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IN THE HIGH COURTOF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2015-404-694
[2016] NZHC 1031

	BETWEEN	E-TRANS INTERNATIONAL FINANCE LTD Plaintiff
	AND	KIWIBANK LTD Defendant

Hearing:	3, 4, 5, 9, 10, 11, 12, 25, and 26 February 2016
Court:	Heath J Professor Martin Richardson, Lay Member
Counsel:	J A Farmer QC, H M Lim and M Moon for Plaintiff T C Weston QC, A S Butler, S C Keene and E M Watt for Defendant
Judgment:	19 May 2016

JUDGMENT OF THE COURT

This judgment was delivered by me on 19 May 2016 at 2.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
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Counsel:
J A Farmer QC, Auckland
T C Weston QC, Christchurch

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Introduction

[1] The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the Anti-Money Laundering Act) came into force fully on 30 June 2013. Based on a number of international reports prepared in the wake of terrorist attacks over the preceding decade,[1] it establishes robust procedures for the reporting of transactions to the police that are *reasonably suspected* to involve money laundering, or the financing of terrorism. The new procedures cast more onerous obligations on reporting entities than was previously the case.[2] The low threshold for reporting (reasonable suspicion) reflects the public interest in a prompt and proper investigation into the source of the funds and the purpose for which such moneys are to be applied, whenever there is a credible basis to believe that money obtained from

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1 See paras [11]–[14] below.
2 The previous legislation was the Financial Transactions Reporting Act 1996.

serious criminal activity is in the process of being laundered, or is linked to intended terrorist activity.[3]

[2] E-Trans International Finance Ltd (E-Trans) carries on business as a currency exchanger and remitter of funds to and from New Zealand. We shall use the term "money remitter" as a generic description of its business activities. The nature of its business (the cross-border remittance of funds) makes E-Trans particularly vulnerable to attempts by third parties to channel money through its accounts; for example, to disguise the proceeds of crime, or to avoid detection of the source of financing of terrorism.

[3] To carry on business as a money remitter from New Zealand, E-Trans needs a domestic bank account.[4] From January 2014, E-Trans operated through an account with Kiwibank. On 26 March 2015, Kiwibank gave notice of its intention to close E-Trans' accounts on 10 April 2015.[5] That decision was taken on the basis of a policy decision made by Kiwibank in March 2014. Following a review by its Financial Crime Team, the Executive Risk Committee initiated a policy by which the bank would progressively "off board" all money remittance providers whose business models were not consistent with Kiwibank's "risk appetite", and not enter into banking relationships with new customers that fell into that category.[6] Kiwibank's strategy was to undertake a staged process of terminating the contracts of relevant remitters. That is the reason why its banking relationship with E-Trans was not terminated until the following year.

[4] This proceeding raises questions about:

(a) The scope of the termination provision in the relevant contract.[7]

(b) The effect of termination (if otherwise valid) from a competition law perspective. It is alleged that the exercise of the termination clause

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3 See also paras [16], [18] and [20]–[23] below.
4 This was acknowledged by the experts called by both E-Trans and Kiwibank: see para [131](a) below.
5 See para [65] below.
6 See paras [53]–[65] below.
7 Clause 7, which is set out at para [83] below.

has, or is likely to have the effect of substantially lessening competition in the relevant market.

(c) Whether the Anti-Money Laundering Act imposes any statutory duties, enforceable by E-Trans as a matter of private law, which affect the validity of Kiwibank's decision to terminate, and

(d) The applicability of s 9 of the Fair Trading Act 1986 (misleading and deceptive conduct in trade) to reasons given by Kiwibank for terminating the contract.

[5] On 23 June 2015, Peters J issued an interim injunction[8] to restrain Kiwibank from acting on its termination notice. Pending further order of the Court, she restrained Kiwibank from closing any and "all existing bank accounts and banking facilities" that E-Trans had with it. The continued operation of such accounts and facilities was to be governed by the pre-termination notice terms and conditions.[9] The practical effect of that order has been to require continuation of the banking relationship, until this proceeding has been determined.

[6] In summary:

(a) Kiwibank asserts that it had a contractual right to terminate the contract on giving 14 days' notice, without reasons. If Kiwibank's approach is correct, the contract is at an end.

(b) E-Trans contends that:

(i) Kiwibank breached an implied term to act fairly and reasonably in exercising its power to terminate the contract. It says that a term to that effect was implied by Kiwibank's adoption of the Code of Banking Practice (the Code). Kiwibank embraced the Code when it became a member of the New Zealand Bankers' Association (the Association). This

8 *E-Trans International Finance Ltd v Kiwibank Ltd* [2015] NZHC 1417.
9 Ibid, at para [34].

point is inextricably linked to Kiwibank's claim that it is entitled to terminate the contract, as of right. We call this the "contractual issue".

(ii) If termination were validly effected, Kiwibank's *exercise* of that contractual power, in the circumstances of this particular case, had, or may have had, the effect of substantially lessening competition in the funds remittance and money changing market. If so, its conduct contravenes s 27(2) of the Commerce Act 1986. We call this the "competition issue".

(iii) Kiwibank has breached a statutory duty (arising out of the provisions of the Anti-Money Laundering Act) to supply banking services to E-Trans. We call this the "statutory duty issue".

(iv) Kiwibank breached s 9 of the Fair Trading Act 1986, by giving (what E-Trans contends were) false reasons for its decision to terminate. We call this the "Fair Trading Act issue".

[7] In its most recent Statement of Claim, E-Trans seeks the following relief:

(a) A permanent injunction prohibiting Kiwibank from closing E-Trans' accounts, so long as E-Trans observes its contractual obligations to Kiwibank.

(b) A declaration that Kiwibank is in breach of obligations cast upon it under the Anti-Money Laundering Act and the Reserve Bank of New Zealand Act 1989 (the Reserve Bank Act), and is not entitled to avoid those obligations by closing the accounts of E-Trans with it.

(c) An inquiry into damages.

(d) Costs.

[8] Because of the argument based on s 27(2) of the Commerce Act, Professor Richardson was appointed as a Lay Member to participate in the hearing as a member of the Court.[10] This is the judgment of the Court, reflecting the unanimous decision of Heath J and Professor Richardson.

The Anti-Money Laundering Act

(a) Introductory comments

[9] The problems that have arisen in this case stem from the need for Kiwibank to fulfil onerous reporting duties cast upon it by the Anti-Money Laundering Act. To some extent, any financial institution which receives money from third parties is at risk of its own processes being used to launder the proceeds of crime. Kiwibank wishes to minimise any risk of reputational damage, for example by being perceived to be involved (albeit inadvertently) in money laundering. As Kiwibank regarded money remitters as being within a class of business that carries a heightened risk, it decided to terminate contracts by which it was to provide banking services to them.

[10] Kiwibank's ability to decline to do business with money remitters generally is at the heart of this proceeding. Before we analyse the competing arguments, it is necessary to consider the obligations cast upon an entity such as Kiwibank by the Anti-Money Laundering Act.

(b) The purposes of the Anti-Money Laundering Act

[11] The "overarching objectives" of the proposed legislation were described in the general policy statement that formed part of the Explanatory Note to the Anti-Money Laundering and Countering Financing of Terrorism Bill.[11] To paraphrase, they were:

> (a) To improve the detection and deterrence of money laundering, and the financing of terrorism.

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10 Commerce Act 1986, ss 77(9)–(11) and 78.

11 Anti-Money Laundering and Countering Financing of Terrorism Bill 2009 (46-1) (explanatory note).

(b) To enhance New Zealand's international reputation, by enacting legislation to promote the prevention (or detection) of money laundering and the financing of terrorism.

(c) To contribute to public confidence in the financial system.

(d) To realise those objectives with minimum cost, by tailoring the new framework to New Zealand's broader financial system.

(e) To ensure that the new framework is compatible with international models dealing with the prevention or detection of money laundering and financing of terrorism.

(f) To provide for a "risk based approach" to give individual businesses scope to assess and respond to the risks of its particular operating environment.

[12] Those objectives are reflected in s 3 of the Anti-Money Laundering Act:[12]

> **3 Purpose**
>
> (1) The purposes of this Act are—
>
> (a) to detect and deter money laundering and the financing of terrorism; and
>
> (b) to maintain and enhance New Zealand's international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the Financial Action Task Force; and
>
> (c) to contribute to public confidence in the financial system.
>
> (2) Accordingly, this Act facilitates co-operation amongst reporting entities, AML/CFT supervisors, and various government agencies, in particular law enforcement and regulatory agencies.

[13] Section 3(1)(b) refers to recommendations issued by "The Financial Action Task Force" (the Task Force). That is an international body. The Task Force was

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[12] Section 3(2) uses the expressions "AML/CFT". That term is specifically defined by s 5 of the Anti-Money Laundering Act to mean "anti-money laundering and countering the financing of terrorism". The type of co-operation to which s 3(2) refers is set out in ss 149–152 of the statute.

created in 1989 by the (then) G 7 group of countries in response to the perceived threat of money laundering within the international financial system. New Zealand has been an active member of the Task Force since 1991.

[14] The Task Force has made recommendations to governments about the most desirable framework to combat threats of money laundering and financing of terrorism. Its recommendations have received widespread support and have become an acceptable international standard. They have been implemented in many countries in which New Zealand entities frequently do business.

(c) The reporting regime

[15] Initially, the Financial Transactions Reporting Act 1996 (the 1996 Act) was passed to respond to the recommendations. In 2003, assessment of New Zealand's implementation was found to be materially non-compliant with eight recommendations and two special recommendations, including core requirements of the regime. Given increased international concerns about terrorism, following the September 2001 attacks in New York, the New Zealand government needed to take specific action to respond to those criticisms.

[16] The Anti-Money Laundering Act operates by imposing reporting requirements on private and public sector businesses that carry on business as a "financial institution".[13] Casinos are subject to the same reporting obligations.[14] Kiwibank is a "reporting entity", as defined by s 5 of the Anti-Money Laundering Act. So too is E-Trans.[15]

[17] A reporting entity is under a statutory duty to convey to the Commissioner of Police (the Commissioner) information that comes to its attention, in respect of which it has reasonable grounds to suspect that a transaction (or proposed transaction) is or may be relevant to the investigation, enforcement or prosecution of specified classes of offences. Section 40 provides:

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13 The term "financial institution" is defined in s 5 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

14 The term "casino" is defined by s 5 to mean to "the holder of a casino operator's licence under the Gambling Act 2003".

15 See para [18] below.

40 Reporting entities to report suspicious transactions

(1) Despite any other enactment or any rule of law, but subject to section 42 of this Act and to section 44(4) of the Terrorism Suppression Act 2002, this section applies if—

(a) a person conducts or seeks to conduct a transaction through a reporting entity; and

(b) the reporting entity has reasonable grounds to suspect that the transaction or proposed transaction is or may be—

(i) relevant to the investigation or prosecution of any person for a money laundering offence; or

(ii) relevant to the enforcement of the Misuse of Drugs Act 1975; or

(iii) relevant to the enforcement of the Terrorism Suppression Act 2002; or

(iv) relevant to the enforcement of the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009; or

(v) relevant to the investigation or prosecution of a serious offence within the meaning of section 243(1) of the Crimes Act 1961.

(2) If this section applies, the reporting entity must, as soon as practicable, but no later than 3 working days after forming its suspicion, report the transaction or proposed transaction to the Commissioner, in accordance with section 41.

(3) Nothing in subsection (2) requires any lawyer to disclose any privileged communication (as defined in section 42).

[18] Section 5 of the Anti-Money Laundering Act defines a "financial institution" as one which, in the ordinary course of business, carries out specified financial activities. These include accepting deposits or other repayable funds from the public, lending to or for a customer, and transferring money or value for or on behalf of a customer. Through that definition, both E-Trans and Kiwibank became subject to the reporting requirements of s 40(2).

[19] There was some debate about the extent to which Kiwibank is entitled to rely on due diligence[16] undertaken by E-Trans, in order to fulfil its own reporting

[16] Section 10 identifies three levels of due diligence, depending on the nature of the entity with which the reporting entity is dealing: standard customer due diligence, simplified customer due

obligations. In our view, this point does not need to be resolved in the context of this case. However, as we refer to it in a different context later[17] we set out s 33 of the Anti-Money Laundering Act:

> **33 Reliance on other reporting entities or persons in another country**
>
> (1) Subject to the conditions in subsection (2), a reporting entity may rely on another person (who is not an agent) to conduct the customer due diligence procedures required for customer due diligence under this Act or regulations.
>
> (2) The conditions are that—
>
> (a) the person being relied on is either—
>
> (i) a reporting entity; or
>
> (ii) a person who is resident in a country with sufficient anti-money laundering and countering financing of terrorism systems and measures in place and who is supervised or regulated for AML/CFT purposes; and
>
> (b) the person has a business relationship with the customer concerned; and
>
> (c) the person has conducted relevant customer due diligence procedures to at least the standard required by this Act and regulations and has provided to the reporting entity—
>
> (i) relevant identity information before the reporting entity establishes a business relationship or an occasional transaction is conducted; and
>
> (ii) relevant verification information as soon as practicable, but no later than 5 working days, after the business relationship is established or the occasional transaction is conducted; and
>
> (d) the person consents to conducting the customer due diligence procedures for the reporting entity and to providing all relevant information to the reporting entity; and
>
> (e) any other conditions prescribed by regulations are complied with.
>
> (3) Despite subsection (1), a reporting entity relying on a third party to conduct the customer due diligence procedure, and not the person carrying out the customer due diligence procedure, is responsible for ensuring that customer due diligence is carried out in accordance with this Act.

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diligence and enhanced customer due diligence.

[17] See fn 101 below.

[20] There is no statutory power for a reporting entity to suspend or to stop a transaction from proceeding if a suspicious transaction report were provided to the Commissioner. Any power to take such a step must be conferred by the terms on which the reporting entity has contracted with any given customer. Investigation of the nature of the transaction, and any enforcement response, is left to the Police.

[21] A suspicious transaction report must contain a statement of the grounds on which the suspicion has been formed.[18] It must be forwarded, in writing, to the Commissioner (usually) through a secure electronic communication, in a form approved by him or her.[19] Provision is made for an oral report in cases of urgency.[20]

[22] Generally, a reporting entity is prohibited from disclosing the fact that a suspicious transaction report has been made, or any information contained in it. Exceptions to that non-disclosure requirement include the Commissioner (or his or her authorised delegate) and the reporting entity's statutory "supervisor". That term is defined in the statute as the "AML/CFT supervisor". We refer to that entity as the "supervisor".[21] The Reserve Bank is the supervisor for registered banks.[22] The Department of Internal Affairs is the supervisor for E-Trans, as an entity that carries on business as a "money changer".[23]

[23] The importance of the secrecy requirement is apparent from the fact that, even in judicial proceedings, the existence of a suspicious transaction report and its content may only be disclosed if a Judge "is satisfied that the disclosure of the information is necessary in the interests of justice".[24] As a result of orders made by Venning J late last year, we have had the opportunity to see how the reporting system works in practice. Deliberately, nothing is recorded in this judgment to identify the nature of the information we have been able to review.

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18 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 41(1)(c).
19 Ibid, s 41(1)(e).
20 Ibid, s 41(2).
21 Ibid, s 46(1) and (2)(a) and (b). The statute defines the term "AML/CFT supervisor" as a person responsible for supervising the reporting entity under Parts 3 and 4 of the Act: s 5. See also para [25] below.
22 Ibid, s 130(1)(a).
23 Ibid, s 130(1)(c).
24 Ibid, s 47.

[24] Every reporting entity is required to have a compliance programme and a compliance officer.[25] There are minimum standards for such programmes.[26] A specified "assessment of the risk of money laundering and the financing of terrorism … that it may reasonably expect to face in the course of its business" must be undertaken.[27] The risk assessment and programme are subject to review.[28] The reporting entity must prepare an annual report, which is provided to its supervisor.[29]

[25] The functions and powers of the supervisor are spelt out in ss 131 and 132 of the Anti-Money Laundering Act:

> **131 Functions**
>
> The functions of … [a] supervisor are to—
>
> (a) monitor and assess the level of risk of money laundering and the financing of terrorism across all of the reporting entities that it supervises:
>
> (b) monitor the reporting entities that it supervises for compliance with this Act and regulations, and for this purpose to develop and implement a supervisory programme:
>
> (c) provide guidance to the reporting entities it supervises in order to assist those entities to comply with this Act and regulations:
>
> (d) investigate the reporting entities it supervises and enforce compliance with this Act and regulations:
>
> (e) co-operate through the AML/CFT co-ordination committee (or any other mechanism that may be appropriate) with domestic and international counterparts to ensure the consistent, effective, and efficient implementation of this Act.
>
> **132 Powers**
>
> (1) [A] … supervisor has all the powers necessary to carry out its functions under this Act.
>
> (2) Without limiting the power conferred by subsection (1), [a supervisor] may,—
>
> (a) on notice, require production of, or access to, all records, documents, or information relevant to its supervision and

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25 Ibid, s 56.
26 Ibid, s 57.
27 Ibid, s 58.
28 Ibid, s 59.
29 Ibid, s 60.

monitoring of reporting entities for compliance with this Act; and

(b) conduct on-site inspections in accordance with section 133; and

(c) provide guidance to the reporting entities it supervises by—

(i) producing guidelines; and

(ii) preparing codes of practice in accordance with section 63; and

(iii) providing feedback on reporting entities' compliance with obligations under this Act and regulations; and

(iv) undertaking any other activities necessary for assisting reporting entities to understand their obligations under this Act and regulations, including how best to achieve compliance with those obligations; and

(d) co-operate and share information in accordance with sections 46, 48, and 137 to 140 by communicating or making arrangements to communicate information obtained by the AML/CFT supervisor in the performance of its functions and the exercise of its powers under this Act; and

(e) in accordance with this Act and any other enactment, initiate and act on requests from any overseas counterparts; and

(f) approve the formation of, and addition of members to, designated business groups.

(3) [A supervisor] may only use the powers conferred on it under this Act and regulations for the purposes of this Act.

(d) The enforcement regime

[26] Part 3 of the Anti-Money Laundering Act deals with questions of enforcement. The statute provides for both criminal and civil sanctions. Examples of offences in respect of which criminal proceedings may be brought include a failure to report a suspicious transaction,[30] providing false or misleading information in connection with a suspicious transaction report,[31] and unlawful disclosure of a suspicious transaction report.[32] Any person, including a reporting entity, who commits any of those offences is liable to a term of imprisonment of not more than

30 Ibid, s 92.
31 Ibid, s 93.
32 Ibid, s 94.

two years and to a fine not exceeding $300,000, if an individual.[33] In the case of a body corporate, a fine of up to $5 million may be imposed. Those maximum penalties reflect the importance of the reporting requirements.

[27] Civil proceedings may be issued by a supervisor, in respect of a "civil liability act". That term is defined, in a non-exhaustive way, by s 78 of the Anti-Money Laundering Act:

> **78 Meaning of civil liability act**
>
> In [Part 3 of the Anti-Money Laundering Act], a civil liability act occurs when a reporting entity fails to comply with any of the AML/CFT requirements, including, without limitation, when the reporting entity—
>
> (a) fails to conduct customer due diligence as required by subpart 1 of Part 2:
>
> (b) fails to adequately monitor accounts and transactions:
>
> (c) enters into or continues a business relationship with a person who does not produce or provide satisfactory evidence of the person's identity:
>
> (d) enters into or continues a correspondent banking relationship with a shell bank:
>
> (e) fails to keep records in accordance with the requirements of subpart 3 of Part 2:
>
> (f) fails to establish, implement, or maintain an AML/CFT programme:
>
> (g) fails to ensure that its branches and subsidiaries comply with the relevant AML/CFT requirements.

[28] Section 79 states:

> **79 Possible responses to civil liability act**
>
> If a civil liability act is alleged to have occurred, the relevant AML/CFT supervisor may do 1 or more of the following:
>
> (a) issue a formal warning under section 80:
>
> (b) accept an enforceable undertaking under section 81 and seek an order in the court for breach of that undertaking under section 82:

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[33] Ibid, s 100(a).

(c) seek an injunction from the High Court under section 85 or 87:

(d) apply to the court for a pecuniary penalty under section 90.

[29] The nature of a "formal warning" is captured in s 80:

80 Formal warnings

(1) The relevant AML/CFT supervisor may issue 1 or more formal warnings to a person if the AML/CFT supervisor has reasonable grounds to believe that that person has engaged in conduct that constituted a civil liability act.

(2) A formal warning must be—

(a) in the prescribed form; and

(b) issued in the manner specified in regulations (if any).

[30] Sections 85–88 (inclusive) confer power for this Court to grant an injunction. They state:[34]

85 Performance injunctions

(1) The High Court may, on the application of the relevant AML/CFT supervisor, grant an injunction requiring a person to do an act or thing if—

(a) that person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do that act or thing; and

(b) the refusal or failure was, is, or would be a civil liability act.

(2) The court may rescind or vary an injunction granted under this section.

86 When High Court may grant performance injunctions

(1) The High Court may grant an injunction requiring a person to do an act or thing if—

(a) it is satisfied that the person has refused or failed to do that act or thing; or

(b) it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing.

(2) Subsection (1)(a) applies whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing.

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[34] If a supervisor applies to the Court for the grant of an interim injunction the High Court must not require the supervisor to give an undertaking as to damages: s 89(1).

(3) Subsection (1)(b) applies—

(a) whether or not the person has previously refused or failed to do that act or thing; or

(b) where there is an imminent danger of substantial damage to any other person if that person refuses or fails to do that act or thing.

87 Restraining injunctions

(1) The High Court may, on the application of the relevant AML/CFT supervisor, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of a provision of this Act.

(2) The court may rescind or vary an injunction granted under this section.

88 When High Court may grant restraining injunctions and interim injunctions

(1) The High Court may grant an injunction restraining a person from engaging in conduct of a particular kind if—

(a) it is satisfied that the person has engaged in conduct of that kind; or

(b) it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind.

(2) The court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if, in its opinion, it is desirable to do so.

(3) Subsections (1)(a) and (2) apply whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind.

(4) Subsections (1)(b) and (2) apply—

(a) whether or not the person has previously engaged in conduct of that kind; or

(b) where there is an imminent danger of substantial damage to any other person if that person engages in conduct of that kind.

[31] Criminal proceedings may be commenced irrespective of whether a proceeding claiming a civil penalty order has been issued in relation to the same or substantially the same conduct.[35] However, proceedings seeking a civil penalty in

[35] Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 73(1).

relation to particular conduct are stayed automatically if criminal proceedings in respect of the same (or substantially similar) conduct are issued.[36]

[32] In certain circumstances, both supervisors and reporting entities will be protected against criminal and civil liability. In the case of a supervisor, civil or criminal proceedings may be brought only if it can be shown that it acted in bad faith.[37] In the case of a reporting entity, protection is available if its actions were taken in good faith and were reasonable in the circumstances.[38]

(e) Exemptions

[33] The Anti-Money Laundering Act specifies means by which an individual reporting entity (or a particular "class" of them) may be exempted from compliance with some or all obligations cast upon it. Section 154(1) states:

> **154 Regulations relating to application of Act**
>
> (1) The Governor-General may, by Order in Council on the recommendation of the Minister, make regulations for the following purposes:
>
> (a) exempting or providing for the exemption of any transaction, product, or service or class of transactions, products, or services from all or any of the provisions of this Act:
>
> (b) excluding certain relationships or banking services from the application of section 29 (which relates to correspondent banking relationships):
>
> (c) exempting a reporting entity from its obligation to obtain some or all of the information set out in section 27(1) in relation to a specified transfer or transaction:
>
> (d) exempting certain movements of cash from the application of subpart 6 of Part 2:
>
> (e) prescribing threshold values for the purposes of sections 68 and 69 and the person or class of persons, transaction or class of transactions, financial activity or class of financial activities to which that threshold value applies:
>
> (f) declaring an account or arrangement to be, or not to be, a facility and the circumstances and conditions in which an account or arrangement is to be, or not to be, a facility for the purposes of this Act:

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36 Ibid, s 73(2).
37 Ibid, s 76.
38 Ibid, s 77.

(g) declaring a person or class of persons to be, or not to be, a reporting entity and the circumstances and conditions in which a person or class of persons is to be, or not to be, a reporting entity for the purposes of this Act:

(h) declaring a transaction or class of transactions to be, or not to be, an occasional transaction and the circumstances and conditions in which a transaction or class of transactions is to be, or not to be, an occasional transaction for the purposes of this Act:

(i) declaring a transfer or transaction or a class of transfers or transactions not to be a wire transfer and the circumstances and conditions in which a transfer or transaction or class of transfers or transactions is not a wire transfer for the purposes of this Act:

(j) declaring a person or class of persons to be, or not to be, a customer and the circumstances and conditions in which a person or class of persons is to be, or not to be, a customer for the purposes of this Act:

(k) declaring an entity or class of entities (whether domestic or overseas) to be eligible for inclusion in a designated business group:

(l) declaring a person or class of persons to be, or not to be, a financial institution for the purposes of this Act.

…

[34] Section 154(2) sets out the factors that the Minister must consider before making any recommendation to exempt a reporting entity from particular obligations. It provides:

154 Regulations relating to application of Act

…

(2) The Minister must, before making any recommendation, have regard to—

(a) the purposes of this Act and the Financial Transactions Reporting Act 1996; and

(b) the risk of money laundering and the financing of terrorism; and

(c) the impact on the prevention, detection, investigation, and prosecution of offences; and

(d) the level of regulatory burden on a reporting entity; and

(e) whether the making of the regulation would create an unfair advantage for a reporting entity or would disadvantage other reporting entities; and

(f) the overall impact that making the regulation would have on the integrity of, and compliance with, the AML/CFT regulatory regime.

…

[35] In addition, the Minister may grant specified types of exemption, under s 157. Section 157(1) and (2) states:

157 Minister may grant exemptions

(1) The Minister may, in the prescribed form, exempt any of the following from the requirements of all or any of the provisions of this Act:

(a) a reporting entity or class of reporting entities; or

(b) a transaction or class of transactions.

(2) The Minister may grant the exemption—

(a) unconditionally; or

(b) subject to any conditions the Minister thinks fit.

…

[36] Section 157(3) sets out the factors that the Minister must consider before granting an exemption of that type. To a limited extent, they mirror the s 154(2) factors.[39] Section 157(4)–(6) provide for the way in which a decision of that type must be notified publicly. Those provisions read:

157 Minister may grant exemptions

…

(3) Before deciding to grant an exemption and whether to attach any conditions to the exemption, the Minister must have regard to the following:

(a) the intent and purposes of the Financial Transactions Reporting Act 1996:

(b) the intent and purpose of this Act and any regulations:

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[39] Set out at para [34] above.

(c) the risk of money laundering and the financing of terrorism associated with the reporting entity, including, where appropriate, the products and services offered by the reporting entity and the circumstances in which the products and services are provided:

(d) the impacts on prevention, detection, investigation, and prosecution of offences:

(e) the level of regulatory burden to which the reporting entity would be subjected in the absence of an exemption:

(f) whether the exemption would create an unfair advantage for the reporting entity or disadvantage third party reporting entities:

(g) the overall impact that the exemption would have on the integrity of, and compliance with, the AML/CFT regulatory regime.

(4) An exemption under this section is a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

(5) A class exemption under this section must be published under section 6 of the Legislation Act 2012 and, for this purpose, class exemption—

(a) means an exemption of general application that applies to a class of reporting entities or transactions; but

(b) does not include an exemption granted in relation to a particular reporting entity or transaction.

(6) An exemption under this section that is not a class exemption under subsection (5) must, as soon as practicable after being granted, be—

(a) published on an Internet site maintained by or on behalf of the chief executive; and

(b) notified in the Gazette; and

(c) made available in printed form for purchase on request by members of the public.

…

Context

(a) The nature of E-Trans' business

[37] E-Trans has offices at two Auckland locations, both in Queen Street. It had a small presence in Christchurch before the major earthquakes that struck that city from September 2010. The sole director and shareholder of E-Trans is Mr Xiaohua

Sun. He explained E-Trans' business model for both currency exchange and remittance transactions. What follows is a summary of his evidence.

[38] After E-Trans undertakes some initial screening checks, its intended customer applies to open an account. E-Trans requires that the initial application be done face-to-face and the application form contains declarations to provide solemn information about the nature of the business that the customer is to undertake. Once that information is obtained, and any additional inquiries are completed, E-Trans decides whether or not to do business with the applicant.

[39] For currency exchanges involving more than $NZ1,000, E-Trans receives foreign bank notes in cash from its customer and then pays out New Zealand dollars, either from cash held on the premises or out of its trading bank account. In the same way, E-Trans may receive New Zealand dollars in exchange for foreign bank notes. E-Trans does not charge fees or commission. Its remuneration is captured within the quoted exchange rates. E-Trans' profit from this type of transaction is the difference between the price at which foreign bank notes have been purchased and the more favourable price at which it can sell those notes. No profit is realised until the foreign bank notes are sold. All profits are retained by E-Trans.

[40] A trading bank account in New Zealand is critical to the ability of E-Trans to undertake its business in that way. Without one, E-Trans cannot pay or receive New Zealand dollars. Since January 2014, Kiwibank has been the trading bank with which E-Trans has transacted its business.[40]

[41] An inbound remittance transaction is initiated by the ultimate beneficiary of the funds in New Zealand. That person will have an account with E-Trans. The customer arranges for the contracted sum to be credited into an account nominated by [a related Australian company] that operates under the E-Trans umbrella, … On receipt of that sum, E-Trans credits the contracted amount in New Zealand dollars to the customer's designated trading bank account in New Zealand. The money is transferred out of E-Trans' bank account. E-Trans does not charge any commission or fee on inbound remittance transactions, other than through the agreed exchange

[40] See paras [49]–[51] below.

rate and any remittance cost. As with currency exchange transactions, all profit derived from the transaction is for the benefit of E-Trans.

[42] Outbound remittance transactions involve an initiating party in New Zealand who holds an account with E-Trans. That party will arrange for the contracted sum to be credited to E-Trans' bank account. E-Trans confirms receipt of that sum by checking on-line banking records with its trading bank. It then instructs [a related Australian company] to credit that amount to the customer's designated off-shore account.

[43] Not all inbound transactions involve only E-Trans and [a related Australian company]. Some involve a number of steps, in two or more jurisdictions. For example, there is a company in Singapore that is used as an intermediary because of its ability, as a licensed broker, under Chinese law, to transfer Chinese Yuan.

[44] Other than through the agreed exchange rate and any remittance cost, E-Trans does not charge any commission or fee on outbound remittance transactions. All profit is for E-Trans' own benefit.

[45] Mr Sun accepts that the manner in which money remittances are conducted will depend on whether the country from which the funds originate (or are to be sent) permit "the free flow of their currencies". Most of the major currencies in which E-Trans deals (US dollars, Euros, Pounds Sterling, Japanese Yen, Hong Kong dollars and Singapore dollars) are currencies of free market States or territories. [In this respect, E-Trans transacts primarily in New Zealand dollars and US dollars but also deals in Yuan, which is not a free market currency. E-Trans transacts about 90 percent of its international transfer business through China, including remittances to or from Hong Kong].

(b) The nature of Kiwibank's business

[46] Kiwibank is a fully owned subsidiary of a State-Owned Enterprise, New Zealand Post Ltd. Section 4(1) of the State-Owned Enterprises Act 1986 states:

> **4 Principal objective to be successful business**
>
> (1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—
>
> (a) as profitable and efficient as comparable businesses that are not owned by the Crown; and
>
> (b) a good employer; and
>
> (c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.
>
> …

[47] Kiwibank describes itself as "the only New Zealand-owned major trading bank". It is registered under the Reserve Bank Act, and is subject to prudential supervision under that statute. At present, Kiwibank has in excess of 800,000 customers. A broad range of personal and business banking services are offered. While they include international funds transfer, exchanges from New Zealand dollars into foreign currency and exchanges of foreign currency into New Zealand currency, Kiwibank operates primarily in the domestic environment. It does not have staff located in a number of the jurisdictions through which E-Trans operates; in particular, China.

[48] Some international banking services offered by Kiwibank are supported through Citibank, a bank based in the United States. That relationship is used to provide international transactions, debits and credits to foreign currency accounts, trade finance transactions and cross-border payments.

(c) E-Trans' banking arrangements

[49] E-Trans began its banking relationship with Kiwibank in 2004. At that stage, while maintaining relatively large sums on term deposit, E-Trans chose to conduct its currency exchange and money remittance business through, initially, ANZ and later ASB and Westpac.

[50] In the period between 2004 and 2014, each of those three banks progressively adopted a policy of not banking money remitters. E-Trans applied to open a business

account with Kiwibank in early 2014, because it was unable to continue its existing banking relationship with Westpac. E-Trans contends that, by early 2014, Kiwibank had become "the bank of choice" for money remitters who had suffered through the actions of other banks in declining to deal with them. Kiwibank does not accept that is an accurate description.

[51] On 6 January 2014, when applying to Kiwibank for a business account, E-Trans completed a "AML/CFT Compliance Questionnaire". The Financial Crime Team within Kiwibank prepared a report on E-Trans, dated 21 January 2014. After giving background and referring to completion of the questionnaire, a recommendation was made that the banking relationship be approved on the basis that E-Trans' "programme aligns with Kiwibank's standard for" anti-money laundering procedures. As a result, E-Trans began to use its banking facility with Kiwibank.

[52] The author of the 21 January 2014 report was [an AML/CFT analyst]. At some point after E-Trans' application for banking facilities had been approved, her report was referred to her superior, Kiwibank's "Manager AML/CFT and Sanctions", Mr Damian Henry. He disagreed with [her] recommendation. It appears that, by this time, E-Trans was operating its account under the impression that its application had been approved.

[53] Mr Henry formed the view that Kiwibank should reconsider its relationship with E-Trans. An analysis of E-Trans was included as part of an internal report, prepared by [Kiwibank's Head of Business Excellence] and dated 31 January 2014, about financial service providers generally. That report focussed on anti-money laundering risks. Appendix B explained the way in which E-Trans used its banking facilities:

> **Account operation:**
>
> Whilst the entity E-Trans International Limited does not hold any foreign currency accounts at Kiwibank, the company account transacts by depositing large deposits transferred from another New Zealand registered company E-Trans Group Limited which is not a Kiwibank customer which is then disbursed as smaller transactions. . . . We have no idea as to the source of the funds nor the intent of the disbursements.

> From a risk perspective there is uncertainty in:
>
> - The movement and disbursement of funds domestically and internationally via multiple accounts
>
> - The lack of clarity of funds movements between entities
>
> - The lack of transparency of source of funds
>
> The AML [financial service providers] Review conducted by the Financial Crime Team recommended that we review our banking relationship with this customer This was based on the fact that while E-Trans appeared to have a robust AML programme in place, they have previously been prosecuted for helping a crime syndicate launder funds . . ., which included failing to verify identities, records of those verifications, or to report suspicious transactions.
>
> All these activities are core to the current AML requirements.

[54] For the purpose of the review, E-Trans was described as a Kiwibank customer that had been "on-boarded" in June 2006.[41] Having considered the nature of E-Trans' business, and others falling within the generic description of financial services' providers, the report concluded:

> **Conclusion:**
>
> It is clear that the Kiwibank has little, if no control over how effectively (if at all) these providers are vetting their clients and the associated transactions. It is also clear that whilst we may not bank the international transfer we may be part of a chain of funds transfers associated with such transactions. By continuing to permit this [financial service providers] segment to operate their accounts, we leave ourselves vulnerable to a greater degree than the other Banks due to aspects of our operating model. ...
>
> **Recommendation:**
>
> It is recommended:
>
> Option 1)
>
> We look to exit existing [money remitters] in this segment . . . and prevent any further potential [money remitters] in this segment from establishing a relationship with Kiwibank for the reasons outlined above. This is the preferred option.
>
> Option 2)
>
> Alternately, if the Bank believes that it wishes to continue or establish relationships in this segment broader than Financial Markets, it is sought that Operational Risk and Compliance (OR&C) in conjunction with the [small to

[41] However, see paras [49]–[52] above.

> medium size enterprises] provide clear assessment criteria/guidelines that can be effectively applied at an operational level.

[55] That report formed the basis of a presentation to Kiwibank's Executive Risk Committee. The committee was asked to endorse "Option 1"; an approach "to exit all" financial service customers that "provide solely foreign exchange or a money transfer service". The reason given was the "reputational risk in being connected" to such a business because it might undertake non-compliant anti-money laundering activity. [The Head of Business Excellence] referred to "the lack of ability to proactively screen and identify these customers at the point of on-boarding".

[56] The Executive Risk Committee accepted her recommendation. Its decision is recorded in the minutes of its meeting of 24 March 2014:

> **7. Financial Services Providers (FSPs) [redacted]**
>
> DM presented the paper requesting ERC to endorse the approach to exit all FSP Business Markets relationships that provide solely foreign exchange or a money transfer services due to the reputational risk in being connected to a FSP that may undertake non-compliant AML activity and the lack of ability to proactively screen and identify these customers at the point of on-boarding through some channels.
>
> In terms of differentiating between (eg) a large reputable finance company such as GE vs other FSPs ERC noted that the business would review the existing money changers and transmitters and carry out due diligence.
>
> AML policy is to be updated and any future account opening enquiries for money changers/transmitters would be subject to case by case assessment by Financial Markets. (No mandate in the Retail Network to open accounts for this type of business).
>
> ERC endorsed the approach as noted above.

[57] An operational decision was made to "off-board" money remitters and foreign currency exchange businesses in three tranches. "Off-boarding" is the term that Kiwibank consistently used to denote steps it was taking to minimise its risk. Lost within that euphemism is the true nature of a deliberate decision to terminate in sequence contracts between particular money remitters and Kiwibank. E-Trans was included in the third tranche. No steps were taken to close its account until March 2015.

[58] On 5 March 2015, Mr Britz, a Business Area Manager with Kiwibank, was asked to arrange a meeting with representatives of E-Trans to discuss termination of its contract. For various reasons, a meeting did not take place until 23 March 2015. The meeting was attended by Mr Britz and Mr Wan, from Kiwibank, and Mr Sun and Mr Wong, from E-Trans. Mr Wong is E-Trans' Compliance Manager, for the purposes of the Anti-Money Laundering Act.

[59] An interpreter, Mr Young, was also present, to assist Mr Sun. As was clear to us when he gave evidence, Mr Sun, while able to read and comprehend English, has difficulty in communicating orally in a fluent manner. Mr Wan was able to provide interpretation assistance to Mr Britz.

[60] There was a dispute between the E-Trans and Kiwibank representatives at the meeting about the precise way in which Kiwibank's decision to terminate the contractual relationship was expressed. We do not need to resolve those differences. There is no material difference between the recollections of the various participants at that meeting. We are satisfied that information was conveyed to Mr Sun which would have led him to believe that Kiwibank had made a conscious decision to terminate the contracts of all business customers falling within the class of money remitters.

[61] Mr Britz offered E-Trans an opportunity to apply for a review of Kiwibank's decision. At 12.22pm on 23 March 2015, Mr Wong sent a detailed email following that meeting asking Kiwibank to reconsider its position. He attached an on-site inspection report from AML Solutions Ltd[42] and a copy of E-Trans' own compliance programme.

[62] Mr Wong stressed a number of points, in suggesting that it might be possible to "work out a practical solution for the way forward". He referred to a similar situation that had arisen in relation to an associated company's business operations in Canada, in which [a Canadian bank] had "decided to retain our relationships based on certain stated conditions, among them a two-yearly independent audit and increased Account Monthly Maintenance Fee to cover monitoring costs". Mr Wong

[42] See para [73] below.

also referred to the business in Australia, saying that E-Trans had "good relationships with [its Australian bankers]".

[63] Mr Wong concluded by saying:

> Other than the above efforts we suggest some considerations for Kiwibank:
>
> 1. You may note that, unlike other similar clients, [E-Trans] receives overseas inward remittance from ONLY one party, that is from our related party in Australia, ... Other inward payments are ALL domestic credit payments from local banks. No cash deposit is allowed. All outward payments are domestic, into accounts in local banks. This is significantly important as to the on-going monitoring of account. To ensure this simplicity, Kiwibank can specify this as a condition to the continuation of the account.
>
> 2. We appreciate that the AMLCFT laws require added tasks in account monitoring, and to justify this we suggest Kiwibank to work out a reasonable account maintenance fee, which can be monthly or quarterly. This is practised overseas.
>
> 3. You may also notice that we have been banking with Kiwibank for more than 10 years. We have currently term deposits of $2m in Kiwibank. You may impose a lien on to these deposits if it helps.
>
> We do appeal and hope that you can reconsider favourably, and looking forward to a long relationship with Kiwibank.

[64] Mr Britz forwarded Mr Wong's email to Wellington. Initially, it was directed for the attention of Ms Bickerton. She forwarded it to Mr Henry, at 5.44pm on 23 March 2015, for a decision. Mr Henry responded to Ms Bickerton at 8.17pm on 24 March 2015 declining E-Trans' request. No independent risk appraisal of E-Trans, as an individual entity, was undertaken. Reliance was placed on the policy decision of the Executive Risk Committee.[43]

[65] On 26 March 2015, at 3.09pm, Kiwibank sent a letter to E-Trans stating:

> Kiwibank is no longer … able to offer you banking services.
>
> This is due to the fact that there has been a change in bank policy regarding accounts associated with money remittance or money changing services.
>
> Your account(s) will be closed on April 10th 2015. This gives you the opportunity to make alternative banking arrangements.

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[43] Compare the comment in the Executive Risk Committee's minute to the effect that new applications would be considered on a "case by case" basis: see para [56] above.

> You will be liable for any debts including transaction fees when your account(s) are closed. Please contact us … if you have any questions.

[66] It is instructive to compare the reasons given by Kiwibank for terminating its contract with E-Trans, as at March 2014 and 2015 respectively:

(a) *March 2014* – The briefing paper for the Executive Review Committee, in addition to the general reasons given for exiting money remitters generally, gave a number of specific reasons for "off-boarding" E-Trans. They included:

(i) The movement and disbursement of funds domestically and internationally to and from multiple accounts.

(ii) The lack of clarity of funds moved between entities.

(iii) The lack of transparency of source of funds.

(b) *March 2015* – The reasons given to E-Trans for the decision to close its accounts were:

(i) There had been a change in bank policy regarding accounts associated with money remittance or money changing services.

(ii) The decision was made after careful consideration by Kiwibank's Executive Review Committee.

(iii) Kiwibank is a domestic bank, and focuses on transactional and lending products.

(iv) While Kiwibank can do international payments, its focus is more in the personal arena.

(v) Money remitters can trigger significant due diligence and monitoring obligations for Kiwibank.

(vi) Kiwibank has limited resources and infrastructure to perform those obligations.

(d) The criminal prosecution

[67] The "prosecution" to which the 31 January 2014 report referred[44] had been brought in 2004, some 10 years earlier.[45] All relevant transactions occurred in the period between 24 and 30 October 2003. E-Trans had pleaded guilty to 11 offences against the provisions of the Financial Transactions Reporting Act 1996.

[68] When sentencing, in the District Court at Auckland, Judge McElrea divided the charges into three groups:[46]

(a) The first consisted of five charges under s 13(1) of the 1996 Act of permitting an unknown person to conduct an occasional transaction without having verified the identity of that person where the transaction involved cash and exceeded the prescribed amount of $9,999.99.

(b) The second group were laid under s 30(1) of the 1996 Act and involved failing to retain or properly keep records sufficient to satisfy the requirements of the Act to verify the identity of a person conducting a transaction.

(c) The third was one of failing to report to the Police as soon as practicable after forming a suspicion on reasonable grounds that the transaction may be relevant to the investigation of a person for a money laundering offence.

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44 See para [53] above.

45 Mr Henry said in evidence that while he was aware of E-Trans' convictions for breach of the Financial Transactions Reporting Act, "they were not a separate and operative reason" for his decision not to reconsider closure of E-Trans' account following Mr Wong's email of 23 March 2015.

46 *Police v E-Trans International Finance Ltd* DC Auckland CRN 4004029491, 6 July 2004 at para [2].

[69] The sentencing Judge regarded denunciation and deterrence as the primary sentencing goals. He stressed the importance of compliance with the 1996 Act "not only in terms of apprehension of those who seek to use the financial institutions of this country for laundering money illegally gained" but also "to the prevention of such crime by making it clear that [New Zealand] will not be a "soft touch" for international drug dealers or international criminals of other types".[47] Having made appropriate allowances for mitigating factors, a total fine of $55,000 was imposed.[48]

[70] There is no evidence of any further transgressions on the part of E-Trans after the convictions entered in 2004. Indeed, E-Trans has received favourable reports from the Department of Internal Affairs, as its supervisor.[49] We find that E-Trans learnt from its mistakes and has subsequently attempted to comply assiduously with obligations cast upon it by the Anti-Money Laundering Act.

(e) Anti-money laundering procedures and money remitters

(i) E-Trans

[71] On 30 September 2014, following a "desk based review" of E-Trans' compliance programme in July 2014, the Department of Internal Affairs (as its supervisor) carried out an on-site inspection to test E-Trans' compliance with anti-money laundering procedures. In a report dated 23 October 2014, the Department concluded that:

> Both the on-site inspection and a review of the updated risk assessment and AML/CFT programme demonstrate E-Trans to be predominantly meeting their obligations under the [Anti-Money Laundering] Act.

[72] In its conclusions and recommendations, the Department stated:

> It is clear that since the desk based programme review, E-Trans has taken prompt action to update the areas of their programme with which the Department had concerns. Further, on-site discussion with the CO, CEO and staff and checks on customer records indicate that E-Trans has strongly committed to meeting its AML/CFT obligations.
>
> There are only 2 specific issues that are noted for E-Trans attention:

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47 Ibid, at para [27].
48 Ibid, at para [36].
49 See paras [71]–[73] below.

> 1) The Department requests that when E-Trans next reviews its account monitoring processes and procedures the appropriateness and effectiveness of the threshold levels applied to its daily exception reporting are specifically reviewed.
>
> 2) The Department reminds E-Trans of the requirement that ongoing CDD and account monitoring is required for customers that existed prior to the [Anti-Money Laundering] Act.
>
> …

[73] On 31 March 2015, AML Solutions Ltd, prepared an independent risk assessment and compliance programme audit report for E-Trans' group for the period 30 June 2013 to 28 February 2015. The report concluded that E-Trans had "put in place a robust initial programme for compliance with its obligations under" the Anti-Money Laundering Act. It stressed the ability and experience of those responsible for implementing relevant policies in a comprehensive way. Leaving some minor points to one side, the auditors opined that all relevant requirements contained in ss 57–59 of the Anti-Money Laundering Act had been met.

(ii) Kiwibank

[74] Kiwibank had some difficulties in the early part of 2014[50] in complying with its own obligations under the Anti-Money Laundering Act. That was around the same time that it was considering the possibility that money remitters might be "off-boarded" because they were too risky to bank; we refer to both the 31 January 2014 report and the 23 March 2014 decision of the Executive Review Committee.[51]

[75] During 2014, international concerns were emerging about the position of money remitters, in the context of the reporting requirements. For example, on 10 November 2014, the United States Department of the Treasury issued a statement on the topic, in the context of the Bank Secrecy Act in force in that country. Among other things, that Department said:

> Currently, there is concern that banks are indiscriminately terminating the accounts of all [money remitters], or refusing to open accounts for any [money remitters], thereby eliminating them as a category of customers.

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50 See para [78] below.

51 See paras [53]–[56] above.

> Such a wholesale approach runs counter to the expectation that financial institutions can and should assess the risks of customers on a case-by-case basis. Similarly, a blanket direction by US banks to their foreign correspondents not to process fund transfers of any foreign [money remitters], simply because they are [money remitters], also runs counter to the risk-based approach. Refusing financial services to an entire segment of the industry can lead to an overall reduction in financial sector transparency that is critical to making the sector resistant to the efforts of illicit actors. This is particularly important with [money remitters] remittance operations.

[76] Those sentiments were echoed by the Reserve Bank (as the supervisor of registered banks) in a public statement issued on 28 January 2015. The statement was specifically directed to the closing of accounts of money remitters by banks, and was designed to highlight the fact that indiscriminate closing of money remitters' accounts was inconsistent with the policy underlying the Anti-Money Laundering Act. Relevantly, it stated:

> **Statement about banks closing accounts of money remitters**
>
> …
>
> Some money remitters have recently experienced difficulty maintaining access to banking services or have completely lost access to banking services. Some of them believe that banks are indiscriminately terminating their bank accounts or refusing to open accounts for any new customers in the money remittance business.
>
> *In some cases, the explanation that banks have provided for terminating money remitters' accounts has referred to obligations that banks have under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act). However, the AML/CFT Act doesn't require banks to take a broad-brush approach, closing existing accounts or refusing to open new accounts for an entire category of customers such as money remitters*. Nor does the AML/CFT Act prohibit banks from providing services to any customers unless the banks are unable to conduct customer due diligence on those customers. *Although the AML/CFT mitigate money laundering and terrorism financing risks posed by their customers, that obligation does not require banks to cease to provide services to a entire category or customers*.
>
> …
>
> *… If banks are de-risking to avoid rather than manage and mitigate those risks, then that would be inconsistent with the intended effect of the AML/CFT Act. It seems unlikely, but if banks are using blanket de-risking itself as a procedure to manage and mitigate those risks, then the Reserve Bank would consider that an inadequate means of complying with their obligations under the AML/CFT Act*.
>
> *The closure of money remitters' accounts is an ongoing international and domestic issue, caused by a complex set of circumstances*. …

(Emphasis added; footnotes omitted)

[77] The Association responded with a press release in which it emphasised the importance of the role played by banks in implementing the Anti-Money Laundering Act, the seriousness with which the banks undertook those tasks and the significant investment in "policies, systems, processes and staff training" to do so. The Association concluded by agreeing with the Reserve Bank that "the law does not require banks to cease providing services to a whole class of customers such as money remitters". However, it added that banks had, instead, "applied their obligations on a case-by-case basis, and will continue to do so". The Association's release underscored the Reserve Bank's view of the importance of the distinction between an individualised risk assessment, and a class of business enterprise with which a bank is not prepared to contract for fear of reputational damage or financial loss.[52]

[78] Independently of the Reserve Bank's concerns about the closing of accounts of money remitters, on 28 October 2015, the Reserve Bank issued a formal warning to Kiwibank under s 80 of the Anti-Money Laundering Act[53] on the grounds that, for various periods between 30 June 2013 and June 2014, Kiwibank had not met fully all customer due diligence obligations under the Act. The Reserve Bank noted that, since June 2014, remedial action had been taken by Kiwibank to address its concerns.

[79] In a press statement also issued on 28 October 2015, Kiwibank accepted the criticism and emphasised it had "comprehensive compliance programmes in place and [was] committed to [ensuring its anti-money laundering] programme operates effectively to prevent any attempted laundering of money".

[80] A particular aspect of the money remitters' problem that has caused concern within New Zealand government circles involves the risk of unavailability (or increased cost) of money remittance services to allow those working in New Zealand

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52 See para [76] above.

53 Section 80(1) entitles a supervisor to issue one or more "formal warnings" to a reporting entity if it has "reasonable grounds to believe that the person has engaged in conduct that constituted a civil liability act". The term "civil liability act" is defined by s 78 of the Anti-Money Laundering Act: set out at para [27] above.

to remit funds to families living in the Pacific Islands. This topic was specifically raised by the Minister of Finance in a letter to the Chief Executive of Kiwibank, dated 16 December 2015. This letter came to the attention of E-Trans after we had reserved judgment, and was the subject of an application for specific discovery.

[81] After hearing from counsel for the parties, we admitted the letter on a provisional basis, together with an email from the solicitors for Kiwibank to the solicitors for E-Trans advising that their client had not responded to the Minister's letter and a release from *Reuters* news agency that had drawn the letter to E-Trans' attention. Mr Farmer, in the course of a telephone conference held on 20 April 2016, identified as the sole purpose of admission of those documents to corroborate E-Trans' assertion that Kiwibank had no intention to change its policy to "off board" all money remitters. We reserved a final decision on admissibility for this judgment.

[82] We have decided to admit the documents because the concerns expressed by the Minister do echo those now articulated by E-Trans. After referring to the importance of a "well-functioning market for remittances [for the] government's objective of increasing prosperity in the Pacific" and referring to such remittances (estimated to be worth over $470 million per annum to the region), the Minister posed these questions:

> **REMITTANCES TO THE PACIFIC**
>
> …
>
> - In your view, what are the main factors driving [money remitter] bank account closures in New Zealand?
>
> - It has been difficult to build a picture of what has been happening in the [money remitter] market and it would be useful for us to know how Kiwibank's relationship to the [money remitter] market has been changing in recent years. How many [money remitters] does Kiwibank currently provide banking services for, and how many closures have you made of [money remitters] bank over the past two years?
>
> - Why are bank-provided remittance services to the Pacific significantly more expensive than [money remitters]-provided remittance services? For example, in October 2015 the average cost of sending money from New Zealand to Samoa via an MTO was 7.3% compared to the bank average of 17.5% (according to the www.SendMoneyPacific.org website).

...

The contractual issue

[83] The first question is whether Kiwibank breached its contract with E-Trans by purporting to terminate it on 14 days' notice.

[84] Kiwibank's relationship with E-Trans is governed by general terms of contract. One of those entitles Kiwibank to terminate the contract on 14 days' notice, without the need to give reasons. Clause 7 provides:

> **7. When can an account be closed or a product or service cancelled?**
>
> When can we close or cancel?
>
> …
>
> Except where our specific terms say otherwise, we can also close your account or cancel the provision of a product or service to you by giving at least 14 days' notice, without needing to give a reason. If we do this, we will use one of the direct communication methods in clause 3.

[85] Unless cl 7 is interpreted in a manner that prevents Kiwibank from terminating the contract on notice alone, it would be entitled to act under cl 7 and, as Mr Weston QC, for Kiwibank, has submitted, that would be an end to the inquiry into the contractual issue.

[86] However, Mr Farmer QC, for E-Trans, contends that Kiwibank breached an implied term to act fairly and reasonably in terminating the contract. That gloss on the words of cl 7 arises out of the terms of the Code.[54] At the time that Mr Sun obtained a copy, the (then) 2007 version of the Code stated that members of the Association would comply with stipulated practices "as a minimum standard".[55]

[87] While one of the obligations assumed by Kiwibank under the Code was to "act fairly and reasonably towards [a customer], in a consistent and ethical way", the Code made it clear that what "may be fair and reasonable in any case will depend on the circumstances", including conduct of both bank and customer.[56] The reasonably

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54 See para [6](b)(i) above.
55 Clause 1.1(a) and (c)
56 Code of Banking Practice, cl 1.2(b)(iv).

arguable possibility that cl 7 should be interpreted in light of those provisions of the Code was the reason why Peters J issued an interim injunction on 23 June 2015.[57]

[88] In her judgment,[58] Peters J, after referring to cl 7 of the contract and the relevant provisions of the Code, held that the Court of Appeal had not "ruled out an argument that the Code may be incorporated in the contract between bank and customer".[59] She continued:

> [22] … Moreover, there are differences between E-Trans' case and that of the appellants in the authorities to which I have referred. E-Trans is a substantial business seeking to resist action by Kiwibank, which action does not arise from any failure on the part of E-Trans. On the contrary, the action is attributed to a change in bank policy.
>
> [23] I accept that there is a serious issue to be tried as to whether, in all the circumstances to which I have referred, the terms of the Code are incorporated in the contract or otherwise affect its construction.
>
> [24] Kiwibank's alternative submission was that it had, in any event, acted reasonably, fairly, consistently and ethically as it had given E-Trans the required 14 days' notice under the General Terms and Conditions and would, if pressed, be amenable to a longer period. Whether Kiwibank has acted reasonably, however, is in dispute. The period notified in the 26 March 2015 letter is only one aspect of the argument. I am not able to determine the issue on the evidence before me.

[89] Mr Weston QC contended that the Code was not intended to interfere with specific contractual rights or obligations that had been agreed between the parties. On the other hand, Mr Farmer submitted that a party who can demonstrate that it has read the Code[60] and received assurances from a bank that its terms would be observed could establish that the terms of the Code form part of the contractual arrangements with the bank.

[90] *Gardiner v Westpac New Zealand Ltd*[61] is the high watermark for E-Trans' argument on the contractual issue. For that reason, we start by considering what was said in that case. Delivering the judgment of the Court of Appeal, Lang J said:

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57 *E-Trans International Finance Ltd v Kiwibank* [2015] NZHC 1417 at para [23].

58 Ibid.

59 By reference to *Gardiner v Westpac New Zealand Ltd* [2014] NZCA 537, at para [69], set out at para [90] below.

60 See the argument as framed, as set out in para [6](b)(i) above.

61 *Gardiner v Westpac New Zealand Ltd* [2014] NZCA 537 at para [69].

> [63] The appellants maintain that Westpac breached obligations it owed to them under the New Zealand Bankers Association Code of Banking Practice. There is no dispute that Westpac is a member of the New Zealand Bankers Association, and that it has voluntarily agreed to be bound by the Code.
>
> …
>
> [69] It is possible to envisage a situation in which a borrower enters into a loan agreement with a bank on the basis of assurances he or she has taken from reading the Code and perhaps discussing those assurances with the bank's representatives. In such a case it may be possible for the borrower to mount an argument that the terms of the Code formed part of the contractual arrangement with the bank. In the present case, however, there is no evidence that any of the appellants were ever aware of the Code, let alone that they borrowed monies from Westpac based on assurances contained within it.
>
> (footnotes omitted)

[91] In an earlier judgment, *Forivermor v ANZ Bank New Zealand Ltd*,[62] a differently constituted Court of Appeal had considered whether provisions of the Code formed part of the contract between Bank and customer. In agreement with Goddard J, in the High Court, and with reasons given by Associate Judge Doogue in *Westpac NZ Ltd v Patel*,[63] the Court considered that the appellant had not demonstrated that "the relevant term is customary in contracts of this kind", referring to the need for such knowledge to be "notorious" before a term to that effect could be implied.[64] The authorities to which the Court of Appeal referred in *Forivermor* in relation to the implication of terms govern this case also.[65]

[92] *Forivermor* is authority for the proposition that a term such as that proposed by Mr Farmer will not be implied into a contract between banker and customer as a matter of custom. On the other hand, *Gardiner* leaves open the possibility that a bank may adopt the Code obligation to act reasonably and fairly when terminating a contract. Adoption of a Code obligation would represent a variation to its original terms. On orthodox principles, in order for a variation to be effective, it would be necessary for a person with actual or ostensible authority to commit the bank to qualifying its absolute right to terminate on notice.

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62 *Forivermor v ANZ Bank New Zealand Ltd* [2014] NZCA 129 (Harrison, White and Venning JJ).
63 *Westpac NZ Ltd v Patel* [2013] NZHC 1011 at paras [19]–[21] and [30].
64 *Forivermor v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at para [45].
65 Generally, see *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283, *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at paras [16]–[27] and *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506 at para [42].

[93] There is no evidence that the person from whom Mr Sun obtained a copy of the 2007 version of the Code had actual authority to bind Kiwibank to a variation to its contract with E-Trans. Nor is there sufficient evidence that the person with whom he dealt had ostensible authority to do so. The settled test for determining whether a person has ostensible authority in such circumstances was stated by Diplock LJ, in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*:[66]

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

[94] That approach was adopted by the Court of Appeal in *New Zealand Tenancy Bonds Ltd v Mooney*.[67] For present purposes, the importance of that decision lies in a pithy statement about the need for a plaintiff to establish a sufficient evidential foundation for a claim that a person acted with ostensible authority for a known principal. Delivering the judgment of the Court, Richardson J said:[68]

> It is of the essence of the doctrine [of ostensible authority] that *the principal has made a representation* as to the extent of the agent's authority. An agent cannot by simply asserting that his authority exceeds the limits laid down by the principal and notified to the contracting party create an apparent or ostensible authority wider than that. …
>
> (emphasis added)

[95] At its highest, Mr Sun's evidence on this topic states:

> 15. Sometime in or after 2007 when [E-Trans] was facing account closure threat from ASB bank, I went to Kiwibank at Wellesley Street Branch, Auckland Central and obtained the Code of Banking

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66 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) at 503.

67 *New Zealand Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280 (CA).

68 Ibid, at 284. See also *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (HC, CA and PC) at 305 (McMullin J), 313–314 (Casey J) and 316 (Bisson J). The Privy Council dismissed an appeal indicating that no arguable point of law arose: at 319.

> Practice from a staff member at the counter. The staff member said to me that Kiwibank complies with the Code.

[96] Mr Sun's evidence is insufficient to establish that the "staff member at the counter" had ostensible authority to bind Kiwibank to a variation to its contracts with E-Trans. Indeed, it is inherently implausible that Mr Sun could have believed that someone at the counter would have had such authority. The evidence given by Mr Sun does not demonstrate any form of assurance (given by a person with ostensible authority) from the bank that it adopted the Code as part of its contractual arrangements with its customer.[69]

[97] In those circumstances, we are not prepared to imply into cl 7 anything that would put a gloss on its clear intent to permit Kiwibank to terminate its contract with E-Trans on 14 days' notice, without reasons.[70] The contractual issue is resolved in favour of Kiwibank.

The competition issue

(a) E-Trans' claims

[98] Section 27(1), (2) and (4) of the Commerce Act provide:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
>
> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> …
>
> (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

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69 Compare with *Gardiner v Westpac New Zealand Ltd* [2014] NZCA 537 at para [69], set out at para [90] above.

70 Clause 7 is set out at para [84] above.

[99] Section 27(1) of the Commerce Act proscribes a person from entering into a contract, arrangement or understanding that contains a provision that has or is likely to have the effect of substantially lessening competition in the market. Despite the common policies employed, E-Trans does not allege that Kiwibank (expressly or tacitly) colluded with other banks of like mind to terminate banking contracts with money remitters as a class. Thus, s 27(1) does not apply in this case.

[100] Section 36 of the Commerce Act proscribes any person that has "a substantial degree of power in a market" from taking advantage of that power for specified anti-competitive purposes.[71] It is common ground that Kiwibank did not have market power of the type to which s 36 refers. Thus, s 36 has no application in this case.

[101] Mr Farmer submits that the termination clause is a "provision of a contract" for the purposes of s 27(2), and its exercise involves Kiwibank giving "effect" to it. He argues, based on expert evidence from an economist, Dr Veljanovski, that the effect of exercise of the termination clause had, or is likely to have, the effect of substantially lessening competition in a market.

[102] Mr Weston counters that submission by contending that s 27(2) only applies to provisions that, of themselves, are anti-competitive in nature. That approach is consistent with s 27(4), which makes any such provision unenforceable.

[103] In closing, Mr Farmer broadened the scope of the s 27(2) challenge, by relying also upon s 3(5) and (7). They are "deeming" provisions in which reference is made to both ss 27 and 28 of the Commerce Act. For contextual purposes ss 3(5), (6), (7) and 28 state:

> **3 Certain terms defined in relation to competition**
>
> …
>
> (5) For the purposes of section 27, a provision of a contract, arrangement, or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if that provision and—
>
> (a) the other provisions of that contract, arrangement, or understanding; or

[71] Commerce Act 1986, s 36(2).

(b) the provisions of any other contract, arrangement, or understanding to which that person or any interconnected body corporate is a party—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

(6) For the purposes of section 28, a covenant shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if—

(a) that covenant; and

(b) any other covenant to the benefit of which that person or an associated person (within the meaning of section 28(7)) is entitled or would be entitled if the covenant were enforceable—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

(7) For the purposes of sections 27 and 28, the engaging in conduct shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if—

(a) the engaging in that conduct; and

(b) the engaging by that person in conduct of the same or a similar kind—

taken together, have or are likely to have the effect of substantially lessening competition in that market.

…

28 Covenants substantially lessening competition prohibited

(1) No person, either on his own or on behalf of an associated person, shall—

(a) require the giving of a covenant; or

(b) give a covenant—

that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(2) No person, either on his own or on behalf of an associated person, shall carry out or enforce the terms of a covenant that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

(3) Subsection (2) applies to a covenant whether given before or after the commencement of this Act.

(4) No covenant, whether given before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market is enforceable.

(5) No person shall—

(a) threaten to engage in particular conduct if a person who, but for subsection (4), would be bound by a covenant, does not comply with the terms of the covenant; or

(b) engage in particular conduct because a person who, but for subsection (4), would be bound by a covenant, has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(6) Where a person—

(a) issues an invitation to another person to enter into a contract containing a covenant; or

(b) makes an offer to another person to enter into a contract containing a covenant; or

(c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms,—

that person shall, by issuing that invitation, making that offer, or making that fact known, be deemed to require the giving of the covenant.

(7) For the purposes of this section, 2 persons shall be taken to be associated with each other in relation to a covenant or proposed covenant if, but only if,—

(a) one person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with the directions, instructions, or wishes of the other person in relation to the covenant or proposed covenant; or

(b) the persons are interconnected bodies corporate.

[104] Sections 27 and 28 of the Commerce Act are directed to different aspects of the same problem. Section 27(2) and (4)[72] operates to ensure that any illegitimate act that gives effect to a provision in a contract that has the purpose or likely effect of substantially lessening competition in a market is rendered unenforceable. Section 28(2) and (4) refer to a "covenant".[73] The type of covenant to which s 28 refers is one (whether or not containing a promise under seal) "annexed to or running

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72 Set out at para [98] above.

73 Section 28 is set out in para [103] above.

with an estate or interest in land".[74] The combined effect of s 28(2) and (4) is to render unenforceable any covenant in land that has the effect or likely purpose of substantially lessening competition.

[105] Section 28 differs from s 27 in one material respect. It brings within its scope a situation in which a person threatens "to engage in particular conduct" where that person would otherwise be bound by a covenant or is failing to comply or proposes or threatens to fail to comply with its terms.[75]

[106] Section 3(5) and (7) has the following effect:

(a) Section 3(5) is directed solely to s 27. It focuses on a provision of a contract. That includes the type of situation to which s 27(2) refers, as well as actual or inferred arrangements entered into without a written contract.

(b) Section 3(7) applies to both ss 27 and 28 and refers to "engaging in conduct", an expression which appears in s 28, but not in s 27.

[107] Mr Farmer submitted that, even if s 27(2) is restricted in scope to a provision that is anti-competitive in nature, the deeming provisions contained in s 3(5) and (7) of the Commerce Act operate to extend the prohibition to cases where a party seeks to exercise *any* contractual power for an anti-competitive purpose, and that exercise has, or is likely to have, the effect of substantially lessening competition in a market.

[108] As specific reliance on s 3(5) and (7) of the Commerce Act had not been foreshadowed, either in the pleadings or Mr Farmer's opening, we gave leave to Kiwibank to file further submissions on the impact of those provisions. We have received submissions as requested, as well as a reply from Mr Farmer and some supplementary memoranda from counsel.

[109] In Kiwibank's response to the s 3(5) and (7) point, it was submitted not only that the deeming provisions were inapplicable on the facts of this case but also that

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[74] Commerce Act 1986, s 2(1), definition of "covenant".
[75] Ibid, s 28(5).

we should not permit E-Trans to pursue the argument because Kiwibank had not had the opportunity to lead material evidence on the underlying factual questions. Specific prejudice was asserted, on that ground. Mr Farmer disputes that any prejudice has arisen and submits that the issue is one of law with which we must deal. Because we are holding against E-Trans on the legal point, it is unnecessary for us to determine the "prejudice" point.

[110] Having considered counsel's further submissions, we observe:

(a) There is broad agreement that the purpose of s 3(5) is to allow a Court to aggregate the effect of provisions in parallel agreements, provided all involve the same counter-party. If the combined effect of those provisions is to lessen competition substantially, then s 3(5) deems the effect of any one of those contracts to have the same result.

(b) It is common ground that s 3(7) allows the Court to aggregate conduct involved in entering into anti-competitive provisions or giving effect to such provisions, also for the purpose of s 27.

(c) There is a dispute as to whether s 3(5) and (7) extends to provisions of contracts that were in effect but have been terminated.

[111] Counsel have been unable to locate any authority dealing specifically with the impact of s 3(5) and (7) in a case of this type. However, Mr Weston was able to refer us to two investigation reports by the Commerce Commission which touch on the topic:

(a) The first involved an investigation into SkyTV contracts. In discussing issues arising under s 27, the Commission identified a number of "commitments" into which parties to retail service provider contracts had entered into which could harm competition in the pay TV market. The Commission indicated that it did not need to

consider the terms of each contract individually because s 3(5) permitted consideration of the provisions in aggregate.[76]

(b) The second was an inquiry into complaints that Winstone Wallboards Ltd had acted anti-competitively in the manufacture and supply of plasterboard. In finding that the evidence did not support such an allegation, the Commission considered various supply agreements through which Winstone paid rebates to merchants which "effectively [prevented] other plasterboard suppliers from accessing merchants and competing".[77] In discussing those aspects of the various contracts, the Commission considered the aggregate effect of each, under s 3(5) of the Commerce Act.[78]

[112] Although there is no reasoning in either report to support the Commission's application of s 3(5), we have found its historical approach to this issue helpful in analysing the point raised under s 3(5) and (7).[79]

(b) Legal analysis

[113] We accept Mr Weston's submission that a provision in a contract that is designed to allow one party to terminate on notice to another does not fall within the ambit of s 27(2) of the Commerce Act.[80] In our view, the deeming provisions in s 3(5) and (7) of that Act[81] do not affect that conclusion. Our reasons for reaching those views can be stated relatively shortly.

[114] There is only one contract in issue in this proceeding. That is the agreement for provision of banking services from Kiwibank to E-Trans. In the absence of any claim that Kiwibank colluded in some way with other banks to eject money remitters

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76 *Investigation Report on SkyTV Contracts* (Project No. 11.03/13479 8 October 2013) at fn 4 and 6. We refer to the public version of this report.

77 *Investigation into Winstone Wallboards Ltd* (Project No. 11.3/14505 22 December 2014) at para 6.2. We refer to the public version of this report.

78 Ibid, fn 1 and para 58 and fn 38.

79 See further paras [124] and [125] below.

80 Section 27(2) is set out at para [98] above.

81 Set out at para [103] above.

from the relevant market, or abused market power, the issue under s 27(2) falls to be determined by reference only to that contract.

[115] The question whether the exercise of a power of termination on notice can amount to anti-competitive conduct of the type covered by s 27 has been considered in at least two decisions in Australia, both of which support the position taken by Kiwibank.

[116] *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd*[82] involved a claim that termination of a dealership agreement by a sole distributor of Datsun motor vehicles in the Gold Coast/Southport area infringed s 45(2)(b)(ii) of the Trade Practices Act 1974–1977 (Cth). At the relevant time that stated:

> **s 45(2)** A corporation shall not
>
> …
>
> (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision–
>
> …
>
> (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

[117] A separate issue arose as to whether s 46 of the Trade Practices Act applied.[83] It was asserted that the party cancelling the arrangement should be seen as controlling a market and seeking to eliminate a competitor by terminating the agreement.

[118] The Australian Industrial Court unanimously held that the party terminating the arrangement was entitled to do so. Three separate judgments were given. In the first, Joske J dealt with the issues under ss 45(2)(b) and 46 as follows:[84]

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82 *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 5 ALR 465 (FC FCA).

83 Section 46 is concerned with abuse of market power, and is comparable to s 36 of the New Zealand Commerce Act 1986.

84 *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 5 ALR 465 (FC FCA), at 466–468.

> The applicant claims that it is entitled to the injunction which it seeks by reason of the respondent, as the applicant alleges, having infringed both ss 45 and 46 of the Trade Practices Act 1974. So far as regards s 45, it is alleged that there is an infringement of sub-s (2)(b) which provides that: "A corporation shall not– . . . (b) give effect to a contract, arrangement or understanding to the extent that it is in restraint of trade or commerce, ..." As to what is a contract in restraint of trade or commerce the applicant relies on the following statement of Diplock LJ in *Petrofina (Gt Britain) Ltd v Martin* [1966] Ch 146 at 180; 1 All ER 126 at 138, viz: "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses.
>
> The applicant maintains that the evidence shows that prior to terminating the applicant's dealership agreement the respondent had entered into an arrangement or understanding with a representative of MRG Automotive Services Pty Ltd to terminate the said agreement and appoint the MRG company dealer in place of the applicant and contends that this was in restraint of trade, but in my opinion there is no evidence which shows that the respondent has entered into an agreement or understanding or arrangement in restraint of trade.
>
> …
>
> However, the respondent is on stronger grounds in submitting that it has not taken advantage of its position substantially to control the market for Datsun motor vehicles. It submits that it was protecting its legitimate trade and business interests in terminating its agreement with the applicant and that in so acting it was doing so in the genuine belief that it was protecting such interests. The applicant replies that it is only necessary to show that the respondent is exercising its power to terminate the agreement and that the consequence of its exercising its powers is to eliminate the applicant as a competitor in the market. This, says the applicant, is taking advantage of its power. The applicant also denies that the respondent terminated the agreement in order to protect its trade or business interests.
>
> …
>
> … In my view, exercise of its contractual right to terminate a contract for the genuine purpose of protecting legitimate trade and business interests is not taking advantage of a power of controlling a market within the meaning of s 46, and providing that there is this genuine purpose, that is enough, though it may be there would always be people who would not regard it as reasonable to exercise the power in the circumstances of any particular case. Unreasonable behaviour may go to show absence of bona fides, but it goes no further than this.

[119] Smithers J, after expressing agreement with the judgment given by Joske J, said:[85]

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[85] Ibid, at 471–473.

> It is certainly true that, notwithstanding the presence of such a provision in a formal agreement, there may exist an arrangement or understanding [caught by s 45(2)(b)] between the parties that rights expressed therein will not be exercised or that some course of conduct inconsistent with it will be observed. But the onus of showing that the parties did make such an arrangement or enter into such an understanding is on the applicant. In the face of a clear express provision in a formal agreement that onus can be satisfied only where there is some feature in evidence which significantly and unambiguously supports the notion that the arrangement or understanding in question was made or entered into.
>
> To my mind there is no such feature in the evidence before this court. I see no reason to doubt that in stipulating in the terms of cl 2(b) the respondent was purposely asserting its freedom to alter its policy about single or multiple dealerships at any time at its own will, and to vary territory boundaries as it might think fit. Mr Gore was not called as a witness and there is nothing to suggest that he did not understand cl 2(b) to represent the true agreement between the respondent and his company.
>
> …
>
> So far as it is the termination of the dealership agreement which is attacked under s 46, it is to be observed that whether that agreement should be terminated or continued for any period depended not upon the respondent's control of the market but upon the terms of the agreement.
>
> It appears to me that in terminating the agreement on 30 days notice according to its terms, the respondent was taking advantage of those terms.
>
> In relation to that action it did not require to take advantage of any power that it had by virtue of its control of the market, and cannot be said to have done so. For the purpose in hand that control was irrelevant.

[120] Evatt J expressed his concurrence with the reasons given by both Joske and Smithers JJ. Evatt J was of opinion that the evidence did not support a claim of the type alleged.[86]

[121] Five years later, in *Ah Toy J Pty Ltd v Thiess Toyota Pty Ltd*,[87] a plaintiff complained that a purported termination of a motor vehicle dealership on 60 days' written notice had "the purpose of substantially lessening competition", in breach of s 45(2)(b)(ii). The Federal Court of Australia rejected that claim. Forster CJ said:[88]

> … It seems to me that the provision in the contract giving the respondent, and also, be it noted, the applicant, the right to terminate the contract on giving 60 days' written notice cannot be a provision which "has the purpose of substantially reducing competition". I think it is unlikely that it could be

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86 Ibid, at 473.

87 *Ah Toy J Pty Ltd v Thiess Toyota Pty Ltd* (1980) 30 ALR 271.

88 Ibid, at 274.

> interpreted as being a provision which "has or is likely to have the effect of substantially reducing competition". It is simply a mutual power between two contracting parties to put an end to the contract.

[122] The Chief Justice referred at some length to the judgments of both Joske and Smithers JJ, in *Top Performance Motors*. He expressed agreement with Smithers J's view that so "far as it is the termination of the dealership agreement which is attacked . . ., whether that agreement should be terminated or continued for any period depended not upon the respondent's control of the market but upon the terms of the agreement". That being so, "in terminating the contract on 30 days' notice according to [its terms], the respondent was taking advantage of those terms."[89]

[123] In common with the Australian judgments, we are of the view that when a party terminates a contract validly on agreed terms, its otherwise valid act cannot be converted into one that is invalid by treating the provision as one to which s 27(2) of the Commerce Act applies. In short, a termination provision is not one that, of itself, has the purpose, or is generally likely to have the effect, of substantially lessening competition in a market. Section 27(2) is not intended to interfere with freedom of contract to that extent.

[124] Nor are we persuaded that application of s 3(5) and (7) alters that conclusion. We agree with Mr Weston's submission that those provisions are designed to deal with a situation in which one contract of itself might not create an anti-competitive term for s 27(2) purposes, but two or more taken in aggregate may do so. This would still require each clause to have inherent anti-competitive effect. A general termination clause does not, for the reasons we have already given, fall within that category.[90] That approach is also consistent with the way in which the Commerce Commission has applied those provisions in its SkyTV and Winstone Wallboards Ltd's reports.[91]

[125] In summary, we hold that Kiwibank was entitled, as a matter of law, to terminate its contract with E-Trans on 14 days' notice, and that it did so. The clause enabling termination to be effected in that way was not anti-competitive in itself.

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89 Ibid, at 275.
90 See para [123] above.
91 See para [111] above.

Therefore, giving effect to it did not contravene s 27(2). Unless some overriding private law duty was owed by Kiwibank to E-Trans under the Anti-Money Laundering Act, the termination was lawful.

(c) Substantial lessening of competition

[126] In case we are wrong in holding that Kiwibank's exercise of its power to terminate its contract with E-Trans does not contravene s 27(2) of the Commerce Act, we consider whether the complaints about substantial lessening of competition have been established. Again, our reasons for concluding that there would be no likely "substantial lessening of competition" can be stated briefly.

[127] The starting point for analysis is definition of the relevant market.[92] Identification of the relevant market establishes the benchmark against which it is necessary to consider whether any substantial lessening of competition is likely to result from the impugned conduct.[93]

[128] E-Trans alleges that there are two relevant markets:

(a) The first is a retail market in Auckland for the supply of international remittance services to and from Auckland. We call this the "downstream" market.

(b) The second is a market in New Zealand for the supply of access to local banking services. We call this the "upstream" market.

[129] We heard evidence from two economists. Dr Veljanovski was called by E-Trans, and Mr Mellsop by Kiwibank. Their qualifications to express relevant opinions on the subject matter of their evidence was not questioned. Helpfully,

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92 The term "market" is relevantly defined by s 3(1)(a) and (4) of the Commerce Act 1986.

93 See *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 (Clifford J and Professor Richardson) at para [539]. See also s 3(1) of the Commerce Act 1986 which defines "competition" as "workable and effective competition". Section 3(2) includes "hindering or preventing competition" as a specie of "lessening of competition". Section 2(1A) provides that "substantial" means "real or of substance". Those definitions were discussed by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 (HC).

during the hearing they conferred. As a result, counsel submitted a joint memorandum in which the areas of agreement and dispute between the experts were identified.

[130] As a matter of economic principle, Dr Veljanovski and Mr Mellsop agree that:

(a) The question whether a substantial lessening of competition has occurred must be considered in the context of the relevant market.

(b) Markets are defined by reference to products and services that are substitutable as a matter of fact, and commercial common sense.[94]

(c) One common test for "substitutability" is the "SSNIP" test.[95] That asks whether a material portion of the market would switch from one product or service to another in response to a material change in price of the former by a hypothetical monopolist. A price increase of between 5 and 10 percent is often used to reflect a material change for the purpose of this test.

(d) The assessment of competitive effects requires consideration of the conditions of competition in the relevant market.

[131] So far as relevant factual matters are concerned, Dr Veljanovski and Mr Mellsop agree that:

(a) Money remitters operating in New Zealand require a New Zealand bank account to do business.

(b) Money remitters have reduced in number over the past few years in New Zealand.

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94 See s 3(1A) of the Commerce Act 1986.
95 A small but significant and non-transitory increase in price.

(c) A number of money remitters remain in the market in New Zealand. (They could not agree on the actual number).

(d) Kiwibank's (internal and unpublished) rates for remittance transactions are generally higher than E-Trans' published rates.

(e) Both banks and money remitters will often offer customers better than published rates; for example, on the basis of an existing customer relationship, or where higher transaction amounts are involved.

[132] So far as market definition is concerned, the experts agree on the two functional levels at which we have expressed the relevant upstream and downstream markets.[96] They agree that banks operate in both the upstream and downstream markets, while money remitters only participate, on the supply side, at the downstream level. Dr Veljanovski and Mr Mellsop agree that the relevant product for "downstream" market purposes can be treated as a bundle of international remittance and foreign exchange services.

[133] In addition, Dr Veljanovski and Mr Mellsop agree that if Kiwibank's action in closing E-Trans' account were taken in isolation, that act could not have the effect of substantially lessening competition in the downstream market. As E-Trans does not participate as a seller in the upstream market, termination of E-Trans banking facility with Kiwibank cannot result in any substantial lessening of competition in that market. We hold that this point is determinative of this issue.

[134] There was some debate about whether the downstream market was limited to the Auckland region or should be regarded as national. We do not consider that the point is determinative of anything of a material nature, in the context of a competition analysis. Our inclination is to regard both the upstream and downstream markets as national in nature. First, the Auckland market proposition was not seriously tested by E-Trans. Second, once a client has established a relationship with a money remitter, there is no need for it to have a physical presence nearby. For

[96] Definitions of the nature of those two markets are set in para [128] above.

example, the client could initiate transactions by telephone, or with some money remitters, through the Internet.

[135] For E-Trans to succeed on this point, it would need to establish that the relevant inquiry is into whether any substantial lessening of competition resulted from the actions of other banks in closing accounts operated by money remitters. On that argument, the important feature of the economic analysis becomes the progressive impact of the withdrawal of banking services to money remitters, to the point where they are no longer able to compete against banks in the downstream market.

[136] An analysis designed to determine whether particular conduct will or will not "substantially lessen competition" requires something against which the conduct can be compared. In competition cases, it is usual to identify a "counter-factual" as a comparator.[97] In the present case, a potential difficulty arises because, as a result of the interim injunction issued by this Court last year, E-Trans and Kiwibank have continued to do business on terms set out in the contract that we have held Kiwibank validly terminated.

[137] In order to undertake a sensible commercial comparison between factual and counter-factual, we treat:

(a) the "factual" as the position that would have pertained had Kiwibank's termination of the agreement been regarded as valid from 10 April 2015, and

(b) the "counter-factual" as what would have been the position had E-Trans been entitled to continue trading under its existing banking arrangement with Kiwibank.

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[97] In *Commerce Commission v New Zealand Bus Ltd* (2006) 8 NZBLC 101,774 (HC) at [121] Miller J stated that: [t]he question whether a substantial lessening of competition is likely is determined by comparing the likely state of competition should the acquisition proceed (the factual) with the likely state of competition if it does not (the counterfactual)". See also *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA).

[138] Both factual and counter-factual are based on the premise that the conduct at issue is termination of the banking contract between Kiwibank and E-Trans. The standard construction of a counter-factual consists of holding as much in common with the factual as possible, other than the impugned conduct and anything that flows necessarily and causally from it. As Mr Weston submitted, the conduct of other retail banks should not, in this case, be taken into account as part of the comparison of the factual and counterfactual in determining the competitive consequences that flow from the impugned conduct. We find that there is no basis on which the conduct of other banks in terminating contracts with other money remitters, or in fact Kiwibank's acts of termination in respect of other customers, can be brought to account in determining whether termination of E-Trans' banking contract had the effect of substantially lessening competition in the downstream market. In summary, because the steps taken by both the non-defendant banks and Kiwibank, in relation to other money remitters, do not change in either the factual or the counter-factual that conduct is irrelevant to the competition analysis.

[139] We heard extensive evidence about the number of money remitters remaining in the national market and the lack of banking facilities available to them. We have considered that evidence in the context of claims that money remitters offer cheaper prices than banks for the services they offer within the money remittance/exchange industry. It is unnecessary for us to analyse the outcome of that debate. Had it been necessary to do so, we would have concluded that the most likely position was that:

(a) The best estimate of Kiwibank's (upstream) market share of Department of Internal Affairs' registered money remitters at that time was a little under 30 percent.[98] That is well below the 80 percent market share suggested by Dr Veljanovski.

(b) The acts of all banks in terminating contracts with money remitters has caused an appreciable decrease in the number of such entities operating within the downstream market.

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[98] That conclusion is based, in broad terms, on the analysis set out in the written closing submissions of counsel for Kiwibank, at paras 59–67.

(c) The banks have the ability to fill the vacuum, at least in part, by offering money remittance services, most likely at a higher price. While there was considerable discussion amongst the experts on this question, the evidence from both external sources and internal Kiwibank documents suggest that banks are more costly in the provision of remittance services. Although Kiwibank's witnesses suggested that headline rates were misleading (as they would offer bespoke prices to large customers), no empirical evidence was provided to support this proposition. Furthermore, it was acknowledged that money remitters also offer bespoke pricing to significant customers. In the absence of evidence to the contrary, we are prepared to accept both that differences in price do exist and that higher rates are charged by banks.

[140] For the reasons we have given, we are not satisfied that there is sufficient evidence to suggest that if E-Trans were to exit the downstream market there would likely be any substantial lessening of competition. Even if the argument based on s 27(2) or s 3(5) and (7) had been upheld, we would not have concluded, on the available evidence, that a substantial lessening of competition was likely to result.

The statutory duty issue

(a) Policy problems

[141] Counsel for Kiwibank reiterated on many occasions that the problems before the Court were really caused by non-justiciable policy choices. That submission is one that is relevant to determination of whether the Anti-Money Laundering Act creates any private law duty owed by Kiwibank in favour of a money remitter, such as E-Trans. Before analysing whether such a private law duty exists, we think it helpful to identify some of the policy issues at play.

[142] It is sound public policy to regulate financial markets in a manner designed to minimise the risk of the proceeds of serious crime and/or the financing of terrorism being channelled through the New Zealand financial system. The dominant public

policy goals are to assist in preventing activities of that type and to preserve New Zealand's reputation within the global community.

[143] It is sound public policy to promote the ability of foreign workers in New Zealand to remit funds to their homelands in order to assist their families to meet costs of living. The evidence demonstrates that there is a specific New Zealand government concern about the possibility of remittances to the Pacific Islands being jeopardised by the reluctance of registered banks to provide banking services to money remitters.[99]

[144] It is sound public policy to put measures in place to promote competition in financial markets. Competition acts to lower prices paid for financial services by consumers. Competition among banks and money remitters is likely to lead to a more efficient and cost effective money remittance market.

[145] The problem is that those laudable policy aims conflict. The co-existence of statutory provisions designed to promote each of those public policy goals seems to have brought about unintended consequences.

[146] By requiring private and public business enterprises to act as reporting entities under the Anti-Money Laundering Act, the public policy goal of minimising the risk of money laundering and financing of terrorism is promoted, but at the cost of reputational risk to financial institutions, such as Kiwibank.

[147] We were presented with statements from the world media in relation to specific circumstances where financial and reputational risk had arisen. We refer to three of those:

(a) First, Hong Kong Shanghai Banking Corporation was fined $1.9 billion for failing to use adequate processes to identify the possibility of Mexican drug dealers using its accounts to launder the proceeds of their crimes.

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[99] See para [82] above.

(b) Second, Barclays' Bank terminated banking services for 250 money remitters amid fears over use of their accounts for money laundering and terrorist funding. The particular concern was about money remittance to Somalia, a poor country dependent on overseas remittances, but one alleged to have links to terrorism.

(c) Third, Westpac Banking Corporation, in Australia, was subjected to a claim that it had not provided remittance business customers with reasonable notice before purporting to close both their bank accounts and access to a specified foreign exchange platform. That claim was settled for a significant sum of money on terms approved by the Federal Court of Australia.

[148] The risks run by reporting entities are not imaginary. All three events led to adverse publicity. Even though reporting entities are obliged to report on grounds of "reasonable suspicion", it is still possible that members of the public might well have regarded the banks as complicit in money laundering.

[149] In those circumstances, it is understandable that a bank would wish to reduce its exposure to potential criminal liability and to minimise its general business risks, including reputational risk. For example, Mr Weston highlighted the fact that Kiwibank was a Government owned organisation and was, therefore, likely to adopt a conservative risk profile. He submitted that it was for the banks (and any other reporting entities) to determine for themselves whether the risks of dealing with certain classes of business were too high to justify maintaining a customer relationship with them.

[150] The costs of complying with the reporting requirements of the Anti-Money Laundering Act must be high. It is likely that such costs will increase fees payable by customers, and might impact on the cost of credit. The riskier the business on which the reporting entity is required to report, the higher the compliance costs will be. That was effectively recognised by Mr Wong when he wrote to Kiwibank, on behalf of E-Trans, in an endeavour to have closure of E-Trans' account

reconsidered.[100] Mr Wong offered, on behalf of E-Trans, to meet additional compliance costs that Kiwibank was likely to incur, or to allow the bank a "lien" over deposits made by E-Trans with the bank.

[151] The nature of the conflict among the public policy goals necessarily gives rise to a degree of sympathy for the plight of both Kiwibank and E-Trans. But, Mr Weston is right to submit that resolution of those policy issues is not justiciable.

[152] The policy choices to be made are ones for Government. It is conceivable that they could be given effect through exemptions, guidance from a supervisor, some other existing statutory mechanism or a specific amendment to the Anti-Money Laundering Act. For example, without either being exhaustive or expressing any view on the appropriateness of these options, it may be possible:

(a) For the responsible Minister to consider exempting a bank from reporting requirements in the case of a money remitter, on the basis that the money remitter itself is required to report on its own business transactions. In effect, that would allow a bank to rely on the quality of reporting undertaken by the money remitter.[101]

(b) For guidance to be given by a supervisor in relation to the need for a case by case assessment of the risks posed by those operating within the money remitter class of business.[102] Such guidance would be consistent with views expressed internationally, and by the Reserve Bank and the Minister of Finance in this country.[103]

(b) The allegations

[153] E-Trans contends that Kiwibank owed private law duties, under the Anti-Money Laundering Act:

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100 See the extract from Mr Wong's email of 23 March 2015, set out at para [63] above.

101 Such an approach may be justifiable by reference to the ideas that underlie s 33 of the Anti-Money Laundering Act. Section 33 is set out at para [19] above.

102 It may be open to the Reserve Bank to give such guidance under s 132(2)(c) of the Anti-Money Laundering Act. Section 132 is set out at para [25] above.

103 See paras [75], [76], [80] and [82] above.

(a) To put in place a sufficient infrastructure and provide sufficient resources to carry out its customer due diligence obligations.

(b) Not to avoid performing its statutory obligations under the Anti-Money Laundering Act by refusing, as a matter of blanket policy, to provide banking services to money remitters, as a class of customer.

(c) To carry on its business in a prudent manner, as required as a condition of its registration under the Reserve Bank Act, and to comply with obligations as a registered bank.

(d) To rely (when undertaking due diligence on another reporting entity) on the due diligence undertaken by that entity in respect of the transactions into which it entered.

[154] E-Trans alleges that Kiwibank breached those obligations by:

(a) Failing to have in place sufficient measures and resources to enable proper customer due diligence to be undertaken in respect of a company such as E-Trans. Reliance is placed on findings made and the censure and warning given by the Reserve Bank under s 80 of the Anti-Money Laundering Act.[104]

(b) Implementing a blanket policy to "off-board" all money remitters with which it carried on business, rather than assessing the risk posed by a particular money remitter on an individualised basis. In particular, it is said that Kiwibank failed to consider whether E-Trans' business model fell within the parameters of risk that Kiwibank could properly accept in a manner consistent with its statutory obligations under the Anti-Money Laundering Act.

(c) Failing to follow the views expressed by the Reserve Bank in its press statement of 28 January 2015, in which banks appear to have been

[104] See para [29] above.

encouraged not to minimise risk through a blanket decision to close accounts of money remitters.[105]

(d) Failing to co-operate with E-Trans in determining whether the latter's compliance programme provided an adequate basis on which Kiwibank could rely on customer due diligence undertaken by it.

(c) Is there an enforceable private law duty?

[155] The first inquiry is into the existence (or otherwise) of an enforceable duty owed by a person with obligations under a statute to a third party who brings a claim.[106] If such a duty were owed, the Court must go on to consider whether the obligation requires a defendant to act in a particular way; whether the duty is owed to a particular plaintiff; whether damages of a kind that the statute was designed to prevent have been proved; whether a defendant has breached the duty; and whether any causal link exists between the breach of duty and any damage suffered.[107]

[156] The circumstances in which a breach of statutory duty will give rise to an actionable private law claim remain unsettled, notwithstanding much recent judicial comment on the subject. It has been described as "one of the law's less certain areas".[108] However, two streams of authority impact on the question whether an enforceable duty exists. The first is based on a "class" approach; the second on a judicial determination, as a matter of statutory interpretation, of whether Parliament intended to create such a duty.

[157] Our preference is to use the statutory interpretation methodology as our primary point of reference. Although the "class" test has sometimes been described as a "cardinal" principle,[109] in *X (Minors) v Bedfordshire County Council*[110] the

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105 Relevant extracts from the Reserve Bank's press statement are set out at para [76] above.

106 Todd et al, *The Law of Torts in New Zealand* (7th ed, Thomson Reuters 2016), at 453–463.

107 Ibid, at 471–473.

108 Ibid, at 468.

109 For example, see *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243 (CA), at 265 (Romer LJ) and *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832 (CA), at 838–840 (Banks LJ). Generally, see Todd et al *The Law of Torts in New Zealand* (Thomson Reuters 7th ed 2016) at 457–460.

110 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL), at 731 (Lord Browne-Wilkinson).

House of Lords applied the "class" test, on the basis that protection of a limited class was necessary for liability to attach.

[158] The underlying purpose of the "class" test is to identify a group of persons at whom the statute is aimed to determine whether a private law statutory duty should be assumed. To do that, it remains necessary to construe the statute to determine whether any such class exists. The same result will follow if the point is determined by reference to statutory interpretation alone. In *Hobson v Attorney-General*,[111] Heath J said: "… the correct approach is to interpret the statute to ascertain whether Parliament intended to create a private law remedy as well as to confer public duties on particular public officials". In each case, other factors will assist only if Parliament's intention is unclear from the express words of the relevant Act, read in light of its purpose.[112] We adopt that approach.

[159] The purposes articulated in s 3(1) of the Anti-Money Laundering Act[113] are quintessentially public in nature. They are aimed at the public good inherent in minimising the risk of criminals using the New Zealand financial system either to launder the proceeds of serious crime or to finance terrorism, or both. Those overwhelmingly public objectives are reinforced by the way in which Parliament has used the Anti-Money Laundering Act to place onerous public duties on private enterprises, in the full knowledge that compliance costs are likely to increase the cost of services provided to consumers, and possibly the cost of credit. That is not a promising start in the search for some statutory acknowledgement of the existence of a private law duty owed by Kiwibank to E-Trans.

[160] The civil remedies provided by the statute underscore its public purpose. While the general rule is that any person with sufficient interest may apply for an injunction to restrain a party from doing something harmful to it, the thrust of the legislative scheme is to place the onus on a supervisor to enforce the obligations owed by the reporting entity. Part 3 of the Anti-Money Laundering Act, which deals

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111 *Hobson v Attorney-General* [2005] 2 NZLR 220 (HC), at para [101]. This proposition was not questioned on appeal: see *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) and *Couch v Attorney-General (On appeal from Hobson v Attorney-General)* [2008] 3 NZLR 725 (SC).

112 Interpretation Act 1999, s 5(1).

113 Set out at para [12] above.

with enforcement, is premised on the need for a supervisor to take civil proceedings in order to enforce statutory obligations of a public nature that are owed by reporting entities. Remedies include the ability to seek performance and restraining injunctions, the issue of formal warnings and the acceptance of enforceable undertakings.[114]

[161] If a supervisor seeks either a "performance" or "restraining" injunction, it, contrary to the usual practice in relation to application for injunctions, is not required to give any undertaking as to damages.[115] While s 84 does not derogate from any other powers of the High Court to grant an injunction, nor does it say that the scope of those who have standing to seek injunctions is, in any way, broadened.[116] Although a particular class of customer might be adversely affected by a reporting entity's decision not to do business with it, there is nothing in the legislation to suggest that such an entity should be entitled to bring a private claim, invoking statutory obligations. The public law purposes of the Anti-Money Laundering Act eliminate that possibility. In those circumstances, no statutory duty enforceable as a matter of private law exists and E-Trans' claim under that head must fail.

The Fair Trading Act issue

[162] E-Trans contends that Kiwibank gave false reasons for closing its accounts. They say that those statements were misleading, and were made in the course of trade. The claim is brought under s 9 of the Fair Trading Act 1986:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[163] For present purposes, we assume (without deciding) that false statements were made in trade by Kiwibank that were misleading. Even on that assumption, E-Trans could not succeed with a claim under s 9. There is no causal link between what was said and any loss or damage suffered by E-Trans. Whatever reasons were given by Kiwibank for closing the account could not affect the legitimacy of its

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114 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, ss 80–88. See paras [29] and [30].

115 Ibid, ss 84–89.

116 Sections 84–88 are set out at para [29] above.

decision, provided it had not breached the contract or infringed some statutory obligation.

[164] The leading decision on this topic is that of the Supreme Court in *Red Eagle Corporation Ltd v Ellis*.[117] A remedy for breach of s 9 is available through s 43 of the Fair Trading Act. The nature of the causal nexus between breach and remedy was discussed by Blanchard J, delivering the judgment of the Supreme Court in *Red Eagle Corporation Ltd v Ellis*:[118]

> [29] . . . The language of s 43 has been said to require a "common law practical or common-sense concept of causation". The court must first ask itself whether the particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. Put another way, was the defendant's breach the effective cause or an effective cause? Richardson J in *Goldsbro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.
>
> (footnotes omitted)

[165] Applying those principles, E-Trans' claim under s 9 must fail.

Result

[166] For those reasons, E-Trans' claims fail. Judgment is entered in favour of Kiwibank in respect of each claim. We discharge the interim injunction granted by Peters J on June 2015.[119] We do so with effect from 1 June 2016, so that there is time for the parties to conclude their business relationship in an orderly manner. The practical effect of this decision is to end the *de facto* contractual arrangements between Kiwibank and E-Trans as from that date.

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117 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.
118 Ibid, at para [29].
119 *E-Trans International Finance Ltd v Kiwibank Ltd* [2015] NZHC 1417 at para [34].

[167] Costs are reserved. We invite counsel to confer. The Registrar shall allocate a case management telephone conference before Heath J at 9.00am on the first available date after 1 July 2016. No less than three working days prior to that conference, counsel shall file a joint memorandum indicating whether costs have been agreed, and if not, what issues require determination. Proposals for timetabling directions to achieve prompt resolution of those issues and whether an oral hearing is necessary shall be addressed in that memorandum. Heath J will deal with questions of costs, sitting alone.

[168] The Registrar is directed to distribute this judgment only to the parties and their counsel. We have endeavoured not to incorporate in our reasons any information of a confidential character that could not be published more widely. However, we prefer to give counsel an opportunity to review what we have written before a version is released for public dissemination. Counsel shall confer and file a joint memorandum on or before 3 June 2016 identifying any excisions they consider should be made and the reasons for them. If no memorandum were filed by 5pm that day, the Registrar may distribute this judgment publicly, in its present form.

[169] We thank all counsel for their assistance.

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P R Heath J
For the Court

Delivered at 2.00pm on 19 May 2016