IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002003
[2017] NZHC 1187

BETWEEN		INNOVATIVE SECURITIES LIMITED Appellant
AND		FINANCIAL MARKETS AUTHORITY Respondent

Hearing: 7 February 2017

Appearances: Andrew Riches for the Appellant
Jenny Cooper and Charlotte Allan for the Respondent

Judgment: 1 June 2017

JUDGMENT OF MOORE J

This judgment was delivered by me on 1 June 2017 at 4:30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Contents

Introduction

[1] Innovative Securities Limited ("ISL") is a New Zealand company registered on the financial service provider register ("FSPR") as a financial service provider ("FSP").

[2] In 2015 the Financial Markets Authority ("the FMA") reviewed ISL's registration. It determined that ISL's registration created a misleading appearance that financial services were provided from a place of business in New Zealand and that ISL's financial services were regulated by New Zealand law. As such, the FMA was of the view that these circumstances had the potential to damage the reputation of New Zealand's financial markets.

[3] The FMA gave notice to ISL of its intention to direct the Registrar to de-register the company. It gave its reasons for intending to give the direction and invited ISL to make submissions.

[4] ISL made submissions. Notwithstanding, the FMA remained of the view that ISL should be de-registered and directed the Registrar to do so.

[5] ISL appeals that decision. It says that the FMA erred in its findings on the effect of its registration.

[6] First, it says the FMA was wrong in finding the activities conducted from its Auckland office were not financial services for the purposes of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("the Act").

[7] Secondly, ISL claims that the FMA erred in failing to take into account and apply proper weighting to the work undertaken by ISL to obtain a discretionary investment management service ("DIMS") licence[1] and in failing to put in place a timeline for an application to be made for a DIMS licence prior to de-registration.

[8] Thirdly, ISL complains that the FMA failed to disclose relevant reasons for its proposal to de-register.

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1 Financial Markets Conduct Act 2013, s 392.

[9] Fourthly, ISL says the FMA failed to give ISL notice of the relevant reasons to de-register and thus committed a breach of natural justice.

[10] And finally ISL says the FMA erred in its application of ss 18A and 18B of the Act.

[11] By way of relief ISL seeks orders allowing the appeal against the FMA's decision to direct de-registration and reversing the decision or, alternatively, referring the matter back to the FMA for reconsideration.

Financial Service Providers (Registration and Dispute Resolution) Act 2008

[12] The Act creates a mandatory registration regime for FSPs in New Zealand. Only those who are registered on the FSPR are permitted to provide financial services as part of a business.

[13] 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]

[14] 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 actually provided.[3]

[15] The Act prohibits anyone from carrying on business as a FSP or holding out that they are in that business unless they are registered.[4]

[16] Significantly, in the context of the present case, registration does not require the services to be provided in or from New Zealand. Neither does the Act require the services to be provided to New Zealand clients or that the registrant is regulated by New Zealand law.

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2 Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 2A.
3 Sections 8A and 11.
4 Sections 11 and 12.

[17] The registration of FSPs in New Zealand reflects this jurisdiction's international obligations imposed under the Financial Action Task Force's recommendations on money launder ("FATF"), which require participating States to licence or register all financial institutions as a means to ensure that effective monitoring is in place requiring financial institutions to meet their anti-money laundering ("AML") obligations. The Registrar of Companies is the Registrar of FSPs.[5]

[18] In 2004 the International Monetary Fund ("IMF") reviewed the status and regulation of financial service providers in New Zealand. This was followed by the Financial Intermediaries Taskforce which adopted the IMF's recommendations. It concluded that the public, industry and financial markets would all benefit from specific financial advisor oversight and regulation.

[19] As a consequence, in 2007, both the Financial Advisors Bill and the Financial Service Providers (Registration and Dispute Resolution) Bill were introduced, the latter requiring all FSPs to be registered and to belong to an approved dispute resolution scheme if they provided services to retail clients.

[20] As originally enacted, the Act applied to the provision in New Zealand of a financial service by a person in New Zealand. However, the Act was amended in 2010 so that it applies to a person who has a place of business in New Zealand, regardless of where the financial service is provided.[6] The new provision was designed to capture FSPs who provide financial services to clients who are abroad from a place of business in New Zealand.

[21] 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

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5 Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 35.
6 Section 46 of the Act was repealed and replaced by s 8A.

this. The fact of registration could 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 a well-regulated financial market.

[22] To close this lacuna the Act was amended in July 2014 to increase the FMA's powers to prevent the registration of or permit the de-registration of registrants in certain circumstances. The amendment gave the FMA these powers if registration has or will have or is likely to have the effect of creating a false appearance of the extent to which the person is providing services in or from New Zealand or is regulated by New Zealand law or will otherwise damage the reputational integrity of New Zealand's financial markets.

[23] In explaining the purpose of the amendments the Hon Craig Foss, the then Minister for Commerce, observed:[7]

> "Since the registration regime came into effect in 2010 a significant number of offshore-based entities have sought to register in New Zealand, in order to take advantage of New Zealand's reputation as a well regulated jurisdiction. These FSPs seek to register for financial services that are not licensed in New Zealand .... The customers of these FSPs may incorrectly assume that they are New Zealand-based or licensed in New Zealand, or both. 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.
>
> Central to the registration requirements of [the Act] is a requirement that FSPs have a place of business in New Zealand ... However, a number of offshore FSPs are superficially adjusting their operations in an attempt to fall within the [Act's] scope, without actually establishing a substantive financial services business in New Zealand."

[24] On the question of how the proposed amendment would operate in practice, Mr Foss said:[8]

> "This amendment would allow the Registrar, on instruction from the FMA, to decline registration or to de-register in situations where offshore FSPs have established superficial New Zealand operations purely to meet the registration requirements for unlicensed services. The FMA is well placed to make determinations on this matter due to its main objective being the

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7 Cabinet Paper "Financial Service Provider Registration Amendments" (16 February 2013) at [4] to [5].

8 Ibid at [24].

promotion and facilitation of the development of fair, efficient, and transparent financial markets."

[25] The amendment resulted in the inclusion of ss 15A and 15B (which relate to registration) and ss 18A and 18B (which relate to de-registration).

[26] These purposes were discussed by the Court of Appeal in *Financial Markets v Vivier & Co Ltd*[9] quoting Brewer J at first instance:[10]

> "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 regime specific to the specific categories of financial services – offshore entities could give the impression to offshore customers that they were resident in and/or regulated in New Zealand:
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> > '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 …'"

[27] For the purpose of the present appeal the relevant provisions containing the power to de-register are contained in ss 18 to 18C of the Act. Section 18 sets out the factors which qualify for de-registration.

[28] Section 18A provides:

> **"18A Purpose of FMA's powers relating to deregistration**
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> 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
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> (ii) provides, or will provide, financial services from a place of business in New Zealand; or
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> (iii) is, or will be, regulated by New Zealand law in relation to a financial service; or

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9 *Financial Markets v Vivier & Co Ltd* [2016] NZCA 197, [2016] 3 NZLR 70.

10 *Vivier & Company Limited v Financial Markets Authority* [2015] NZHC 2337, [2016] 2 NZLR 348 at [9], quoting Cabinet Economic Growth and Infrastructure Committee "Financial Service Provider Regulation Amendments" (16 February 2013) at [16].

(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."

[29] Section 18B provides:

"**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.

(5) Sections 19 and 20 do not apply if a financial service provider is deregistered as a result of a direction given under subsection (3)(c)(i)."

[30] Section 18C provides:

> **"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."

[31] When s 18B(3)(a) of the Act is engaged, that is where the FMA decides to give a direction to the Registrar to de-register a FSP, the FMA is required to give written notice of its intention to give the direction, provide reasons why it intends to give the direction and extend to the FSP the opportunity to make written submissions.

[32] The FMA is required to consider any such submissions and if, notwithstanding, it remains of the view the FSP should be de-registered direct the Registrar to de-register. The FMA must give reasons for its decision.

Factual background

[33] ISL was incorporated in New Zealand in 2008. It has been registered as a FSP since 3 December 2012.

[34] ISL is a wholly-owned subsidiary of Innovative International Group Limited registered in the United Kingdom on 20 November 2008. The parent entity is jointly owned by two Hungarian men based in Budapest.

[35] ISL owns 100 per cent of Innovative Securities Europe ZRT. Innovative Securities Europe ZRT holds an operating licence from the Hungarian Central Bank.[11] This company is permitted to conduct business and serve clients in all European Union countries. Other related companies include Innovative Securities Asset Management LLC, which is registered in the United States of America as a financial advisor and manages funds in the United States solely for professional clients and third party accounts (brokers and banks). Innovative Securities NBFI is another related company which is registered in the former State of Yugoslavia and serves European clients in non-European Union countries. It has offices in Bulgaria, Russia, Kazakhstan, Ukraine and Estonia. Another related company, Innovative Securities Profit Max Fund NV, is registered and listed in The Netherlands. Innovative Securities Limited is registered and licensed in Central America.

[36] According to ISL, the company was established in New Zealand for commercial reasons. The stated purpose was to establish a base in New Zealand with the intention of eventually offering services to clients in Australia, New Zealand and Asia.

[37] Although ISL employs three staff in its Auckland office, all its 21,000 clients are situated outside New Zealand. The five principal countries in which ISL's customers are located are the Russian Federation, Kazakhstan, Ukraine, Bulgaria and Uzbekistan. There are no New Zealand clients. ISL did operate bank accounts with BNZ and ASB but according to ISL these were subsequently closed by the banks, apparently due to money laundering concerns.

[38] In November 2013, a year after ISL registered as an FSP, staff from the FMA visited the company's premises in Quay Street, Auckland. They interviewed the company's compliance officer. As a result they formed the view that ISL was not in a business of providing financial services from New Zealand because:

(a) business decisions were not made from New Zealand;

(b) the New Zealand staff had no actual client contact;

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11 Granted on 30 October 2014.

(c) due diligence and customer service support was not completed in New Zealand; and

(d) despite monies being deposited into the New Zealand bank accounts these funds were moved to accounts outside New Zealand.

[39] Furthermore, despite ISL's registration as an FSP, the FMA was of the view no financial services were provided directly from New Zealand nor was there any notable business expansion in New Zealand despite ISL having been registered as an FSP for a year.

[40] In July 2014 a member of the public emailed the FMA and alleged that ISL was "potentially a big Ponzi [scheme]". Attached to the email were numerous website extracts and warnings.

[41] This correspondence, together with later emails in April 2015 from the same source, operated as the catalyst for the FMA to examine ISL's bona fides more closely as is discussed below.

[42] On 23 February 2015 the FMA received a request for mutual assistance via the Crown Law Office from the Polish Prosecutor-General's Office. The request was dated 8 December 2014. It referred to ISL and the financial services it offered in Poland. The letter suggested that ISL was involved in a Ponzi scheme. It noted there was a suspicion a director of ISL was involved in criminal activity.

[43] On 28 May 2015 Mr Liam Mason, the FMA's then general counsel, received a recommendation memorandum from an FMA advisor recommending that the FMA determine it necessary or desirable for ISL to be de-registered and to give ISL notice of that intention. Listed as a matter of concern was that ISL's ownership or control was overseas with no apparent connection to New Zealand other than its incorporation and registration and certain administrative services being performed out of its office in Auckland. The concern was that ISL's operations were either web-based and controlled from overseas or otherwise substantively overseas and that the services were not primarily aimed at people in New Zealand.

[44] As a result, the memorandum expressed the view that in these circumstances the registration of ISL damaged the integrity and reputation of New Zealand's financial markets because overseas clients would mistakenly believe that registration as an FSP in New Zealand meant the entirety of ISL's activities were regulated in New Zealand. When it was discovered that was not the case damage would likely result to the integrity and reputation of New Zealand financial markets and the laws and regulatory arrangements in relation to those markets. The memorandum also observed that registration as a FSP in New Zealand is likely to create the misleading appearance that ISL is subject to AML regulation when it is not. Mr Mason noted on the front page of the memorandum that he agreed with the recommendation.

[45] On 29 May 2015, as a consequence of the recommendation, Mr Mason gave notice to the directors of ISL of the FMA's intention to direct the Registrar to de-register ISL. The notice largely repeated the contents of the recommendation memorandum but added an invitation for ISL to make written submissions by 30 June 2015. On that issue, Mr Mason specifically advised ISL that the FMA would be interested in receiving submissions on why it was necessary for ISL to be registered as an FSP in New Zealand when the financial services it provided were substantially provided outside New Zealand to clients outside New Zealand. Mr Mason observed that it was the FMA's view that a principal purpose of ISL being registered in New Zealand was to create the appearance that financial services were provided from a place of business in New Zealand and that ISL was regulated by New Zealand law in relation to the financial services it provided (including AML compliance).

[46] The letter also noted that the FMA wished to know if ISL was complying with the regulatory provisions in the jurisdictions its clients resided in.

[47] On 19 June 2015 ISL's lawyers requested an extension of time for the filing of submissions. They did, however, comment on Mr Mason's letter stating:

> "5. ISL does not dispute that it only serves overseas clients and is not regulated in New Zealand for the financial services it offers. However, ISL has had a presence in New Zealand since 2012. It employs three staff in its Auckland office. These staff are responsible for accounting and compliance services in relation to the

> financial services offered to overseas customers. It files audited financial statements with the Companies Office and pays tax to the Inland Revenue Department. It is in the process of completing an anti-money laundering programme and will be applying for a Discretionary Investment Management Services Licence ("DIMS licence") in New Zealand."

[48] On 30 June 2015 ISL filed its substantive submission and obtained from the FMA an undertaking that it would give ISL five days notice of any decision to de-register.

[49] ISL's response was detailed. It ran to 79 paragraphs and included a large number of attachments. In summary, ISL submitted that it and other companies in the group would suffer significant loss if ISL was de-registered. Its reputation overseas would be damaged. De-registration could trigger "events of default" causing ISL's overseas bank accounts to be frozen and as a consequence ISL could be in breach of client agreements.

[50] ISL stated that companies in the group had been operating successfully since 2008. The group had grown quickly and had built a solid reputation. The companies did not operate in isolation and it made commercial sense for aspects of the business to be outsourced; some to the headquarters in Hungary and others in the countries where ISL was based, noting that clients access ISL's financial services through the internet making it immaterial where the services are actually conducted from.

[51] The letter also stated that ISL was in New Zealand for commercial reasons. It had established its base in New Zealand with a view to eventually offering services to clients in Australia, New Zealand and Asia and with a longer term vision to actively grow its business in this part of the world.

[52] On the question of what actual functions the New Zealand office undertook ISL listed the following:

(a) accounting for ISL with customer fees for financial services paid to ISL;

(b) monitoring ISL's financial transactions;

(c) liaising with ISL's chairman and CEO, keeping track of board decisions, board meetings, organising director visits to New Zealand, arranging meetings with advisors. Board resolutions recording the business operations are also undertaken in Auckland;

(d) liaising with Life Division (which undertakes some administrative function for ISL);

(e) contracting with agents to promote ISL's financial services;

(f) liaising with New Zealand advisors on regulations and AML compliance;

(g) finalising ISL's AML programme;

(h) administration of client documentation;

(i) arranging financial statements and audits of ISL's finances; and

(j) complying with PAYE and other tax requirements.

[53] ISL stated that until 2013 it operated all its financial transactions with New Zealand banks but these accounts had been closed by the banks due to the perception of AML risk.

[54] ISL said it outsourced some of its administrative duties in respect of marketing, customer care, advertising, IT, administration and other support functions.

[55] The letter also stated that ISL intended to submit an application for a DIMS licence within the next three months.

[56] On 3 July 2015 ISL issued the FMA with a request under the Official Information Act for information held by it. The FMA responded on 3 September 2015.

[57] Included in the information disclosed was the FMA's recommendation memorandum of 2 May 2015, recommending that Mr Mason issue a notice of intention to de-register. Also included was the email dated 2 July 2014 from the member of the public (name and identifying details redacted) who complained that ISL might be a Ponzi or pyramid scheme.

[58] On 18 September 2015, ISL wrote to the FMA expressing its concerns regarding some of the material provided. In particular ISL rejected the claim it was potentially a Ponzi or pyramid scheme. It made submissions on that issue as well as the Polish KNF's warnings.

[59] Over the following months there was an extensive exchange of correspondence between the parties. This included the FMA writing to ISL advising that while the FMA remained of the view that ISL should be de-registered it undertook not to take that step pending ISL submitting an application for a DIMS licence and the application being assessed by the FMA.

[60] On 30 September 2015 ISL submitted an application for a DIMS licence. Amongst the material submitted in support was an AML audit report purported to have been prepared by Aub Chapman and Michael McDonald. Concerned that the report did not look legitimate, the FMA wrote independently to Mr Chapman and Mr McDonald asking them to confirm whether they or their firms had assisted in the preparation of the AML report.

[61] Mr Chapman replied saying he had initially declined to participate in the audit due to existing commitments but had informally revised a draft of the final report but only in respect of its structure, format and coverage. He said that at no stage did he enter into any formal contractual arrangements and had no involvement in the actual conduct of the audit. He said he did not seek nor was he provided with any documentation regarding any analysis or testing undertaken as part of the audit.

[62] Mr McDonald's position was more abbreviated. He said he had no connection with ISL; had never heard of them and had not conducted any AML audit or anything else for ISL.

[63] As a result, on 15 December 2015, the FMA wrote to ISL setting out its concerns in relation to the apparently false AML audit report. This "minded to decline" letter was followed by oral advice to the same effect given at a meeting on 18 December 2015.

[64] On 18 December 2015 ISL wrote to the FMA advising that it had accidentally submitted the wrong document with its DIMS licence application and supplied a new version. ISL then withdrew its application for a DIMS licence on 28 January 2016 after being advised it had failed to meet any of the minimum standards for registration. It has not re-submitted a DIMS licence application.

[65] The FMA sent further emails to ISL dated 11 February 2016 and 29 February 2016 consistent with its "minded to decline" letter of 15 December 2015.

[66] However, the FMA agreed to defer action on the de-registration pending the outcome of the *Vivier* appeal to the Court of Appeal. Following the Court's decision delivered on 10 June 2016 the FMA wrote to ISL inviting it to make any final submissions on the FMA's decision to de-register.

[67] Contained in the FMA's recommendation memorandum were the following observations:

(a) ISL had advised that warnings issued by Russian and Polish central banks and the Polish Supervision Authority appeared to have been prompted by a warning issued by the Central Bank of Belize which had since been removed.

(b) There were currently internet warnings about a previous director of ISL who appeared to be associated with a number of companies which turned out to be scams. However, ISL was not aware of any warnings and the director was removed in 2010. As a result the memorandum recorded that the FMA was not overly concerned about this director's previous involvement in ISL. A handwritten note adjacent to this

observation, accepted to have been written by Mr Mason, reads "Agree not relevant."

(c) The investigation in respect of the AML audit report continues. It was unfair at this stage to determine whether ISL deliberately provided the incorrect document or whether it was a case of human error as claimed by ISL.

(d) It was believed that neither the New Zealand-based director nor the compliance officer read the AML audit report in sufficient detail to notice it referred to site visits by people who did not come to New Zealand. This indicates a lack of oversight within the company. Mr Mason's marginal note reads, "Maybe, but not relevant for s 18B".

(e) The FMA remains of the view, for reasons set out in the memorandum of 28 May 2015 and above, that ISL should be de-registered and recommends Mr Mason directs the Registrar to de-register ISL. Beside this entry Mr Mason has written, "Agree".

(f) ISL can re-apply for registration if the proposal to move the portfolio and asset management functions to the New Zealand offices is adopted. Beside that entry is a tick.

(g) ISL has raised concerns regarding the impact de-registration will have on its reputation because overseas banks and regulators may consider that de-registration of the company is an indicator that ISL is having problems in New Zealand. The memorandum recorded, "In our view this supports our view that registration on the FSPR is being used to create a false or misleading impression about the extent to which ISL is regulated in New Zealand."

[68] Significantly, this memorandum set out the timeline of correspondence with ISL and summarised the extensive submissions provided by ISL. It noted:

> "2.26 While ISL has made extensive submissions throughout our view of the company's registration on the FSPR no information has been provided to suggest that the company is currently providing financial services from the New Zealand office.
>
> 2.27 As mentioned earlier, ISL's business activities [are] substantially conducted overseas with 21,000 clients based in Europe and the operational aspects conducted from Hungary. In circumstances where financial services are only provided overseas or are substantially provided overseas and no financial services as such are being provided from the New Zealand place of business, we are of the view that registration of ISL will have or is likely to have the effect of damaging the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets. That is because overseas clients of New Zealand financial service providers, as evidenced by complaints made to the FMA, mistakenly believe that registration as a financial service provider in New Zealand means that the entity is regulated in New Zealand for the services provided. When they discover that is not the case that is likely to result in damaging the integrity and reputation of New Zealand's financial markets and the law and regulatory arrangements in relation to those markets."

[69] On 2 August 2016 a recommendation was made to Mr Mason that ISL be de-registered but given five working days' notice of the FMA's decision to direct the Registrar to de-register ISL as an FSP.

[70] On 3 August 2016 Mr Mason advised ISL in writing of the FMA's decision to direct that it be de-registered. That letter set out the reasons for the decision as:

(a) those set out in the notice of intention dated 28 May 2015;

(b) the FMA's view that no financial services were provided to clients in New Zealand and that the services provided by ISL's New Zealand office were principally administrative and compliance and were not financial services in terms of s 5 of the Act;

(c) the FMA's view that notwithstanding changes made to ISL's website, the continued registration of ISL was likely to create a false or

misleading appearance and be damaging to the activity and reputation of New Zealand's law on financial markets; and

(d) the FMA's view that it was not appropriate for ISL to remain registered pending possible fulfilment of its plans to apply for a DIMS licence.

[71] On 11 August 2016 the FMA gave a direction to the Registrar in those terms. This direction is currently stayed pending determination of this appeal.

[72] On 14 October 2016 the FMA received a copy of a letter which ISL had sent to the Polish KNF. It is undated but appears to have been received in Poland on 3 June 2016. The letter is addressed, "To Whom It May Concern". The subject heading of the letter is "Warning Circular on Innovative Securities Limited". In the body of the letter the compliance officer for ISL stated:

> "Innovative Securities is a financial service provider (FSP) *registered in New Zealand in accordance with the laws and regulations of New Zealand.* The FSP registration allows Innovative Securities to carry out the following activities:
>
> - broking service (including a custodial service);
> - holding, investing, administering, or managing money, securities or investment portfolios on behalf of other persons.
>
> In the course of our regular revision of Innovative Securities' reputation we found a public warning on your website. [Details]
>
> The warning states that Innovative Securities is not registered in Poland.
>
> This statement is essentially correct, however, Innovative Securities has never stated to be registered in Poland, nor conducted any business activities in Poland. Therefore, we kindly request that you remove the above statement as it presents a false image of our company which may discredit and damage the reputation of Innovative Securities."
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> (Emphasis added)

[73] This letter was not put to ISL by the FMA because its existence was not known to the FMA at that time.

The nature of this appeal – legal principles

[74] The statutory right of appeal to the High Court is prescribed in s 42 of the Act. Section 42(1A) of the Act provides that an FSP which is not satisfied with any direction given by the FMA under s 18B may appeal to the High Court.

[75] Section 42(3) sets out the powers of the Court on appeal. It provides:

> "**42 Appeals from Registrar's decisions and FMA directions**
>
> ...
>
> (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."

[76] The Court of Appeal in *Vivier* discussed the nature of appeals under s 42 referring to Brewer J's observations at first instance that the appeal was one against the exercise of discretion by the FMA and Nation J's determination in *Excelsior Markets Limited v Financial Markets Authority*[12] that the decision was discretionary in part only.

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12 *Excelsior Markets Limited v Financial Markets Authority* [2015] NZHC 3334.

[77] The Court was not convinced that either approach was correct and determined that appeals under s 42 of the Act are by way of general appeal, engaging the principles set out by the Supreme Court in *Austin, Nichols & Co Ltd v Stichting Lodestar*.[13] It follows that the correct approach embraces three features namely:

(a) the appeal Court must come to its own view on the merits. The weight it gives to the decision of the original decision maker is a matter of judgment;[14]

(b) the appellant bears the onus of showing the original decision was wrong;[15]

(c) where the decision maker has a particular advantage such as technical expertise or the opportunity to assess the credibility of witnesses, the appeal Court may rightly hesitate to conclude that its findings of fact or fact and degree are wrong.[16]

[78] I agree with Ms Cooper for the FMA that the FMA is a specialist body with knowledge and expertise in financial market regulation. As the factual background to this case reveals, it has had extensive dealings with ISL since at least November 2013. Correspondence between ISL and the FMA has been both frequent and voluminous. This extends to both the de-registration process and ISL's application for a DIMS licence.

[79] This principle was specifically referred to by the Court of Appeal in *Viver* when it said:

> "[69] … 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. 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."

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13 *Austin, Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. See also *Godfrey Hirst NZ Limited v Commerce Commission* [2016] NZHC 1262, [2016] 3 NZLR 645.

14 *Austin, Nichols & Co Ltd v Stichting Lodestar* above n 13 at [3].

15 At [4].

16 At [5].

Grounds of appeal

[80] On 15 August 2016 ISL gave notice it was appealing the 3 August 2016 decision of the FMA directing the Registrar to de-register ISL from the FSPR. That notice of appeal was amended on 25 November 2016. The amended grounds of appeal are:

(a) The FMA erred in the following factual findings:

(i) the registration of the company will or is likely to have the effect of creating a false or misleading appearance to the extent to which the company provides financial services from a place of business in New Zealand and the extent to which it is regulated by New Zealand law;

(ii) it is otherwise damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets;

(iii) the activities conducted from its Auckland office, office management, compliance and administrative services which are principally in the nature of administrative and compliance and not "financial services" in terms of s 5 of the Act;

(b) The FMA erred in failing to take into account and apply proper weighting to the work being undertaken by ISL in order to obtain a DIMS licence. The FMA erred in failing to place a timeline in place for an application to be made for a DIMS licence prior to de-registration.

(c) The FMA did not comply with s 18B(3)(a)(ii) by issuing notice of intention to de-register dated 28 May 2015 and 10 June 2016 seeking final submissions while failing to state the reasons for the proposal to de-register, more specifically the FMA failed to identify relevant reasons for the notice of intention to de-register as follows:

(i) the FMA received a request for assistance by the Polish Financial Supervision Authority (KNF) with supporting documentation;

(ii) the FMA received a complaint alleging:

- the appellant is "likely a ponsi (sic) scheme or pyramid scheme";
- the appellant is listed on the Polish Financial Supervision Authority's website as an entity suspicious of committing a crime;

(iii) the FMA considered the appellant may have deliberately provided an incorrect document to the FMA;

(iv) the FMA considered the BNZ decided to close ISL's bank accounts due to money laundering concerns.

(d) The FMA committed a breach of natural justice by:

(i) failing to give ISL notice that the matters contained in paragraph 1(c) were:

- being relied on by the FMA;
- were relevant to the decision as to whether to de-register;

(ii) relying on the information contained in paragraph 1(c) without giving the appellant the opportunity to respond to the allegations amounted to:

- a breach of natural justice; and/or
- a failure to comply with s 18B requirements to give notice.

(e) The FMA has erred in applying ss 18A and 18B of the Act.

[81] ISL seeks orders:

(a) granting the appeal against the decision of the FMA dated 3 August 2016;

(b) reversing the decision pursuant to s 42(3)(a) of the Act; or alternatively

(c) referring the matter to the FMA for reconsideration after compliance with s 18B.

[82] I turn now to consider each of ISL's grounds of appeal.

First ground of appeal: ***Does the registration of ISL create a false and misleading appearance or is it likely to damage the reputation of New Zealand financial markets and regulation?***

Appellant's submissions

[83] Mr Riches, for ISL, submits that the FMA's decision that ISL's continued registration has or is likely to have the effects set out in s 18A was based on its finding that ISL does not provide financial services as defined in s 5 of the Act in New Zealand or from a place of business in New Zealand.

[84] Mr Riches submits that in making this finding of fact, the FMA has erred in three material ways:

(a) relying on the fact that ISL is currently providing no financial services within New Zealand without considering the ongoing express intention of ISL to provide the services subject to its application for a DIMS licence;

(b) that it is, in fact, providing financial services from New Zealand; and

(c) its staff are currently providing financial services from within New Zealand.

[85] Mr Riches submits that in coming to this conclusion the FMA overlooked the numerous pieces of correspondence provided to the FMA by ISL including its response to the notice of de-registration dated 20 June 2016 which stated:

> "ISL's New Zealand office provides key functions for the company including accounting compliance management, outsourcing monitoring and ancillary services. The remaining business including IT and call centre is being undertaken through the office in Budapest, Hungary.
>
> ...
>
> (d) the financial records already provided for the DIMS application shows ISL as a substantial business. ISL's audited financial statements for the year ended 31 March 2015 are attached."

[86] Mr Riches submits that the FMA's assertion that the services undertaken by ISL in New Zealand are of an administrative nature only is wrong. He says the very reverse is correct, pointing out that the New Zealand office provides key functions to enable ISL to continue, including management, monitoring, AML/CFT review with ancillary services being undertaken overseas in Budapest. He submits that the outsourcing of the call centre is common practice and in no way reflective of the fact that the core financial activities are being undertaken overseas.

[87] Mr Riches submits that the FMA also failed to take into account the fact that ISL was intending to move functions to New Zealand including operative compliance, investment portfolio management, marketing management and daily

transaction operations. In particular, business visas were granted for two of the company's directors in November 2016.

[88] Thus, in summary, Mr Riches submits the FMA failed to take into account the ongoing changes being made by ISL.

Analysis

[89] I am satisfied that the FMA was correct in determining that ISL does not provide financial services as defined in s 5 of the Act in New Zealand or from a place of business in New Zealand. My reasons follow.

[90] First, ISL has only overseas clients and is not regulated in New Zealand for the financial services it offers. This was expressly admitted by ISL in its letter of 19 June 2015. The five principal countries where its 21,000 customers are located are the Russian Federation, Kazakhstan, Ukraine, Bulgaria and Uzbekistan.

[91] As the Court of Appeal observed in *Vivier*, what is far more material than incorporation or 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".[17]

[92] In its substantive response of 30 June 2015 ISL set out the tasks undertaken by the Auckland office. These were listed earlier in this judgment. They run to 10. None involves the provision of financial advice to clients whether in New Zealand or elsewhere. None is reflective of the core business of an FSP. The tasks are broadly administrative and compliance related.

[93] I agree with Ms Cooper that none of these activities, taken either individually or collectively, are financial services for the purposes of s 5 of the Act.

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17 *Financial Markets v Vivier & Co Ltd* above n 9 at [56].

[94] Secondly, this conclusion is reinforced by the notes to ISL's annual financial statements for the 2015 year which state:

> "The company operates in the investment market. The company operations involve managing an underlying asset purchased by the company from monies raised from client deposits. Client funds acquired are invested with registered banks in cash or cash equivalents and investment funds located internationally.
>
> The company is registered in New Zealand. The company's New Zealand office performs accounting, compliance, monitoring and ancillary activities. The management of the fund assets is undertaken by GeoWealth Management LLC, a company incorporated in the United States of America. The remaining business, including the IT and call centre, is undertaken through the company's office in Budapest, Hungary. This office is a part of related entity Life Division Limited, with whom the company has a management and service agreement. … The clients of the company are international individuals or trusts, however, there is a concentration of business in countries throughout Europe and Asia."

[95] In my view, this statement by ISL provides real context to the roles and functions of the New Zealand office when these activities are viewed against the wider business activities of the company, particularly where the core business of providing financial services take place. And that is not in New Zealand.

[96] Thirdly, it is notable that if these financial services were provided by ISL to clients in New Zealand it would not only require FMA licensing but also ISL's activities would be regulated under New Zealand laws such as the Financial Advisors Act 2008, the Financial Markets Conduct Act 2013 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. These provisions apply only to FSPs carrying out business in New Zealand who have clients or potential clients in New Zealand.

[97] Fourthly, some emphasis was placed on the fact ISL pays tax in New Zealand. But that is a consequence of how ISL has elected to structure itself. Its accounts are in Euros. It is not registered for GST. It has not had any bank account since 2013. All (hard copy) client records are held in Hungary.

[98] Furthermore, while ISL's revenue is substantial, there is no indicator of the source of those funds because the accounts are consolidated in a way which prevents any attribution of the income earning entity.

[99] Fifthly, ISL has provided very limited information as to how it and its related offshore entities are regulated overseas. Furthermore, what explanations it has provided are confusing. For example, ISL advised that its parent company, Innovative International Group Limited, registered in the United Kingdom, has its headquarters in Hungary and an AML programme in Belize. However, the document attached to the submission is described as ISL's AML/CFT Policy (Belize). It refers only to New Zealand's AML legislation. It makes no reference to AML regulations in Belize. Furthermore, despite apparently having no clients in Belize, ISL is registered and licensed there for international asset protection and management, money transmission services and payment processing services. Why this is necessary if ISL has no clients in Belize is left unexplained.

[100] Similarly, one of its European subsidiaries, Innovative Securities Europe ZRT, has an operating licence from the Hungarian Central Bank to perform portfolio management investment services but no information has been provided as to how ISL is subject to regulatory oversight in Hungary or the other European Union jurisdictions where it provides financial services.

[101] Sixthly, despite having been incorporated in New Zealand since late 2012 there is a paucity of evidence the business has expanded in the way ISL said it intended. As I understand the evidence, the New Zealand office remains modest in size and little or no steps have been taken to develop new markets in New Zealand, Australia or Asia.

[102] Seventhly, ISL's claim to the Polish KNF that it is registered in New Zealand in accordance with the laws and regulations of New Zealand is demonstrably misleading. It conveys the wholly incorrect impression the fact registration means ISL is subject to New Zealand legal regulatory compliance when plainly that is not so. This is the very concern the FMA has expressed; that ISL, through its New Zealand registration, conveys the wholly misleading impression it is subject to New Zealand domestic regulation.

[103] I agree with Ms Cooper when she summarises this evidence by observing that ISL provides administrative support services from a place in New Zealand for the

purposes of the financial services it, or its subsidiaries or related companies, provide to clients abroad. Those services are not regulated by New Zealand law because they fall outside New Zealand's jurisdiction. Given that no financial services are provided to New Zealand clients and that the nature of the services provided from ISL's place of business in New Zealand are of an administrative nature only, I agree that de-registration is both necessary and desirable to avoid the effects identified in s 18A.

[104] This ground of appeal accordingly fails.

Second ground of appeal: ***Does ISL's intention to apply for a DIMS licence provide a basis for registration to be maintained?***

Appellant's submissions

[105] Mr Riches submits that the decisions in *Excelsior* and *Vivier* are distinguishable from the present because both were Auckland-based companies which provided services exclusively to overseas clients. In neither case was there any evidence they were taking steps to be in a position to provide services directly to the New Zealand public.

[106] In contrast, he submits that ISL has been actively working towards a DIMS licence in order to enable it to provide services to local clients.

[107] Mr Riches submits that the FMA imposed an unreasonably short period on ISL within which to submit its DIMS licence application so that when the FMA notified ISL it would be declining the DIMS licence application, ISL withdrew the application and began work on preparing a more substantial application.

[108] He submits that ISL finds itself in something of a "catch 22"; until it is able to obtain a DIMS licence it is restricted to providing financial services from New Zealand to overseas clients which results in significant foreign currency trade. However, once it obtains a DIMS licence it will be able to offer services to the New Zealand public thereby negating the need to trade as significantly in foreign exchange.

Analysis

[109] This argument may be dealt with reasonably economically. The evidence is that FMA did take ISL's intention to apply for a DIMS licence into account.

[110] As the narrative above reveals the FMA delayed its decision making process to allow time for ISL to make its application. The only reasons that was done was to provide ISL with the opportunity to realise its stated intentions which may well have been relevant to the decision to de-register. ISL elected to withdraw its application after the FMA indicated it was likely to be declined because of the limited information ISL had provided in support. After the application had been withdrawn the FMA determined that the prospect of a further application by ISL was not an adequate reason for ISL to remain registered. This was specifically referred to by Mr Mason in his letter of 3 August 2016.

[111] In my view it would be contrary to the purpose of the legislation if the FMA's ability to seek de-registration was required to be suspended indefinitely pending the possibility of a DIMS licence being applied for at some future date.

[112] It is noteworthy that ISL submitted its application for a DIMS licence on 30 September 2015. In November 2015 the FMA made the inquiries of Mr Chapman and Mr McDonald regarding their involvement in the preparation of the AML audit report submitted with the DIMS licence application. On 15 December 2015 the "minded to decline" letter was sent to ISL in respect of the DIMS licence outlining the concerns and requesting a response. ISL requested an extension which was granted and on 28 January 2016, well before the extension period expired, ISL withdrew its DIMS licence.

[113] Further evidence of the FMA's balanced approach to the process is found in its agreement to stay the decision to de-register pending the outcome of this appeal.

[114] As at the time of the hearing of the appeal no DIMS licence application had been made. Given that ISL has never provided financial services in or from New Zealand I am of the view that there is no good reason why, despite ISL's continuing expressions of intention, ISL should not be de-registered.

[115] Accordingly this ground of appeal must also fail.

Third ground of appeal: ***Did the FMA fail to comply with s 18B(3)(a)(ii) by failing to give notice of the reasons why it intended to de-register ISL?***

Appellant's submissions

[116] Mr Riches submits that the FMA did not comply with s 18B(3)(a)(ii) by issuing the notices of intention to de-register dated 29 May 2015 and 10 June 2016. He says that the FMA failed to disclose relevant reasons for issuing the notice of intention to de-register. These included:

(a) the Mutual Assistance Request by KNF;

(b) the complaint from the member of the public that ISL was likely to be a Ponzi scheme or pyramid scheme and that ISL was listed on the Polish Financial Supervision Authority's website as an entity suspected of criminal offending;

(c) that the FMA considered ISL may have deliberately provided an incorrect document to the FMA, namely the AML report filed in support of its application for a DIMS licence; and

(d) the bank's decision to close ISL's bank accounts due to money laundering concerns.

[117] Mr Riches submits that seized of this information it was inevitable that Mr Mason decided to de-register ISL. However, he submits, none of these allegations was ever put to ISL and each could easily have been refuted if ISL had been given the opportunity.

Analysis

[118] Again, ISL's complaint in respect of each of these features does not require exhaustive analysis. This is because there is no requirement under s 18B(3)(a)(ii) for the FMA to identify matters which do not form a material part of the reasons for its

decision to direct de-registration. All that is required is for the FMA to give the FSP "the reasons why it intends to give the direction". The obligation of the FMA under this provision was discussed by the Court of Appeal in *Vivier* where, the Court stated:

> "[81] ... the requirements of natural justice of a deliberative body such as the FMA do not require disclosure of non-material communications. 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."

[119] The recommendation memorandum of 28 May 2015 makes no reference to any of the matters listed at [116] above. More significantly, while the recommendation memorandum of 2 August 2016 did make reference to some of these matters they were plainly not taken into account for the purposes of the decision.

[120] For example, the memorandum makes no reference to the claims that ISL might have been a Ponzi or pyramid scheme. The warnings by Russian and Polish banks and the KNF were noted but the explanation provided by ISL's lawyers on that issue was set out in the document. This was that ISL believed the warnings were prompted by a warning issued by Belize. There is no suggestion in the document that this explanation was not accepted although for reasons which follow there is now good reason to be sceptical of that explanation.

[121] In respect of the AML audit report purported to have been prepared with the assistance of Mr Chapman and Mr McDonald, the recommendation memorandum noted it was unfair to determine whether ISL had deliberately provided the incorrect document or whether it was a case of human error as claimed by ISL. It noted that the FMA believed that neither the New Zealand-based director nor the compliance officer had read the report sufficiently closely to note that it referred to site visits by people who had not come to New Zealand. Mr Mason's handwritten note "Maybe, but not relevant for s 18B" plainly conveys that this issue was not regarded by him as a material or relevant factor for the purposes of the Act.

[122] Furthermore, the suggestion that the FMA was influenced by the advice that ISL bank accounts had been closed due to money laundering concerns did not make it into the recommendation memorandum.

[123] It follows that I am not satisfied that any of these factors featured as a material part of the FMA's reasons to direct de-registration.

[124] But, in any event, these matters were disclosed by the FMA and addressed in the extensive correspondence the FMA had with ISL throughout the process.

[125] I agree with Ms Cooper that the notice requirement in s 18B(3)(a)(ii) needs to be interpreted and applied in a flexible manner that permits ongoing dialogue between the FMA and the person whose registration is under consideration. The communications between the FMA and ISL need to be assessed holistically. The question is whether ISL had notice of these factors and was provided with the opportunity to respond and explain.

[126] In relation to the mutual assistance request by KNF the FMA did not have any further dealings with the Polish authorities after receiving the request until it sought their consent to disclose the request for the purposes of this appeal. Even so, although ISL was not informed of the Polish request for assistance, it was asked on 10 July 2015 to comment on KNF's warning about ISL.

[127] ISL's comments are contained in their letters dated 20 July 2015, 18 September 2015 and 21 June 2016. ISL explained the KNF warning appeared to relate to an incorrect warning issued by Belize and because the Belize warning was a technical error, later corrected, the KNF warning was without foundation. However, this explanation is inconsistent with the terms of the KNF warning and with the correspondence between ISL and the Polish authorities which was received in October 2016.

[128] I agree with Ms Cooper that there is a troubling inconsistency between ISL's letter to the KNF and ISL's repeated statements to the FMA that it believed the Polish warning related to the Belize warning. This is because ISL's letter to the KNF

referred to an ISL investigation which took place around 2012. If ISL had been involved in a Polish investigation in 2012 it begs the question as to how ISL could have believed that the Polish warning related to the Belize warning.

[129] I accept that this information did not form part of the reasons for the FMA's decision to de-register because it only became available after the decision had been made. It does, however, provide further support for the view that ISL's explanations to the FMA should be treated with some caution.

[130] In respect of the allegation that ISL was likely a Ponzi or pyramid scheme I have already pointed out why this information was not a reason for the FMA's decision to de-register ISL.

[131] The chronology discussed above reveals that the email exchange containing these allegations prompted the recommendation memorandum of 28 May 2015 which recommended issuing a notice of intention to give a direction to the Registrar in respect of ISL. It was in that sense a catalyst for the FMA's later actions.

[132] Thus the position is comparable to that which confronted the Court of Appeal in *Vivier* where the Court observed that the initial complaint in that case was merely a catalyst and had no material influence on the ultimate de-registration decision.[18]

[133] For this reason I am satisfied it was not necessary for the FMA to disclose the email to ISL as one of the reasons justifying its decision.

[134] Despite this, ISL was aware of the emails and the allegations because these were disclosed by the FMA on 3 September 2015 as part of its Official Information response. Furthermore, ISL's solicitors made reference to the complaint and commented on it in their letter of 18 September 2015.

[135] Thus, in relation to this aspect, not only am I satisfied it did not form part of the FMA's decision to de-register but ISL had notice of it and submissions were made in respect of it.

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18 *Financial Markets v Vivier & Co Ltd,* above n 9, at [80].

[136] A not dissimilar situation arises in respect of the AML audit report submitted as part of the DIMS licence application. In addition to Mr Mason expressly observing this issue was not relevant for the purposes of s 18B, ISL was well aware of the FMA's concerns and had ample opportunity to respond.

[137] On the issue of whether the FMA relied on the advice that the BNZ decided to close ISL's bank accounts due to money laundering concerns this, too was information which was plainly in the possession of ISL because it was information which ISL itself had provided to the FMA.

[138] Accordingly, this ground of appeal also fails.

Fourth ground of appeal: ***Did the FMA commit a breach of natural justice?***

[139] Essentially this point duplicates the third.

[140] As the Court of Appeal observed in *Vivier*, complaints about the process cannot alter the essential conclusions as to the appropriateness of de-registration.[19]

[141] For the reasons already discussed I am satisfied that there was no breach of ISL's rights to natural justice. No matter material to the FMA's decision to de-register ISL was not disclosed to ISL. ISL was invited to respond to those which the FMA considered relevant to its decision to de-register. In any event, those matters which ISL now claims influenced or were part of the FMA's decision were known to ISL and explanations given.

[142] Furthermore, I agree with Ms Cooper that this appeal, being a general appeal, has provided ISL with the opportunity, had there been a breach, to cure that by the presentation of evidence and submissions on these points. In doing so I refer to the passage in Aronson and Dyer, *Judicial Review of Administrative Action*[20] cited by the Court of Appeal in *Singh v Attorney-General*[21] where the learned authors observed:

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19 *Financial Markets v Vivier & Co Ltd,* above n 9, at [78].

20 Aronson and Dyer *Judicial Review of Administrative Action* (LawBook Company, Sydney, 1996) at 476.

21 *Singh v Attorney-General* [2000] NZAR 136 (CA) at [16].

> "If there is an appeal on the merits by way of a *de novo* hearing to a person who is unlikely to be affected by what occurred at first instance, the appeal may be able to provide all that procedural fairness requires. If so, it is a far superior remedy for breach of natural justice than judicial review, since it will not only redress the initial unfairness more effectively and quickly than judicial review can, but also replace the initial decision with a fresh decision on the merits. This provides a strong justification for Courts allowing such appeals to cure defects and requiring those complaining of breach of natural justice to exercise their rights of appeal instead of seeking judicial review."

[143] That has occurred in the present case. Not only have counsel had the opportunity to make submissions on the evidence, but, by consent, I granted leave to both parties to adduce further evidence on this appeal.

[144] Accordingly this ground of appeal must also fail.

Fifth ground of appeal: ***Did the FMA err in applying ss 18A and 18B of the Act?***

[145] Mr Riches did not specifically address me on this ground and his submissions do not appear to have dealt with it.

[146] No doubt this is because this ground of appeal manifests itself in the other grounds and the submissions made in respect of them.

Conclusion

[147] I am satisfied that the criticisms made of the processes and reasoning of the FMA in determining that ISL should be de-registered cannot be sustained. I am satisfied there was sufficient evidence before the FMA to justify that course.

[148] More particularly, for the reasons discussed under the first ground of appeal, I am satisfied that ISL does not provide financial services as defined in s 5 of the Act or from its place of business. That being the case the FMA was correct to determine that the registration of ISL is or is likely to create a false or misleading appearance that it is an FSP in New Zealand, its financial services are provided from New Zealand and that the provision of services from New Zealand to overseas clients are regulated by New Zealand law when this is clearly not the case.

[149] Thus the FMA was correct to consider that registration in such circumstances will have or is likely to have the effect of damaging the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets.

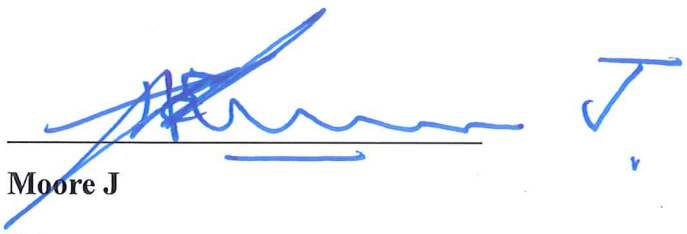
[150] The FMA, having regard to its expert knowledge and experience of financial markets in New Zealand and overseas, was uniquely placed to make this judgment and while coming to the decision that the FMA was correct, I do so on my own view of the evidence. I am, however, fortified in that conclusion because the FMA with its own special knowledge and expertise came to the same view, particularly when assessing damage to New Zealand's reputation in financial markets and whether registration would create a misleading appearance.

[151] It follows that in determining the FMA was correct, ISL has failed to discharge its burden of satisfying me otherwise.

Result

[152] The appeal is dismissed.

[153] Costs are ordered in favour of the FMA on a 2B basis.



Moore J

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