it simply provides no financial services in or from New Zealand?

**Legislation**

[4] The purposes of the Act are to promote the confident and informed participation of businesses, investors and consumers in the financial markets, and to promote and facilitate the development of fair, efficient and transparent financial markets.[2]

[5] The Act requires registration of any person who is in the business of providing a financial service and is ordinarily resident or has a place of business in New Zealand, regardless of where the financial service is provided.[3] Registration does not thereby require services to be provided in or from New Zealand. It does not thereby require services be provided to New Zealand clients. And it does not require that they be regulated by New Zealand law.

[6] The regulation of the provision of financial services is left to other legislation such as the Financial Advisers Act 2008, the Financial Markets Conduct Act 2013 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009

---

1 *Vivier and Co Ltd v Financial Markets Authority* [2015] NZHC 2337, [2016] 2 NZLR 348.
2 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 2A.
3 Sections 8A and 11.

(AML/CFT Act). That regulatory legislation only applies to FSPs who are carrying on business in New Zealand and have clients or potential clients in New Zealand.[4]

[7] All this creates the possibility of a FSP being incorporated and registered in New Zealand but not being otherwise subject to New Zealand regulation. The Government became concerned about this. It enacted amending legislation in 2014. As Brewer J put it:[5]

> In summary, the concern was that by becoming registered as Financial Service Providers, but not carrying on business as such in New Zealand — which would have required submission to and compliance with the regulatory regimes specific to the various categories of financial services — offshore entities could give the impression to offshore customers that they were resident in and/or regulated in New Zealand:
>
> > This presents a risk to New Zealand's reputation as a well regulated jurisdiction and to the reputation of legitimate New Zealand-based financial service providers …

[8] The relevant provisions governing deregistration are now ss 18–18C of the Act:

> **18 Deregistration of financial service provider**
>
> (1) The Registrar must deregister a financial service provider after a notice period in accordance with sections 19 and 20, if the Registrar is satisfied that the provider—
>
> (a) is no longer qualified to be registered in accordance with section 13; or
>
> (aa) has failed to notify the Registrar of the name, business address, and membership number, as required by section 16(1)(ab); or
>
> (b) is not in the business of providing a financial service (at any time after the expiry of 3 months after registration); or
>
> (c) has been registered because of a false or misleading representation or omission; or
>
> (d) has proffered an application fee or annual confirmation fee

---

4 Financial Markets Conduct Act 2013, ss 33, 47, 239 and 387; Financial Advisers Act 2008, s 157; Financial Markets Authority, Reserve Bank and Department of Internal Affairs *Territorial scope of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (Guideline issued under s 131(c) of the AML/CFT Act, December 2012) at [8].

5 At [9], quoting Memorandum for Cabinet Economic Growth and Infrastructure Committee "Financial Service Provider Registration Amendments" (16 February 2013) at [16].

or levy that has subsequently been dishonoured, declined, or reversed.

(1A) The Registrar may, if the Registrar considers it necessary or desirable after taking into account section 18A, refer consideration of whether a financial service provider should be deregistered to the FMA for the FMA's direction.

(1B) The Registrar must deregister a financial service provider if the FMA gives a direction under section 18B(3)(c)(i).

(2) The Registrar must deregister a financial service provider if the provider so requests in writing, with effect from any future date requested. The Registrar must notify any relevant licensing authority of this deregistration.

(3) For the purposes of this section and sections 19 and 20, notice period means 20 working days from the date of the Registrar's notification under section 19.

**18A Purpose of FMA's powers relating to deregistration**

The purpose of section 18B is to provide for the deregistration of a person (A) if A's registration has, will have, or is likely to have the effect of—

(a) creating, or causing the creation of, a false or misleading appearance with respect to the extent to which A—

(i) provides, or will provide, financial services in New Zealand; or

(ii) provides, or will provide, financial services from a place of business in New Zealand; or

(iii) is, or will be, regulated by New Zealand law in relation to a financial service; or

(b) otherwise damaging the integrity or reputation of—

(i) New Zealand's financial markets; or

(ii) New Zealand's law or regulatory arrangements for regulating those markets.

**18B Consideration of deregistration of financial service provider by FMA**

(1) The FMA—

(a) may, but is not required to, consider a referral under section 18(1A); and

(b) may otherwise consider giving a direction under this section at its own discretion (if a referral has not been made).

(2) If the FMA decides to consider the referral or otherwise decides to consider giving a direction under this section, the FMA must, after taking into account section 18A, consider whether it is necessary or desirable for a financial service provider to be deregistered.

(3) If, after acting under subsection (2), the FMA decides to give a direction to the Registrar under this section to deregister the financial service provider, the FMA must—

(a) give the financial service provider—

(i) written notice of its intention to give the direction; and

(ii) the reasons why it intends to give the direction; and

(iii) a date (being not less than 20 working days after the date of the notice referred to in subparagraph (i)) by which the applicant may make written submissions to the FMA in relation to its proposed direction; and

(b) consider any submissions received in accordance with paragraph (a)(iii); and

(c) either,—

(i) if the FMA remains of the view that the financial service provider should be deregistered, direct the Registrar to deregister the provider; or

(ii) if the FMA decides that the provider should not be deregistered, advise the Registrar accordingly; and

(d) give its reasons for the direction or advice, as the case may be.

(4) A provider who is not satisfied with a direction given under this section may appeal to the High Court under section 42.

…

**18C FMA may direct deregistration regardless of whether section 18(1) applies**

The FMA may give a direction under section 18B in relation to a person regardless of whether any of paragraphs (a) to (d) of section 18(1) apply.

[9] The consequences of deregistration are that the FSP cannot be in the business of providing a financial service in New Zealand or hold out that it is registered under

the Act.[6] It is less clear whether that action precludes the FSP from maintaining a place of business in New Zealand. We did not hear detailed argument on that point, and it is not necessary for us to decide it for present purposes. We note that Ms Scholtens, for the FMA, took the position that Vivier was entitled in any event to continue its present limited activities in its Auckland office given they did not involve provision of a "financial service" in terms of s 5 of the Act. Deregistration does not of course preclude reorganisation and reapplication for registration.

[10] Finally, we note that a statutory right of appeal to the High Court is prescribed in s 42 of the Act. Section 42(3) provides:

> (3) On appeal, the court may do any of the following:
>
> (a) confirm, modify, or reverse the decision or direction or any part of it:
>
> (b) exercise any of the powers that could have been exercised by the Registrar or the FMA in relation to the matter to which the appeal relates:
>
> (c) refer the decision or direction back to the Registrar or the FMA (as the case may be) with directions to reconsider the whole or a specified part of the decision or direction.

**Facts**

[11] The facts are set out comprehensively in the judgment below.[7] We summarise the essential events.

[12] Vivier was registered as an FSP on 21 March 2014. At the time of registration it had one New Zealand resident director. By early 2015 it had five directors. Two were resident in Ireland, one in Italy and two in New Zealand. It had a single New Zealand-based shareholder at all relevant times.

[13] In late 2014 the FMA received four enquiries from various sources as to whether Vivier was "supervised by FMA as they claimed in their website", duly registered, why it had the FMA logo on its website, and whether it was supervised by the FMA.

---

6 Sections 11–12.

7 *Vivier and Co Ltd v Financial Markets Authority*, above n 1, at [11]–[33].

[14] In consequence, the FMA wrote to Vivier on 7 November 2014. Its letter included the following:

> 3 We are concerned with claims made regarding regulation by NZ law on the website of Vivier and Company Limited, https://vivierco.com particularly, we are concerned with the following statements and have detailed our concerns following each statement:
>
> (a) 'Vivier and Company Limited ('VCL') is incorporated and registered as a Financial Service Provider ('FSP') in New Zealand, whose Financial Markets Authority supervisors (sic) all FSPs.' Concern: The Financial Markets Authority does not supervise all FSPs. The Registrar of FSPR does not regulate, merely registers and maintains the Register.
>
> (b) 'The New Zealand Financial Markets Authority (FMA) supervises all Financial Service Providers, including Vivier & Co.' Concern: The Financial Markets Authority does not supervise all FSPs. The Registrar of FSPR does not regulate, merely registers and maintains the Register.
>
> (c) The use of the Financial Markets Authority logo. Concern: The Financial Markets Authority has not give approval for its logo to be used in advertising by Vivier and Company Limited.

[15] On 27 November 2014 Vivier's chairman replied stating that Vivier had been advised by the Department of Internal Affairs that it would come under the FMA's "regulatory supervision", but had "now removed all references to the FMA on our website".

[16] In February 2015 the FMA received an anonymous complaint. The complaint referred to a news report on a website called interest.co.nz stating Vivier had been accused of tax fraud and money laundering in the Irish media. The complainant asked the FMA if it thought Vivier's registration was damaging New Zealand's market reputation.

[17] The FMA made inquiries. An inspector from the Ministry of Business, Innovation and Employment (MBIE) visited Vivier's Auckland office on 24 March 2015. It was a small internal room within a suite of serviced offices. He reported that Vivier did not accept clients from New Zealand or the USA. Vivier's clients all appeared to be from Europe, in particular from Spain. There was just one employee at the office. He had been there for three weeks. He was bored, apparently

performing minor administrative functions only. Very little seemed to be done from the office.

[18] In addition the Department of Internal Affairs (DIA) advised the FMA on 8 April 2015 that Vivier was operating outside the DIA's territorial jurisdiction for the purposes of the AML/CFT Act. Its annual return showed no New Zealand financial activity at all.

[19] A notice of intention to deregister was sent to Vivier on 23 April 2015. The notice said:

> We consider that the registration of Vivier & Co Limited on the FSPR is likely to have the effect of creating a false or misleading appearance of the extent to which Vivier & Co Limited provides financial services in New Zealand, 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.

[20] The notice referred to information collected from the site visit and Vivier's website. The FMA said it had received general complaints that registration in New Zealand creates the impression of both services being provided from New Zealand and that the registered entity is subject to regulation in New Zealand. No specific complaints about Vivier were identified. It did not mention the news article or the anonymous complaint.

[21] Vivier was invited to make submissions as to why it was registered in New Zealand and whether it complied with regulations in the jurisdictions in which it supplied services.

[22] A Mr Hart, one of Vivier's directors, responded on 26 May 2015. The response was legalistic and aggressive in tone. He challenged the notice's lack of supporting evidence and imprecision, and requested further information from the FMA. Mr Hart explained Vivier was incorporated in New Zealand because it provided the advantages of an offshore financial centre, was not a harmful tax jurisdiction and has a stable and competent government and well-developed infrastructure. No information was provided about Vivier's compliance with

overseas regulations. Mr Hart said overseas compliance was beyond the FMA's remit to investigate.

[23] The FMA considered the submission and directed the deregistration of Vivier on 26 June 2015. Its key reasons, communicated to Vivier, were that registration was likely to have the effect of:

> (a) creating a false or misleading impression with respect to the extent to which the company provides financial services from a place of business in New Zealand and to which it is regulated by New Zealand law in relation to those services; and/or
>
> (b) otherwise damaging the integrity and reputation of New Zealand's financial markets and New Zealand's law regulatory arrangements for regulating those markets.

[24] The FMA added that no (or few) financial services were being undertaken in New Zealand; only administration services. This was likely to create a misleading appearance that Vivier was providing financial services from New Zealand and was regulated by New Zealand law. That would damage the integrity and reputation of New Zealand's financial markets.

**High Court decision**

[25] First, Brewer J treated the appeal as against the exercise of discretion by the FMA. In doing so he agreed with a submission by the FMA. The Judge gave three reasons:[8]

> (a) The FMA did not have to objectively apply a defined legal test to establish facts to reach a certain result.
>
> (b) The FMA is an expert body, and deference should be given to its evaluation of options.
>
> (c) The relevant focus was on the nature of the FMA's decision-making power, rather than the appellate body's powers on appeal.

---

8 At [42].

[26] Secondly, the Judge concluded that the statutory framework requires the FMA to have evidence relating to the particular FSP in terms of whether its registration was misleading or harmful to New Zealand's market reputation.[9] It could not rely on "generalisations and complaints relating to other FSPs". He also concluded the FMA could not rely solely on the fact that an FSP does not provide services in or from New Zealand in order to direct deregistration.[10] The Judge said:[11]

> … By law, FSPs with a place of business in New Zealand must be registered even if all of their financial services are provided overseas. When enacting s 18A Parliament chose not to alter the qualification requirements for FSP registration. The law does not state that only those who provide services in or from New Zealand, or who are regulated by New Zealand law, can be registered. It follows that it is not necessary or desirable to deregister an FSP simply on the basis that the FSP only provides financial services overseas. Parliament intended that something more be required.

[27] The Judge held that the FMA erred in deciding Vivier should be deregistered. It did not have any particular evidence that Vivier's registration was misleading or harmful. "There needed to be specific problems with the way in which Vivier promotes itself before the satisfactory evidence threshold could be crossed."[12] Nor had the FMA adequately considered Vivier's submissions in opposition, which raised issues with the reliability of the information the FMA had collected.[13]

[28] Thirdly, the Judge held that the FMA failed to observe the principles of natural justice. The procedure in s 18B(3) was not exhaustive — the FMA had to do more than simply consider Vivier's written submissions.[14] The FMA had acted unfairly in not disclosing to Vivier the anonymous complaint and annexed news article. The Judge rejected the FMA's submission that no weight was given to the complaint. He inferred the complaint had been considered because the FMA requested information as to Vivier's compliance with overseas regulations.[15]

---

9 At [68].
10 At [69].
11 At [69].
12 At [79].
13 At [80].
14 At [84].
15 At [91]–[93]

[29] The Judge also found the FMA acted unfairly in failing to provide Vivier with further information requested in its submissions. FMA was obliged to enter into ongoing consultation with Vivier given the severity of the consequences of deregistration. Vivier had requested specific evidence of, among other things, what was false or misleading about its appearance, to which the FMA needed to provide a specific response.[16]

[30] For these reasons, Brewer J allowed the appeal, quashed the deregistration, and referred the decision back to the FMA.

**Another High Court decision: *Excelsior***

[31] Brewer J's judgment was issued on 25 September 2015. On 29 September 2015 Nation J sitting in Auckland heard another appeal against deregistration, *Excelsior Markets Ltd v Financial Markets Authority.*[17] In issuing his decision in that appeal, in December 2015, Nation J expressly disagreed with Brewer J's analysis in two respects: as to whether the appeal was from the exercise of discretion, and as to the evidential threshold for deregistration under s 18B.

[32] Excelsior was a New Zealand-incorporated company with a single New Zealand-based director an office in Auckland. Its sole shareholder was a United Arab Emirates company. Like Vivier:

(a) it was registered as an FSP under the Act;

(b) it did not conduct any financial activities in New Zealand;

(c) it did not have any New Zealand clients;

(d) its local bank account was not used to hold New Zealand client funds (there being no such clients anyway); and

---

16 At [98]–[100].

17 *Excelsior Markets Ltd v Financial Markets Authority* [2015] NZHC 3334.

(e) it simply undertook administrative and marketing functions out of its New Zealand office.

[33] The FMA in that case gave notice of intention to deregister in May 2015 — shortly after the notice given to Vivier. The Excelsior notice was given on the basis that no financial services were (or would be) provided for New Zealand. Registration would likely have the effect of creating a false or misleading appearance as to the extent to which Excelsior provided financial services from New Zealand and was regulated by New Zealand law in relation to those services.[18] After considering Excelsior's response and further information supplied by it, the FMA directed deregistration essentially for the reasons just given.

[34] Nation J dismissed Excelsior's appeal. In doing so, and as we have said already, he disagreed with Brewer J's analysis in two distinct respects.

[35] First, he did not agree that the appeal should be treated as wholly an appeal against the exercise of discretion. He did so despite the fact that both Excelsior and the FMA accepted Brewer J's analysis on that point. Nation J held that the FMA ultimately had a discretion as to whether to direct the Registrar to deregister Excelsior, "but, for it to be able to exercise that discretion, it had to be satisfied that the potential grounds for deregistration, referred to in s 8A, had been made been made out".[19] To that extent the FMA was required to make an objective assessment of fact against a defined test. More was involved than simply a "careful evaluation of options".[20] Nation J therefore concluded that there was a two-step process required. The first step required an assessment as to whether the qualifying criteria had been met. The second involved the exercise of a discretion as to the ultimate decision which might follow from the objective analysis.[21] Nation J went on:[22]

> With regard to the first step on whether the grounds under s 18A have been made out, the appeal is by way of general appeal requiring me to consider all the evidence on the basis it is a rehearing. In regard to the ultimate decision

---

18 The notice of intention to deregister did not rely on s 18A(b) (damage to financial market integrity or reputation).
19 At [17].
20 At [18].
21 At [20].
22 At [20].

> the FMA made on the basis of the initial findings, the appeal is against the exercise of a discretion.

The Judge noted however that the outcome of the appeal would be no different if the appeal had been treated wholly as an appeal against the exercise of a discretion.[23]

[36] Secondly, Brewer J had held that the FMA could not rely solely on the fact that an FSP does not provide services in or from New Zealand in order to reach the conclusion that deregistration was necessary or desirable.[24] Nation J disagreed:[25]

> With respect, I differ from his approach. Parliament has enabled and, indeed, required financial service providers based in New Zealand to be registered even where its financial services were being provided overseas. That is not inconsistent with Parliament also allowing or requiring the FMA to take into account the fact that all or most of such services are being provided overseas in deciding whether the circumstances referred to in s 18A exist and whether it is undesirable for the company to remain registered as an FSP.

[37] On that basis, Nation J concluded that if the FMA found Excelsior's financial services were being provided almost wholly outside New Zealand, "that could provide a sufficient basis for the FMA to conclude that there could be a misrepresentation as to the extent to which those services were regulated in New Zealand".[26]

[38] Nor did Nation J consider that it was necessary that there be evidence of the particular way in which the FSP was carrying on its business being likely to cause such damage:[27]

> … The FMA is a body with specialist knowledge as to how financial markets operate, both in New Zealand and internationally. Parliament has chosen to give the FMA the required authority to make decisions about whether such harm is likely to be caused. I consider that its decisions in this regard should be respected provided the decision can be explained on a reasonable basis, having regard to the evidence and the purposes of the legislation.

---

23 At [21].
24 *Vivier and Co Ltd v Financial Markets Authority*, above n 1, at [69].
25 *Excelsior Markets Ltd v Financial Markets Authority*, above n 17, at [123].
26 At [124].
27 At [126].

**Issues**

[39] This appeal gives rise to five issues:

(a) Is the appeal one against exercise of a discretion?

(b) What is the evidential threshold for exercise of s 18B?

(c) Did the FMA meet the requisite evidential threshold in this case?

(d) Did the FMA breach natural justice by failing to disclose the fact of receipt of the complaint and news article?

(e) Did the FMA breach natural justice by failing to provide Vivier with further information about its reasons for seeking deregistration?

**Issue 1: Is the appeal one against exercise of a discretion?**

[40] As in *Excelsior,* both parties before us proceeded on the basis that the present appeal was one from a discretionary decision. Brewer J took that view in the present case, for the reasons summarised at [25] above. On the other hand in *Excelsior* Nation J held the decision was discretionary in part only, for the reasons summarised at [35] above. We are not convinced that either approach is correct.

[41] We note the following points.

[42] First, the fact the FMA must make a broad factual evaluation and value judgment does not of itself mean the appeal is discretionary.[28] A similarly broad evaluation was held in *Austin, Nichols & Co Ltd v Stichting Lodestar* to give rise to a general appeal. The relevant provision provided the Commissioner of Trade Marks "shall, after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions or limitations, if any, registration is *to be*

[28] *Austin, Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16]; *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

*permitted*".[29] The criteria of "necessary and desirable" in this case is similarly broad.

[43] Secondly, the requirement for reasons in s 18B(3)(d) coupled with the right of appeal in s 18B(4) suggests to us that what is required is a reasoned decision capable of being contested, on appeal, on its merits.

[44] Thirdly, s 42(3)(b) of the Act states the High Court on appeal may exercise any powers that could have been exercised by the FMA, which must include an ability to rehear evidence and receive further evidence. This, the Supreme Court has held in *Kacem v Bashir*, is a "classic indicator" of a general appeal.[30]

[45] Finally, if one breaks the inquiry under s 18B into the two logical stages identified by Nation J, the following points may be observed:

(a) The first stage is to assess whether one of the grounds in s 18A is made out. That is, whether registration is misleading or damaging to financial markets. That requires an assessment, and this might be thought to give rise to a general appeal. Although in terms of s 18B(2) the FMA is only required to take into account s 18A, statutory powers must be used in accordance with their purpose, here stated to be to provide for deregistration in the circumstances envisaged by s 18A.[31] It follows that a direction to deregister in the absence of either of the considerations in s 18A would be beyond the scope of the statutory provision.

(b) The second stage is to assess whether deregistration is necessary or desirable. That too requires an assessment based on the factors in s 18A and whether there is any mitigation. Ultimately, only one correct conclusion is legally possible.[32] If error can be pointed to, the

---

29 Emphasis added.
30 *Kacem v Bashir*, above n 28, at [33].
31 *AstraZeneca Ltd v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [29].
32 *Opthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37].

conclusion may be challenged without the constraints applicable to appeals from discretionary decisions.

[46] By those lights, we consider the entire appeal in this case should be classified as a general appeal. Given, however, our conclusion subsequently that Brewer J erred in principle, the question of classification of the appeal makes no practical difference to the outcome.

**Issue 2: What is the evidential threshold for exercise of s 18B?**

[47] The FMA's primary argument is the High Court placed the evidential threshold required for deregistration too high. It says the misleading appearance can be created by the registration itself. The High Court erred in requiring evidence that the particular FSP's registration was actually misleading. It is a mandatory consideration whether registration is likely to be misleading, but the FMA's power to direct deregistration requires consideration of other matters within its knowledge as expert regulator. This will include general consumer complaints and experience with respect to other FSPs.

[48] Vivier, on the other hand, seeks to uphold the High Court Judge's conclusion on this issue essentially for the reasons given by the Judge. We now examine those reasons.

*Discussion*

[49] The Judge was particularly influenced by the fact that in enacting the amending legislation in 2014, Parliament did not alter the requirements for registration. In particular it did not require that financial services be provided in New Zealand or be regulated by New Zealand law.

[50] The Judge noted that in 2014 Parliament did not alter the qualification requirements for FSP registration — so that an FSP with a place of business in New Zealand must be registered even if all their financial services are provided overseas. The Judge inferred from that that it was not necessary or desirable to deregister an

FSP simply on the basis that the FSP only provides financial services overseas.[33] A number of points need to be made about the former observation.

[51] First, one of the primary rationales for enactment of the Act was to provide a register of FSPs consistent with recommendations of the Financial Action Taskforce on Money Laundering's 1996 report.[34] Companion legislation for the present Act, the AML/CFT Act, was enacted in 2009. A New Zealand-incorporated provider of financial services wholly overseas is not a "reporting entity" under that Act.[35]

[52] Secondly, at the time of original enactment, s 46 of the Act provided, consistently with the AML/CFT Act:

> This Act applies to the provision in New Zealand of a financial service by a person who is in New Zealand, regardless of where the financial service provider is resident, is incorporated, or carries on business.

As is evident from its terms, that provision is intended to confine the registration requirement of entities (wherever incorporated) to those providing financial services in New Zealand. However, in 2010 s 46 was repealed and replaced with a new s 8A. The rationale for the amendment was to require registration of of "all people providing financial services based in New Zealand, regardless of where the client is located".[36]

[53] Thirdly, the 2014 amendments that then introduced the deregistration mechanism in ss 18A to 18C were expressly intended to deal with what might be called flag of convenience registrations. As the Minister put it in a memorandum to the Cabinet Economic Growth and Infrastructure Committee:[37]

> Central to the registration requirements of the FSPA is a requirement that FSPs have a place of business in New Zealand. The Registrar of Financial Service Providers (Registrar) has introduced processes to identify and prevent, where possible, registrations that do not meet this criteria. However, a number of offshore FSPs are superficially adjusting their

---

33 *Vivier and Co Ltd v Financial Markets Authority*, above n 1, at [69].
34 Financial Action Task Force on Money Laundering "The Forty Recommendations" (1996).
35 Financial Markets Authority, Reserve Bank and Department of Internal Affairs, above n 4, at [8].
36 Financial Service Providers (Pre-Implementation Adjustments) Bill 2009 (109-2) (explanatory note) at 6.
37 Memorandum for Cabinet Economic Growth and Infrastructure Committee, above n 5, at [5].

> operations in an attempt to fall within the FSPA's scope, without actually establishing a substantive financial services business in New Zealand.

Similar expressions of intention are to be found in the Minister's speeches in the House as the amendment legislation progressed through to enactment.[38]

[54] Fourthly, it is not in our view entirely correct to say that Parliament did not alter the qualification requirements for FSP registration in 2014. That view overlooks parallel amendments made in ss 15A to 15C, which enable the FMA to direct the Registrar to reject an application for registration in like circumstances to s 18A. So an FSP otherwise qualifying for registration by reason of its possession of a place of business in New Zealand may be denied registration if, for instance, to do so would have the likely effect of causing a misleading appearance with respect to the extent to which the registrant would provide financial services in or from New Zealand.

[55] Fifthly, it follows that mere possession of a place of business in New Zealand does not equate to a right to registration. Nor does the fact of incorporation in New Zealand — so that in one sense the FSP is not "overseas" or "offshore" — decide the matter.

[56] Drawing these points together, what is far more material than incorporation or possession of a place of business in New Zealand is whether the FSP is providing financial services in or from New Zealand, and whether it is generating any associated financial activity in New Zealand. If it is not doing so, or cannot demonstrate any intention of doing so, alarm bells should sound.

[57] We accept bona fide FSPs with a place of business in New Zealand, but no relevant financial service activity in New Zealand, may seek registration notwithstanding. In such a case we would expect that registration (and continued registration) might reasonably depend on:

(a) reliable information being given as to the manner in which the FSP was to promote itself. For instance, either not promoting itself at all,

---

[38] (17 September 2013) 693 NZPD 13406; (27 May 2014) 699 NZPD 18354.

or promoting itself on the basis that it states clearly that it is neither providing financial services in or from New Zealand nor is regulated by New Zealand law in relation to the financial services it provides in other jurisdictions;

(b) evidence of compliance with the requirements of a relevant offshore regulator would also be relevant to the FMA's assessment; and

(c) other relevant information including, for instance, that the FSP is substantial and reliable.

[58] The fact that all or most of the registrant's services are being provided overseas may be sufficient in context to deny registration in the first place under s 15B. Evidence specific to the FSP that registration may be misleading or harmful to New Zealand's reputation is not necessary. The FMA may draw appropriate inferences based on its own expert knowledge and experience. The matters referred to in the preceding paragraph may be relevant. The absence of provision of financial services in New Zealand is equally sufficient to premise deregistration under s 18B, if the FMA (using its own expertise) concludes rationally and in context that continued registration has or is likely to have one of the effects stated in s 18A and that it is necessary or desirable that deregistration occur.

[59] We disagree also with the Judge's conclusion at [68] that the FMA could not properly rely on general evidence or complaints relating to other FSPs to reach a conclusion that it is necessary and desirable to deregister Vivier. That conclusion was based expressly on the wording of s 18A. However, we do not think that conclusion follows from the words. Again we draw on the parallel provisions in ss 15A to 15C. There, absent any trading activity, the FMA might properly have rejected an application for registration on the basis that no financial services and associated financial activity was intended in or from New Zealand — so that the fact of registration without more might convey a false impression. That assessment must necessarily be made without evidence the FSP's registration is actually misleading some person. The words of s 18A also appear to contemplate that the mere fact of registration without financial activity in or from New Zealand may, in its context, be

enough to trigger deregistration, again if the FMA concludes rationally and in context that continued registration has or is likely to have one of the effects stated in s 18A and that it is necessary or desirable that deregistration occur.

[60] We therefore agree with the conclusions reached by Nation J at [124] and [126] of his judgment in *Excelsior* — set out above at [37] and [38] — and disagree with the contrary conclusions reached by Brewer J in the judgment on appeal.

*Conclusion*

[61] It follows that we answer this issue thus: in acting under s 18B(2) the FMA must take into account the mandatory considerations in s 18A, to decide whether, at a minimum, registration will likely have the effects prescribed in that provision.[39] Secondly, in doing so it may have regard to its expert knowledge and experience of financial markets in New Zealand and overseas. Thirdly, it is not required to have evidence specific to the conduct of the particular FSP if inferences as to effect can reasonably be drawn from generic information (such as the absence of any, or any material, financial services in or from its New Zealand place of business).

**Issue 3: Did the FMA meet the requisite evidential threshold in this case?**

[62] Here, the FMA says it was necessary or desirable to direct deregistration based on:

(a) advice from the DIA that Vivier was outside its monitoring jurisdiction for AML/CFT purposes;

(b) Vivier's August 2014 return under AML/CFT Act indicating it had no New Zealand financial activity;

(c) a suggestion on Vivier's website that it was a non-bank deposit taker when it was not registered by the Reserve Bank as one under the Non-bank Deposit Takers Act 2013;

---

[39] See above at [45(a)].

(d) the fact that Vivier provides no financial services from New Zealand, or into New Zealand; and

(e) Vivier's submission which indicated registration was to take advantage of New Zealand's good reputation.

[63] The FMA also submits Vivier's compliance with overseas regulations is relevant to its consideration because non-compliance with overseas regulation is likely to be damaging to New Zealand's reputation. Vivier's refusal to provide information about overseas compliance suggested non-compliance and therefore risked reputational damage to New Zealand markets.

[64] Vivier again sought to uphold the High Court judgment, essentially for the reasons given by the Judge, to which we now turn. Mr Riches submitted, also, that the FMA had failed to focus on whether the registration caused a false and misleading appearance as required by s 18A of the Act.

*Discussion*

[65] First, we have found that the Judge applied an incorrect evidential threshold for deregistration. It is therefore necessary to undertake a fresh assessment in line with our approach as summarised above at [61].

[66] Secondly, the notice of intention to deregister relied expressly on the following considerations as meeting the evidential threshold for deregistration:

(a) the absence of provision of financial services in or from New Zealand;

(b) generic complaints received by the FMA showing that in such circumstances clients mistakenly believe deregistration means that services are provided from New Zealand and the entity is regulated in New Zealand for services it provides;

(c) a statement on Vivier's website that it is a registered FSP in New Zealand;

(d) the inference drawn by the FMA that it was a principal purpose of Vivier's registration to "create the appearance that financial services are provided from a place of business in New Zealand and that Vivier … is regulated by New Zealand law in relation to the financial services it provides";

(e) that discovery by clients that a New Zealand-registered FSP is not regulated by New Zealand law in relation to the financial services it provides is likely to result in damage to the integrity and reputation of New Zealand's financial markets;

(f) the FMA's opinion that where registration appears primarily to be for the purpose of creating, or was in fact likely to create, the appearance that financial services are provided from New Zealand and are regulated in New Zealand, that is likely to be damaging to the integrity and reputation of New Zealand's financial markets; and

(g) relevant to that inference was whether Vivier was in fact complying with laws relating to provision of financial services and the offering of financial products in the jurisdictions its clients reside in.

[67] As to the latter point, the absence of such information (and a refusal to supply it) in our view legitimately enlarges the apparent risk. To contrary effect, provision of it would diminish the risk. That is, the damage to local market reputation might be less if full offshore compliance was demonstrated. The FMA sought submissions from Vivier on its compliance with foreign law in the jurisdictions in which it offers its services. Presumably similar mitigation might be made if Vivier made clear to the public that it did not provide financial services out of or into New Zealand, and was not therefore regulated by New Zealand law in relation to services it did provide.

[68] Thirdly, the FMA was unsurprisingly unimpressed by the response sent by Vivier. That response offered little comfort as to Vivier's bona fides and, ultimately, the twin considerations in s 18A. It therefore maintained the views expressed in its

original notice. In an internal memorandum recommending deregistration of Vivier the FMA observed:

> … we remain of the view that registration as a financial service provider in New Zealand would or would be likely to create a false or misleading appearance that all of its services are provided from a place of business in New Zealand and that the provision of those services either to overseas clients would be regulated by New Zealand law, and clearly this is not the case. This in turn was 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 …

On 29 June 2015 the FMA gave a direction to the registrar to deregister Vivier. The position was explained at some length in a letter to Vivier dated 26 June 2015.

[69] Fourthly, we agree with the view expressed by Nation J in *Excelsior* that in reaching these conclusions, the FMA was entitled to draw on its expert knowledge of financial markets in New Zealand and overseas.[40] It was in the best position to assess matters such as damage to the reputation of financial markets and whether registration would create a misleading appearance. These are the very tasks the legislature has given it.

[70] Fifthly, we are not persuaded that the FMA reached conclusions not reasonably available to it on the evidence, including inferences drawn from the facts of:

(a) registration (and use of that fact in Vivier's self-promotion);

(b) non-provision of financial services in or from New Zealand;

(c) the purely nominal connection with New Zealand set out at [17] above (in which only insignificant administrative services were undertaken in New Zealand);

(d) Vivier's own submission that (despite these realities) registration was effected to take advantage of New Zealand's good reputation; and

---

40 *Excelsior Markets Ltd v Financial Markets Authority*, above n 17, at [126].

(e) the failure of Vivier to offer alternative comfort as to regulatory compliance in other relevant jurisdictions.

[71] In our view, therefore, there was ample justification for the conclusions reached by the FMA that Vivier's registration in these circumstances would likely have the effect:

(a) of creating a false or misleading appearance of the extent to which it 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; and

(b) of thereby damaging the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets.

*Conclusion*

[72] We therefore answer Issue 3 "Yes".

**Issue 4: Did the FMA breach natural justice by failing to disclose the fact of receipt of the complaint and news article?**

[73] As noted at [16], in February 2015 the FMA received an anonymous complaint annexing a news report stating that Vivier had been accused of tax fraud and money laundering in the Irish media. A consequence of that complaint was the FMA's investigation. But it did not disclose that complaint to Vivier.

[74] Brewer J held that s 18B(3) gave Vivier fair hearing rights, but those statutory rights were not exhaustive. In addition, natural justice rights at common law existed.[41]

[75] That conclusion was not challenged by the FMA on appeal. However the FMA challenged the Judge's further conclusion that non-disclosure of the complaint

---

41 *Vivier and Co Ltd v Financial Markets Authority*, above n 1, at [84], relying on *Daganayasi v Minister of Immigration* [1982] NZLR 130 (CA) at 141.

and attached report was a breach of natural justice and error of law. In short Ms Scholtens submits that the complaint and article were not relevant to the ultimate decision and merely a catalyst setting off a chain of enquiry. It was not referred to and not considered by the delegated decision-maker.

[76] For Vivier Mr Riches submitted that the FMA "based its determination" upon the complaint and report. Vivier was "not given the opportunity to respond to the serious allegations contained in [the] article".

*Discussion*

[77] We may be relatively brief.

[78] First, the natural justice argument assumed the greater part of Mr Riches' argument for Vivier. Given the conclusions already reached however, the question of natural justice now assumes less importance in this appeal. That is because complaints about process cannot alter the essential conclusions as to the appropriateness of deregistration of Vivier. Vivier's appeal to the High Court should have failed on its merits regardless, and relief for now immaterial process errors would not be granted.

[79] Secondly, there is a further problem lying in the way of Vivier. The question of alleged breach of natural justice was first taken up by Vivier in its submissions. It formed no part of the notice of appeal filed in the High Court. As Mr Riches quite reasonably pointed out, Vivier was unaware of the complaint annexing the report of the Irish media coverage of Vivier at the time it filed its notice of appeal. That filing occurred on 1 July 2015, and disclosure was given by the FMA three weeks later on 21 July 2015. However, although the hearing did not take place until 24 August 2015, Vivier did not seek leave to file an amended notice of appeal. Rather, the natural justice point was simply taken up in its submissions. The FMA's position was that the complaint was a mere catalyst for its investigation, but not relevant to the ultimate decision and neither referred to nor considered by the ultimate decision-maker. The Judge drew a different inference from the record. We will

come back to that.[42] But we think this was a rather unsatisfactory platform on which to draw conclusions as to breach of natural justice at all. The notice of appeal should have been amended if this ground was to be relied upon and the FMA should have been permitted to adduce evidence on the point, once pleaded.

[80] Thirdly, our review of the record suggests there is substance in the FMA submission that the initial complaint, with annexed report from the Irish media, was a mere catalyst and had no material influence in the ultimate deregistration decision. Specifically:

(a) The annexed report was from a publicly available source. It is unclear on the evidence whether Vivier was aware of its existence or not.

(b) The report was referred by the FMA to the Companies Office Integrity Officer who undertook the site visit at Vivier's Auckland office. But that occurred in the context of a reference within the report to the effect that the Companies Office was in fact making inquiries. The FMA wished to know whether in fact it was.

(c) More importantly, thereafter the complaint and article are not referred to in the FMA's analysis, which instead drove off (1) the site visit report by the Companies Office (demonstrating no New Zealand clients and no New Zealand-based financial services being provided) and (2) the Department of Internal Affairs advice received (showing that Vivier's 2014 annual return showed no financial activity in New Zealand).

(d) The report is not referred to in the 21 April 2015 memorandum of recommendation to the FMA's general counsel, which led to the 23 April 2015 notice of intention to deregister. Nor was it referred to in the 25 June 2015 memorandum to the FMA's general counsel, endorsed by him the next day, and by the FMA itself on 29 June 2015, in its direction to deregister.

---

[42] See below at [80](e)].

(e) The Judge at [91] of his judgment inferred that a reference in the notice of intention to deregister to a concern about Vivier's compliance in client jurisdictions indicated that the complaint was "an important consideration" in the FMA reaching its decision. We accept Ms Scholtens' submission however that the Judge misunderstood that passage. Rather the relevance of the passage, as we have noted already, was that (1) client jurisdiction legal compliance would mitigate concerns about New Zealand market integrity; but (2) client jurisdiction *non-compliance* would, obviously, exacerbate it.[43] The passage does not, on our reading, suggest that the complaint or attached report of the Irish media coverage was material to the FMA's deliberations on deregistration.

[81] Fourthly, the requirements of natural justice of a deliberative body such as the FMA do not require disclosure of non-material communications.[44] If the complaint and Irish report were material to the FMA's deliberations, so that in fairness Vivier needed an opportunity to respond to it when making its submission of 26 May 2015, that would be a different matter. But those were not the facts here.

*Conclusion*

[82] Accordingly the answer to Issue 4 is "No".

**Issue 5: Did the FMA breach of natural justice by failing to provide Vivier with further information about its reasons for seeking deregistration?**

[83] The Judge's additional conclusion, at [100] of his judgment, that the FMA breached Vivier's natural justice rights by failing to furnish it with more detailed evidence and information about why the FMA were seeking its deregistration, derived in part from his conclusion (with which we disagree), that registrant-specific evidence was required in order to justify deregistration. The Judge identified the sort of information required at [98] of his judgment. It included clarification of the evidence as to the false and misleading impression, clarification of whether the

---

43 See above at [67].

44 *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) at [113]–[114].

contention was that Vivier was giving a misleading appearance of providing greater or fewer financial services in New Zealand, and clarification as to whether the contention was whether Vivier was giving a misleading appearance of providing financial services from a place of business inside or outside of New Zealand.

*Discussion*

[84] With respect we disagree with the Judge's conclusion.

[85] First, the unsatisfactory pleading and evidential position has been averted to already: see [79] of our judgment above.

[86] Secondly, this particular natural justice conclusion derives from the evidential threshold imposed by the Judge on the FMA's analysis. We disagreed with that threshold, and held that (1) the absence of any material financial services being provided by a New Zealand-registered FSP may give sufficient cause for the FMA to give notice of deregistration if the FMA concludes rationally and in context that continued registration has or is likely to have one of the effects stated in s 18A and that it is necessary or desirable that deregistration occur, and (2) registrant-specific evidence beyond that is not required.

[87] Thirdly, the notice of intention to deregister given by the FMA on 23 April 2015 was clear in its own terms. It is, in particular, obvious from the terms of that notice that the FMA is suggesting Vivier created an impression of greater (not fewer) services are being provided from New Zealand, and a misleading appearance that services are being provided from (rather than outside) New Zealand. No further clarification of this could reasonably be required. The same may also be said of a further suggestion that clarification was needed as to whether the contention was that Vivier was giving a false impression that it was or was not regulated by New Zealand law. We consider the plain meaning of paragraphs [7], [8], [9] and [11] of the notice of the intention to deregister was that an impression was created that Vivier was regulated by New Zealand law. Vivier would have been in no doubt about that.

[88] For these reasons we find ourselves in disagreement with the second respect in which the Judge held the FMA to have breached natural justice.

*Conclusion*

[89] We answer Issue 5, "No".

**Result**

[90] The appeal is allowed.

[91] The direction by the appellant that the respondent be deregistered from the Register of Financial Service Providers is restored.

[92] The respondent must pay costs to the appellant for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
C R Allan (Financial Markets Authority), Wellington for Appellant
Saunders & Co, Christchurch for Respondent