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

**CIV-2015-404-001196**
**[2015] NZHC 3334**

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| BETWEEN | EXCELSIOR MARKETS LIMITED<br>Appellant |
| AND | FINANCIAL MARKETS AUTHORITY<br>Respondent |

Hearing: 29 September 2015

Appearances: M G Locke for the Appellant
M T Scholtens QC & M Keil for the Respondent

Judgment: 18 December 2015

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**JUDGMENT OF NATION J**

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## Introduction

[1] The appellant (Excelsior) is a New Zealand registered company. It was registered on the Financial Service Providers Register (the Register) to provide a financial service described as "trading financial products or foreign exchange on behalf of other persons". It has an office in Auckland. Excelsior's sole director in New Zealand is Steven James Green of Auckland. It has a corporate shareholder with a United Arab Emirates address.

[2] By letter dated 1 May 2015, sent by email on 4 May 2015, the Financial Markets Authority (FMA) gave notice to Excelsior that it would direct the Registrar of Financial Service Providers (the Registrar) to deregister Excelsior. Such notice was given essentially on the basis that no "financial services" (as defined in s 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the Act), relating to the substantive operations of Excelsior were being provided from its

place of business in Auckland and that the services provided were administrative in nature. Excelsior has appealed that judgment to this Court.

## The legislative framework

[3] With the passing of the amending legislation in 2014, ss 18A, 18B and 18C became part of the Act.[1] These sections clarify both the purpose and decision-making process of deregistration:

> **18A Purpose of FMA's powers relating to deregistration**
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> The purpose of section 18B is to provide for the deregistration of a person (A) if A's registration has, will have, or is likely to have the effect of—
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> (a) creating, or causing the creation of, a false or misleading appearance with respect to the extent to which A—
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> (i) provides, or will provide, financial services in New Zealand; or
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> (ii) provides, or will provide, financial services from a place of business in New Zealand; or
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> (iii) is, or will be, regulated by New Zealand law in relation to a financial service; or
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> (b) otherwise damaging the integrity or reputation of—
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> (i) New Zealand's financial markets; or
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> (ii) New Zealand's law or regulatory arrangements for regulating those markets.
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> **18B Consideration of deregistration of financial service provider by FMA**
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> (1) The FMA—
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> (a) may, but is not required to, consider a referral under section 18(1A); and
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> (b) may otherwise consider giving a direction under this section at its own discretion (if a referral has not been made).
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> (2) If the FMA decides to consider the referral or otherwise decides to consider giving a direction under this section, the FMA must, after taking into account section 18A, consider whether it is

[1] Financial Service Providers (Registration and Dispute Resolution) Amendment Act 2014, s 19.

necessary or desirable for a financial service provider to be deregistered.

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

(a) give the financial service provider—

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

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

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

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

(c) either,—

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

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

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

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

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

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

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

[4] The first judgment from this Court on an appeal against deregistration is a recent judgment of Brewer J.[2] He stated:

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2 *Vivier and Company Ltd v Financial Markets Authority* [2015] NZHC 2337.

> [3] The purposes of the Act are:
>
> (a) to promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
>
> (b) to promote and facilitate the development of fair, efficient, and transparent financial markets.
>
> [4] In order to achieve these purposes, the Act requires financial service providers to be registered and requires them to be members of a dispute resolution scheme if they provide financial services to retail clients.
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> [5] The Register enables the public to access information about financial service providers. It enables the registrar and other regulators to regulate financial service providers.
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> [6] Among the prescribed purposes of the Register is:
>
> (c) to conform with New Zealand's obligations under the FATF Recommendations [Financial Action Task Force Recommendations on Money Laundering, establish in Paris in 1989].
>
> [7] It is important to recognise that the Act itself does not create a licensing regime for the provision of financial services. Nor does it regulate the provision of financial services. Other legislation does that.
>
> (Citations omitted.)

[5] As Brewer J noted, the Government became concerned about the use of the registration provisions in the Act by some offshore based entities. This concern led to the 2014 amendment of the Act.

[6] I, too, was referred to cabinet papers prepared in 2013, the explanatory notes at the first reading of the Credit Contracts and Financial Services Law Reform Bill and a report from the Select Committee which had considered the proposed amendments.

[7] Brewer J stated:[3]

> Section 18A was inserted into the draft Bill following the Select Committee stage due to a concern that the power to direct deregistration as introduced was not sufficiently constrained. The Select Committee Report says:

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[3] At [53] (citations omitted).

> We recommend inserting new sections 15AA and 18AA (clauses 80 and 84) to clarify the extent of the Financial Market Authority's powers. This amendment would allow, for example, the authority to prevent overseas financial service providers registering in New Zealand solely to bolster their reputation; we consider this would strengthen New Zealand's financial regulation regime. We recommend allowing the FMA to act on its own discretion when considering deregistration of a financial service provider; this has resulted in a proposed amendment to section 18A (clause 84).

[8] On 27 May 2014, the Minister of Consumer Affairs moved that the Bill be read for a third time. He noted:[4]

> The legislation also makes changes to financial service provider registration and dispute resolution. In particular, it will provide the Financial Markets Authority with the power to prevent offshore financial service providers from registering in New Zealand solely to take advantage of our good standing as a well-regulated jurisdiction. This change will be important in maintaining the international reputation of our regulatory system.

[9] I agree with Brewer J that:[5]

> The purpose of ss 18, 18A and 18B is to prevent offshore FSPs using the New Zealand registration system to improve their reputations by misrepresenting to consumers that they are licensed under and/or regulated by New Zealand's law and regulatory mechanisms in such a way that harms or is likely to harm New Zealand's reputation as a well-regulated jurisdiction.

**Approach on appeal**

[10] In his judgment, Brewer J gave careful and detailed consideration to whether such an appeal is against the exercise of a discretion or whether it is a general appeal. The distinction is often important.

[11] If it is an appeal against the exercise of a discretion, the criteria for a successful appeal are limited to:[6]

(a) error of law or poor principle;

(b) taking into account irrelevant considerations;

(c) failing to take account of relevant considerations; or

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4 (27 May 2014) 699 NZPD 18353.
5 *Vivier and Company Ltd v Financial Markets Authority*, above n 2, at [60](c).
6 *Kacem v Bashir* [2010] NZSC 112, [2011] NZLR 1 at [32].

(d) where this decision is plainly wrong.

[12] If it is a general appeal, the appeal proceeds by way of rehearing and I am required to make my own decision on all the evidence that was considered by the FMA. If my decision were to be different from that of the FMA, I would have to allow the appeal.

[13] Brewer J gave detailed reasons as to why he considered this appeal had to be treated as an appeal against the exercise of a discretion. Counsel for both Excelsior and FMA accept the correctness of his judgment in that regard.

[14] Although I agree that the FMA ultimately had a discretion as to whether to direct the Registrar to deregister Excelsior, that discretion could be exercised if the information provided to the FMA was sufficient to establish that continued registration would have the effects referred to in s 18A and the FMA had followed the procedure provided for in s 18B.

[15] Section 18B(1) gave the FMA a discretion to consider giving a direction to deregister without the need for a referral from the Registrar. It was in that sense that the legislation gave the FMA a discretion as to whether it would consider deregistration. It was not a general discretion as to whether deregistration was justified.

[16] Pursuant to s 18B(2), if considering a s 18(1A) referral or giving a direction on its own initiative, the FMA had to take into account s 18A. It was only after having done so that the FMA was required to consider "whether it is necessary or desirable for a financial service provider to be deregistered".

[17] I proceed on the basis that the FMA did have a discretion as to whether it was "necessary or desirable for a financial service provider to be deregistered" but, for it to be able to exercise that discretion, it had to be satisfied that the potential grounds for deregistration, referred to in s 18A, had been made out. This was how the FMA proceeded in this case, stating that its direction to deregister was made pursuant to s 18B(3)(c)(i), after taking into account s 18A(a)(ii) and (iii).

[18] As Brewer J noted, it is possible for an appeal right contained in a statute to give rise to both general appeals and appeals against the exercise of a discretion.[7] I differ from Brewer J in that I consider that, in this instance, the FMA was required to make an objective assessment of fact against a defined test. I consider the FMA's decision did require more from it than a "careful evaluation of options". In having to take into account s 18A, the FMA had to consider whether any of the particular grounds referred to in s 18A(a) were made out or if Excelsior's registration:

> … has, will have, or is likely to have the effect of –
>
> (b) otherwise damaging the integrity or reputation of –
>
> (i) New Zealand's financial markets; or
>
> (ii) New Zealand's law or regulatory arrangements for regulating those markets.

[19] I agree with Brewer J where he stated:[8]

> My conclusion is that the law requires the FMA to be guided by s 18A in determining whether it is necessary or desirable to deregister an FSP. Section 18A requires the FMA to have regard to a number of scenarios that would justify the deregistration of an FSP. In order to establish whether one or more of the scenarios exists, the FMA is required to make factual findings as to the way in which the FSP provides its financial services and as to the nature of the representations the FSP makes about the services it provides. These findings must be supportable and based on satisfactory evidence.

[20] In a number of cases concerned with applications for name suppression, there has been a divergence of opinion as to whether a two-step process is required or whether the ultimate decision involves the exercise of a discretion, namely, in ascertaining the desirability of a suppression order.[9] With that divergence of opinion, there is still judicial recognition that the particular legislative context may require a two-step process with the first step requiring an assessment as to whether the qualifying criteria have been met and, the second, the exercise of a discretion as to

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7 *Vivier and Company Ltd v Financial Markets Authority*, above n 2, at [43] referring to *Coughlan v Abernethy* HC Auckland CIV 2009-004-2374, 20 October 2010*; Rabih v Professional Conduct Committee of the Dental Council* [2015] NZHC 1110, [2015] NZAR 1102; *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

8 At [66].

9 See *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856 at [23]; *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZHC 933, [2013] NZAR 1055 at [36]; and *Rabih v Professional Conduct Committee of the Dental Council* [2015] NZHC 1110, [2015] NZAR 1102 at [20]. Contrast Mallon J's approach in *N v Professional Conduct Committee of Medical Council* [2013] NZHC 3405, [2014] NZAR 350 at [45].

the ultimate decision which might follow from that.[10] I consider that, with this legislation, establishing the qualifying criteria for deregistration is sufficiently distinct from the ultimate decision that has to be made for the two-step process to apply. With regard to the first step and whether the grounds under s 18A have been made out, the appeal is by way of general appeal requiring me to consider all the evidence on the basis it is a rehearing. With regard to the ultimate decision the FMA made on the basis of the initial findings, the appeal is against the exercise of a discretion.

[21] In the particular circumstances of this case, I can say the outcome on this appeal would have been no different if the appeal was to be treated wholly as an appeal against the exercise of a discretion.

**Evidential issues**

*Notice to produce documents*

[22] Before the hearing, counsel for Excelsior served a notice on the FMA under r 8.32 High Court Rules requiring the FMA to produce certain documents. The FMA filed a notice of objection. At the hearing, counsel for Excelsior confirmed it was no longer seeking production of the documents referred to.

*Leave to file further evidence*

[23] Counsel also filed an application, pursuant to r 20.16, for leave to file an affidavit on behalf of Excelsior. It was an affidavit sworn by Mr Green. At the hearing, it was agreed that I would deal with this application at the same time as I dealt with the substantive judgment.

[24] The FMA objected on the basis that there was no need for the affidavit to be filed as most of the material it referred to or included as annexures was before the Court as part of the common bundle of documents. Further, there was no special reason for the Court to hear evidence additional to the decision-maker's record.[11] Consistent with authority and principle, the FMA submitted the Court should

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10 *Rabih v Professional Conduct Committee of the Dental Council*, above n 7, at [20].
11 High Courts Rules, r 20.16(3).

proceed on the basis that all relevant information and evidence should be provided to the FMA when the opportunity is afforded under s 18B(3)(a)(iii) of the Act so that the FMA can make its decision on the best information available at the time of its decision.[12]

[25] In support of the notice of objection, the FMA filed an affidavit from Ms Davis-Calvert. In that affidavit she stated most of the documents annexed to Mr Green's affidavit were in the common bundle. She did refer to a number of new documents annexed to the affidavit. She referred to information in one of them which she said further supported the FMA's reasons for its decision. She said the information in the documents would not have altered the FMA's decision.

[26] I agree with the statements made by Ronald Young J as to how all relevant factual material on which a decision maker reached its decision should be put before the Court by way of an agreed bundle.[13] If a party wishes to adduce further material, this should ordinarily be by way of an application for leave to bring the evidence with the necessary justification. Consistent with the normal approach and the relevant rule, it would be rare that such an application would succeed where the evidence is not fresh and could reasonably have been put before the decision maker at the time it was required to make a decision. In the context of the FMA, all parties should proceed on the basis that they have an obligation to put all relevant information before the FMA when they have an opportunity to do so and when the FMA is considering what, if any, decision it should make pursuant to s 18B.

[27] The great bulk of the documents and information contained with Mr Green's affidavit are before the Court through the common bundle of documents so there was no need to have them before the Court by way of an affidavit. Mr Green's affidavit did however provide some information and documents as to the way in which Excelsior might enable people to engage in foreign exchange dealing. The information provided would have probably been of little assistance to the FMA. With their specialist knowledge, the FMA personnel dealing with the issue would probably have had a very good understanding of how Excelsior software and servers

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12 Referring to *Re New Zealand Computer Society Inc* (2011) 25 NZTC 20-033 (HC) at [25]; *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC).

13 *Canterbury Development Corporation v Charities Commission*, above n 12.

might be utilised in providing the service which it was operating. The FMA would also have known how an account in the United Kingdom, as referred to by Mr Green, could be used. Acknowledging that I do not have the same specialist knowledge, the information and documents included in the affidavit of Mr Green are of some assistance to the Court in putting the issues on this appeal in an appropriate factual context. In that sense, the evidence is of a sort which this Court has permitted to be put before it on appeal, even though it is not fresh and was reasonably available when the matter was first dealt with.[14]

[28] In the particular circumstances of this case, I do not consider the admission of the evidence at this stage is prejudicial to the FMA. It is of some assistance to me. Accordingly, I grant leave for that affidavit to be admitted as evidence and have taken it into account in giving this judgment.

**The process by which the FMA reached its decision**

[29] In its notice of appeal, Excelsior said one of its grounds of appeal was "that the [FMA's] decision was discriminatory and breached the principles of natural justice". Excelsior later filed points on appeal in a memorandum of 12 July 2015. In relation to breach of natural justice, the memorandum claimed it was unconscionable for Excelsior to be removed from the Register by one government agency after another government agency had agreed it could be registered as a financial service provider on 23 November 2013 and Excelsior had made a significant investment as a result of that registration. It was submitted that the FMA was estopped from removing it from the Register in these circumstances.

[30] No further submissions were presented for Excelsior with regard to any alleged breach of natural justice in the process of investigation adopted by the FMA.

[31] Estoppel principles can be of no relevance when the legislation expressly permits the FMA to direct deregistration on the basis of circumstances that exist or have arisen after registration.[15]

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[14] *Terrace Tower (New Zealand) Pty Ltd v Queenstown Lakes District Council* [2001] 2 NZLR 388 (HC).

[15] See discussion in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson

[32] I have seen the record of how the enquiry proceeded, of the way the FMA gave notice to Excelsior of its concerns and the opportunity Excelsior had to provide information or make submissions with regard to those concerns. I do not consider there was any breach of the principles of natural justice in the process the FMA adopted. That contrasts with Brewer J's conclusions in the case he had to deal with.[16]

**The evidential basis for the direction to deregister**

[33] The information which the FMA took into account was put before me by way of an agreed record of decision.

*The FMA's initial consideration*

[34] The information which was important to the FMA's initial view that Excelsior should be deregistered was summarised in a report from Ms Davis-Calvert (an FMA investigator) to the FMA's general counsel of 20 January 2015. The report included the following information:

- Excelsior had one sole director in New Zealand who was also the director of Equity Trust International Limited (Equity), a local agent which represented Excelsior. It had one shareholder with a United Arab Emirates address.

- Excelsior's registered office, address for service and business address on the Register was also the registered office and address for service for Equity.

- Excelsior's website "excelsiormarkets.com" was hosted by a Registrar in Panama. The website offers Excelsior's services to the world and did not target New Zealand investors directly.

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Reuters, Wellington, 2009) at [19.2.5].

16 *Vivier and Company Limited v Financial Markets Authority*, above n 2.

- The Ministry of Business, Innovation and Employment (MBIE) had referred Excelsior to the FMA for consideration as to deregistration on the basis that the Department of Internal Affairs (DIA) had formed a view that Excelsior's registration created a false or misleading appearance that it did provide financial services from a place in New Zealand and/or was regulated by New Zealand law in doing this.

- The DIA/MBIE advised the FMA that, through correspondence and meetings with Excelsior's director, Mr Green, between October and December 2014, they had been told:

  - Excelsior had not conducted financial activities in or from New Zealand in the ordinary course of business and, when the company did commence trading, it did not intend to have New Zealand customers or use its New Zealand bank account for holding clients funds.

  - The functions of the company once it commenced trading would be to provide representative and support functions for the benefit of a substantive business in Pakistan. As such, it would be providing due diligence and marketing services and not financial services.

  - Its online operation was accessed internationally and out-sourced to an office in Sri Lanka. It had no New Zealand customers.

  - The ANZ bank account for the company was not being used to hold funds of New Zealand clients in the ordinary course of business.

[35] The report was accompanied by documentation consistent with the information which had been referred to. That information included the correspondence and the communications between the DIA and Excelsior relating to steps Excelsior was taking to ensure it met its obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML Act). That correspondence and those communications were consistent with the information the DIA/MBIE had provided to the FMA.

*The FMA's written notice of intent*

[36] In a letter to Excelsior of 21 January 2015, the FMA advised Excelsior that, subject to considering any submissions from Excelsior, it intended to direct the Registrar to deregister Excelsior. Under the heading "Reasons for issuing this notice", the FMA briefly summarised the information which it was then relying on. The letter stated:

> The Department of Internal Affairs (DIA) has advised the FMA that you have advised DIA that the company has not yet commenced trading and that when it does commence trading it will provide representative and support functions for the primary business in Pakistan. DIA have formed the view based on their enquiries of you that the company does not provide financial services from the address noted above and does not intend to provide financial services from this address in the future.
>
> On the basis of the information we have, we consider that the registration of Excelsior Markets Limited on the FSPR is likely to have the effect of creating a false or misleading appearance with respect to the extent to which the company provides, or will provide financial services from a place of business in New Zealand and to which it is regulated by New Zealand law in relation to those services. In particular, we note that no financial services are provided in or from New Zealand and therefore Excelsior Markets Limited is not subject to regulation in New Zealand for the services it is registered for on the FSPR.

*Excelsior's written submissions*

[37] Pursuant to s 18B(3)(a)(iii), the FMA gave Excelsior the opportunity to present written submissions which Mr Green took. His submissions included:

- The information the DIA obtained was not current.
- Since its incorporation on 11 September 2013, Excelsior had been working on establishing its New Zealand business. It had established a physical office, retained staff and incurred operating expenses "towards establishing a successful business as an FSP in New Zealand". Excelsior had signed an agreement to lease offices at Level 4, 44 Khyber Pass Road.
- It had also purchased a trading platform, independent servers and feeds and had established a fully functioning technical back office and had

trained qualified staff to maintain IT policies and equipment. Associated with this, Mr Green said Excelsior had:

> … endeavoured to maintain its professionalism throughout by out-sourcing servers and back office technical operations, with sales and marketing and customer relations … to clarify this issue, Excelsior Markets has servers based in different countries where the feeds with the exchanges can be secure, independent and fast; the 24 hour monitoring of the IT system has been out-sourced by professionals in Sri Lanka that ensure that the technical processes are constantly working …

- It had set up a website.
- It had been focusing on developing a sales and marketing strategy appropriate to prospective New Zealand clientele. Excelsior then had clientele, a New Zealand bank account as well as a bank account in Sri Lanka, both of which had been used for client funds.
- It had been doing background work with a view to making an application for a derivatives issuer license.
- It was "clearly" in the business of providing a financial service it had been taking all the necessary steps required to offer financial services to prospective clients.
- Excelsior's director, Mr Green, was "directing the business" from New Zealand. He had travelled to Sri Lanka with Excelsior's "owner and senior manager" to "review operations and further training in management and coordination of Excelsior for the future and expansion plans in New Zealand".
- Although Excelsior did not have clients as at the AML annual return date of 30 June 2014, it was offering its services to the public via its physical office and their website.
- In any event, Excelsior had clients offshore, located in South Asia which meant that "technically they were involved in the business of providing financial services as it is not a requirement that financial services are strictly provided only within New Zealand".

- Excelsior "conducts its business as a company which provides an online trading platform for foreign exchange traders".

*The FMA's consideration of Excelsior's submissions – requests for updated information*

[38] After receiving that response, FMA noted the submission that the information provided to the FMA by the DIA was out of date. The FMA asked for a range of specific information which might have backed up the assertions which Mr Green had made for Excelsior.

[39] In a letter of 17 April 2015 from Mr Green as director, Excelsior responded to particular queries. With the letter were a number of documents which the FMA had asked for. Those documents included bank account statements to 31 March 2015 and invoices from two people said to be working for Excelsior for professional services for a period between March 2014 and March 2015.

[40] Ms Davis-Calvert analysed this further information and documents in a report prepared for general counsel of 30 April 2015. It was apparent from the report that the FMA investigator considered that Excelsior had no more than a nominal presence in New Zealand. She considered that, with Excelsior offering services to the world (for example, through an online platform), the registration of Excelsior as a financial service provider in New Zealand brought with it a number of risks to the integrity and reputation of New Zealand's financial markets and New Zealand's legal arrangements for regulating those markets.

[41] Ms Davis-Calvert considered the registration generally created a misleading appearance that the services were provided from New Zealand and that the New Zealand registered entity was subject to regulation in New Zealand.

[42] Ms Davis-Calvert said that registration could be misleading:

> … even if there are no overtly misleading statements on the entity's website and even if some nominal financial services are provided from New Zealand. This view is supported by complaints made to the FMA, which show that in such circumstances clients mistakenly believe registration as a financial

> service provider in New Zealand means that services are provided from New Zealand and the entity is regulated in New Zealand for the services provided.

In that sense, I consider she was referring to information which was within the specialist knowledge of the FMA which it was entitled and indeed expected to use in reaching a decision.

[43] In her report, Ms Davis-Calvert concluded that no "financial services" (as defined in s 5 of the Act) relating to the substantive operations of Excelsior were being provided from its place of business in Auckland and that the services provided were administrative or business support services in nature.

[44] The FMA had earlier asked Excelsior to provide client records for clients advised in person by Excelsior staff at Excelsior's office in New Zealand. The response from Excelsior was that it had only one New Zealand office. It had no New Zealand clients. No client records were provided.

[45] The FMA had asked for all Excelsior's New Zealand GST and income tax returns and working papers which would show that Excelsior was carrying out a financial service business from New Zealand. Excelsior provided two IR345 forms showing PAYE of $252 was paid on 17 March 2015 and $521 on 14 April 2015. Financial statements for the year ended 31 March 2014 showed no income but payments made to Equity for various corporate services provided by Equity during the period, including the costs of the director and office manager.

[46] The FMA asked for all bank account statements for Excelsior showing client fund transactions. Excelsior provided Sri Lankan bank statements for the period 2 June 2014 to 31 March 2015. The ledger balance on the most recent Sri Lankan bank statement as at 31 March 2015 was US$513,324.48. Excelsior also provided ANZ USD bank account statements from 13 March 2014. There was little account activity except for a deposit on 26 August 2014 of $4,869 by Ijaz Ahmad Rasib and another of $10,470 on 4 February 2015 by Safdar Raza Abbas Ali Raza. Ms Davis-Calvert considered that the bank accounts indicated the substantive business was in Sri Lanka and that Excelsior was not operating a substantive business from New Zealand.

[47] The FMA had asked for details of people employed by Excelsior. The FMA received documents showing Excelsior had employed as independent contractors an office manager and a second employee for marketing and customer relations responsibilities. No evidence was supplied to indicate that any client files were held at the office or maintained by these people. Ms Davis-Calvert considered that whatever work was undertaken by these contractors was administrative or to provide marketing or sales support. Because there was no client base in New Zealand for these services, she considered that if they were providing the support described, it had to be for the benefit of the business in Sri Lanka. Mr Green had been asked to provide a copy of the marketing strategy that he had claimed the marketing person was engaged to provide. A one page description of what appeared to be a marketing/sales approach, with regard to providing seminars on forex exchange trading, was described by Ms Davis-Calvert as token at best. That is how I would also describe the statement which was provided.

[48] The FMA asked Excelsior to provide the names and addresses of people who had attended Excelsior's New Zealand office to obtain financial services. Excelsior provided the FMA with the names of three people, all of Auckland, including a male and female of the same address. Further documentation provided purported to show that they had attended a seminar on 28 March 2015 demonstrating the Meta Trader 5 platform. Excelsior provided what appears to be some communication from two of these people to the sales person referring to a seminar they had attended. One referred to it as an "opportunity to learn about forex trading and Excelsior Market's important role". The other referred to a presentation as to "the Meta Trader 5 software" and concluded "Thank you for giving me this new very useful knowledge. I have already started using the demo at my home and I hope you do great in the future." Also provided to the FMA were 16 photographs. Some of these showed these three people being spoken to and sitting and looking at a computer screen.

[49] The documents provided strongly suggest to me that all of this was done not as part of normal business but as a stratagem to counter the FMA's concerns. As the FMA noted, these people did not obtain financial services from Excelsior.

[50] The FMA asked for all invoices and itemised accounts sent by Equity or any of its associates to Excelsior. Excelsior provided five invoices dated from 23 October 2013 to 25 November 2014. Consistent with the documents, Ms Davis-Calvert considered the invoices were connected with Excelsior's registration, office lease/rent, Mr Green's role as nominee director and administrative support. She noted that Excelsior's registered office and address for service was the same as for Equity. The support provided by Equity, as evidenced by the invoices, was consistent with Ms Davis-Calvert's view that the services provided by Excelsior from New Zealand were business administration and compliance services, not financial services.

*The FMA's direction to deregister*

[51] Ms Davis-Calvert's report and recommendations were accepted by the FMA's general counsel. In a letter to Excelsior, the general counsel for the FMA advised Excelsior that, after taking into account s 18A, the information provided to the Registrar and the submissions received from Excelsior, it had directed the Registrar to deregister Excelsior from the register.

[52] The FMA summarised its reasons for taking this step in the letter:

> 3. Section 5 of the FSP Act lists the services that fall within the definition of 'financial service'. Having considered the nature of the services undertaken in New Zealand on behalf of Excelsior, FMA is of the view that the services provided are of an administrative nature only and not 'financial services' in terms of section 5 of the FSP Act.
>
> 4. The FMA notes that any financial services provided are substantively provided outside of New Zealand or via a website controlled outside of New Zealand to clients outside New Zealand and that no financial services relating to the substantive operations of Excelsior are provided from New Zealand.
>
> 5. Consequently, the FMA considers that registration of Excelsior is or is likely to create a false or misleading appearance that as a financial service provider in New Zealand its financial services are provided from New Zealand and that the provision of services from New Zealand to overseas clients are regulated by New Zealand law when clearly this is not the case as financial services provided to overseas clients are not regulated by New Zealand law.
>
> 6. The FMA has also considered the financial services you have stated that you have provided from New Zealand by holding a seminar on forex

> exchange trading on or about 28 March 2015 which covered the basics of the Meta Trader 5 Platform and functionality. We do not accept that the seminar you described amounts to the provision of a financial service, however, even if we did accept that proposition, the FMA is of the view that providing some minimal financial services from New Zealand (in the context of the business as a whole) does not alter the fact that the bulk of the business is overseas and is run from overseas. As such, even if some financial services are provided from New Zealand, the FMA is of the view that Excelsior's registration as a financial service provider in New Zealand is likely to create a misleading appearance about the extent to which financial services are provided from New Zealand and the extent to which Excelsior is regulated in New Zealand in relation to the services provided to overseas clients. We also note that providing minimal financial services from New Zealand in these circumstances is, if anything, likely to reinforce that misleading appearance.

[53] The FMA's direction as to deregistration was based on the information it obtained in considering whether it was appropriate to give a direction under s 18B.

**Submissions for Excelsior**

[54] In arguing that the FMA did not have a proper basis for the direction it issued, Mr Locke referred to the company's website which stated:

> EML is registered to provide the following financial services:
>
> - Keeping, investing, administering, or managing money, securities or investment portfolios on behalf of other persons
>
> - Trading financial products or foreign exchange on behalf of other persons.

[55] He submitted that Excelsior's activities fell within the definition of "financial service" set out in s 5(1)(d) and (k). He also referred to s 6 of the Act:

> In this Act, **in the business of providing a financial service** means carrying on a business of providing or offering to provide a financial service (whether or not the business is the provider's only business or the provider's principal business).

[56] He further submitted:

- Excelsior was a bona fide company duly incorporated in New Zealand with an office, staff and offering financial services in New Zealand.

- Excelsior's services were in the area of internet-based foreign exchange. It held client funds and any margin requirements in bank accounts located in both New Zealand and Sri Lanka.

- Excelsior was incorporated on 11 September 2013 and was registered as a financial services provider from 23 November 2013. Excelsior was offering to provide its services to New Zealand clients and the absence of any current New Zealand clients did not take it out of the definition in the Act.

- Registration was not, of itself, misleading as there was no requirement under the Act for a financial services provider to provide the financial services only in New Zealand or principally in New Zealand, or even to provide services to New Zealand-based customers at all.

- The FMA was wrong to proceed on the basis that registration was misleading in suggesting that financial services provided to overseas clients were regulated by New Zealand law. Registration could not be misleading in that way because registration under the Act did not provide for any regulation or licensing.[17]

- Section 8A(a) stipulates that "this Act applies to a person who is ordinarily resident in New Zealand, or has a place of business in New Zealand, regardless of where the financial service is provided". The FMA had not adequately investigated the extent to which Excelsior was providing services from New Zealand in respect of overseas clients, because it wrongly considered what Excelsior might be doing in that regard was irrelevant.

[57] In his submissions, Mr Locke acknowledged international investors were quite likely to see New Zealand as a well regulated investment environment and to see advantages to dealing with a New Zealand-based and registered financial service provider. Excelsior and its major shareholder and parent company would not deny that this was seen as a competitive advantage in marketing terms. Being a registered provider of financial services, with the implication the company had been worthy of

[17] Financial Service Providers (registration and Dispute Resolution) Act 2008, s 8A.

gaining and retaining registration by a government-created and run agency would lend some degree of impression of respectability and trustworthiness. There was nothing improper in that, provided Excelsior met the legislative requirements for registration.

**Discussion**

[58] The factual information which was before the FMA, and which I also have considered, justified the FMA's conclusion that the nature of the services undertaken by Excelsior or on behalf of Excelsior *in New Zealand* was of an administrative nature only and not "financial services" in terms of s 5.

[59] In submissions, both to the FMA and to the Court, Excelsior relied primarily on its role with regard to foreign exchange dealings as being sufficient to show it was in business in New Zealand as a financial services provider. The fact that it went to the trouble and expense of registering as a financial service provider, and was able to do so, is some evidence that it was intending to be in business in that sense but registration is not conclusive as to this. The point of ss 18A and 18B is to allow the FMA to look at what is happening with the business after registration. If registration, of itself, were to be taken as truly indicating that a company was in business for the purpose for which it was registered, the scope for applying ss 18A and 18B for the purposes Parliament intended would be severely limited.

[60] Neither Mr Green nor anyone else on behalf of Excelsior has suggested that the information which Excelsior provided to the DIA, when the DIA was concerning itself with anti-money laundering issues, was wrong. Around October 2014, Excelsior gave information to the DIA which indicated that, when Excelsior did commence trading, it did not intend to have New Zealand customers or use its New Zealand bank account for holding client funds.

[61] The information provided to the FMA by Excelsior in 2015 and the information which the FMA obtained did justify the FMA concluding that there had been no real change in the way Excelsior was operating or indeed intended to operate between the time Excelsior provided information to the DIA and the time of its last submission to the FMA of 30 April 2015.

[62] On the information before it and on the information which was before me, it was reasonable for the FMA to conclude that Excelsior's business was to provide a platform which people could use overseas to engage in foreign exchange trading.

[63] Excelsior had told the DIA around October 2014 that this was its business. Excelsior had drawn the attention of the DIA and the FMA to its website. The bold heading to the company's homepage was "Award Winning Trading Platform Backed By Powerful Technology". Also highlighted was its trading platform and that it was registered as a New Zealand financial service provider.

[64] The website highlighted that it was registered as an FSP. In that way the website said Excelsior was registered to provide certain financial services. There was no information on the website as to how it provided those services or as to the people who would be involved.

[65] What Excelsior has said about itself and its services on a website may be some evidence of how it was actually operating but not necessarily so. It is quite possible, through a website, to present a picture of what a business is doing and how it operates which may be misleading.

*Mr Green's affidavit*

[66] The recent affidavit, which I have given leave to Excelsior to file, provides information which is consistent with the FMA's conclusion as to how Excelsior was carrying on business.

[67] In his affidavit, Mr Green confirmed that Excelsior's sole shareholder was an overseas company, Excelsior International Limited, a company incorporated and registered in the Ras Al Khaimah Administrative Jurisdiction of the United Arab Emirates. Mr Green said that Excelsior International was wholly owned by Mr Hussain Gulraze Mir, a Pakistani national who worked as a business development consultant at Harvest Topworth International. Mr Green said that this company was an introducing broker headquartered in Karachi which offered services in the area of internet-based foreign exchange and contract for difference (CFD) trading.

[68] This information was confirmed by certain documents annexed to Mr Green's affidavit. Those documents included the memorandum and articles of association of Excelsior International Limited. Relevantly, the objects of that company, as stated in the memorandum, were:

> a) to carry on the business of Business consultancy;
>
> b) to be and act as a holding company and to do investments in property;
>
> c) to own properties;
>
> d) to carry on the business of trading building materials, textiles, cosmetics, furniture, food stuff, soft drinks, vegetables and fruits, electronics, stationery, fabric, carpets, lighting & fixtures, rubber products, toys, leather bags and shoes, auto spare parts, grains, equipments etc.

[69] The memorandum stated that all those activities were to be carried on outside the UAE. The memorandum also stated that the Company shall not –

> b. enter into business as a bank, an insurance, a re-insurance Company or broker, a trust Company or any financial institution or any other financial business or activity of any nature, unless it has received approval from the competent authorities of the United Arab Emirates to carry on such activities; …

[70] In his affidavit, Mr Green said that Excelsior held a "margined FX trading account with CFH Clearing Limited", a United Kingdom company which offered "an internet-based suite of financial services to wholesale clients". Mr Green added:

> 6. … At its most basic level, CFH provides an online platform (ClearVision) which allows its clients to trade FX derivatives with a number of investment banks, including Goldman Sachs, UBS and Barclays.
>
> 7. ClearVision also offers additional functionality which allows CHF's wholesale clients to offer brokerage services to their own retail client base. This additional functionality includes: the provision of front end software for use by retail clients (for example, Meta-Trader 5); full back office support for the execution and clearing of market orders; the creation and management of client accounts; risk monitoring; and the automatic creation of a full audit trail of all client transactions.

[71] Given the FMA's finding that Excelsior was providing only administrative support to its clients, it is significant that Mr Green stated in the affidavit:

> 8. EML provides execution only brokerage services to its clients via the Meta-Trader 4 or Meta-Trader 5 (Meta-Trader) online trading platforms. Prior to its deregistration, EML also intended to offer its clients the facility to trade on margin by means of CFDs.

[72] Mr Green, in his affidavit, acknowledged "the routing of client orders is automated, and largely instantaneous".

[73] Mr Green annexed various documents which clients who used Excelsior would have to sign including the application form Excelsior had submitted in order to open a corporate trading account with CFH Clearing. The CFH Clearing Corporate Account – Guidelines on the Application included this item:

> *Compliance letter*
>
> In the event the activity which you are to conduct with CFH Clearing is considered to be regulated by our financial services regulator but not by the financial services regulator which you are to conduct your business activity under, we may request a Compliance Letter from you to confirm the same.

Those words indicate that CFH Clearing required Excelsior's financial services to be regulated by a "financial services regulator which you are to conduct your business activity under".

[74] The documents provided to CFH with the application included a resolution from Excelsior Markets recording that the company had:

> RESOLVED, that a trading account in the name of the Account Holder [Excelsior Markets Limited] be opened with CFH Clearing Limited, Warwick House, 25 Buckingham Palace Road, SW1W OPP, London, United Kingdom ("CFH Clearing") for the purpose of margined forex exchange trading.

[75] The application form specified that the account holder with CFH Clearing was to be Excelsior and the funds it would be depositing would be from company profits or its capital. The application form did not disclose to CFH that there would be deposits or withdrawals on Excelsior's account on behalf of other investors.

[76] Included in this application was evidence as to the way Excelsior had used its NZFSP registration to represent that activities, in respect of which it wished to open an account, were regulated. Hence Excelsior's affirmation that it was registered by a

Financial Services Authority, namely "the Financial Service Providers Register". Excelsior listed its FSP registration number, thereby indicating that the Registrar was regulating Excelsior's provision of financial services.

[77] In the field for "24 Hour Contact Information", CFH's application form required two contact persons whom Excelsior (as account holder) authorised CFH to contact in an emergency situation or in the event of any breakdown in communication between Excelsior and CFH. By nominating these persons, Excelsior accepted full responsibility for the consequences that may arise from such contact.

[78] Excelsior listed Hussain Gulraze (Excelsior shareholder) as its contact for trading emergencies, and Mohammad Adnan (Excelsior Manager, IT Operations) as contact for both IT and trading emergencies. Telephone numbers were provided for each. The country code for Mr Gulraze was for Pakistan, Mr Adnan's country code was Sri Lankan. Mr Adnan's email address associated him with Excelsior.

**In the business of providing a financial service?**

[79] Excelsior argues that its registration was not misleading because, being based in New Zealand but offering to provide financial services overseas, it still had to be registered as a financial services provider under the Act.

[80] In opening an account with the CFH Clearing House in London, providing the Meta 5 Platform and a bank account in Sri Lanka which could be used by investors to enable them to enter into foreign exchange trading, the information before the FMA and the evidence before me did establish that Excelsior were offering to provide a financial service in terms of s 5. Pursuant to s 6, in the business of providing a financial service means carrying on a business of providing or offering to provide a financial service. Pursuant to s 8A, the Act applies to a body corporate which has a place of business in New Zealand, regardless of where the financial service is provided. Excelsior had a place of business in New Zealand.

[81] The FMA's decision was not, however, based on its conclusion that Excelsior was not providing a financial service in terms of the Act. Its ultimate decision was made on the basis that the services provided in New Zealand were of an

administrative nature only and that any financial service was substantively provided outside of New Zealand via a website controlled outside New Zealand to clients outside New Zealand and that no financial services relating to the substantive operations of Excelsior were provided from New Zealand. The information and evidence available to the FMA justified that conclusion.

[82] If Excelsior was offering a financial service as described under the Act, could the FMA nevertheless direct deregistration having regard to ss 18A and 18B? I consider it could.

[83] Section 18(1)(6) states that the Registrar must deregister a financial service provider after a notice period in accordance with ss 19 and 20, if the Registrar is satisfied that the provider "is not in the business of providing a financial service (at any time after the expiry of 3 months after registration".

[84] Section 18C states:

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

[85] It was thus clear from the new provisions that Parliament intended that ss 18A and 18B could be applied even where the registered company was continuing to provide a financial service in terms of the Act.

[86] Section 18A requires the FMA to consider the extent to which a financial service provider is providing financial services in New Zealand and not whether it is providing a financial service in terms of the Act. Hence, the FMA is required to consider the extent to which the registered company:

> (i) provides, or will provide, financial services in New Zealand; or
>
> (ii) provides, or will provide, financial services from a place of business in New Zealand; or
>
> (iii) is, or will be, regulated by New Zealand law in relation to a financial service;

[87] Section 18A thus required the FMA to consider situations where the financial service was provided both within and outside New Zealand.

**Creating a false or misleading appearance?**

[88] Furthermore, while the FMA was required to consider matters in s 18A(a)(i), (ii) and (iii), it could independently of such matters decide that it was "necessary or desirable for financial service provider to be deregistered" if it considered registration was likely to have the effect referred to in s 18A(b)(i) and (ii).

[89] It was submitted for Excelsior that registration as a financial service provider in New Zealand is not likely to create a false or misleading appearance that its financial services are provided from New Zealand because registration could be required in relation to financial services provided overseas.

[90] The mere possibility that a company can be registered in New Zealand in respect of a financial service to be provided overseas does not mean that registration in New Zealand cannot create a false or misleading appearance that the company is actually providing financial services from a place of business in New Zealand.

[91] Whether or not Excelsior's registration could have that effect had to be considered with due regard to all relevant information. That included the fact that its business address was in Auckland, its director was a New Zealand resident and it was a party, as required by the Act, to a dispute resolution scheme based in Wellington. Also important was the extent to which it referred to its New Zealand FSP registration.

[92] The information and evidence before the FMA and me was thus sufficient to justify the conclusion that registration would be likely to have the effect of creating a false or misleading appearance as to the extent to which Excelsior provides or will provide financial services from a place of business in New Zealand.

[93] In the reasons for its decision, the FMA considered that registration was likely to create a false or misleading appearance that the provision of services from New Zealand to overseas clients was regulated by New Zealand law when this was

not the case because financial services provided to overseas clients were not regulated by New Zealand law.

[94] It was submitted for Excelsior that registration could not create such a misleading impression because the Act is only about the requirement to register the administration of the register itself, and the requirement for a registered person to be a party to a dispute resolution scheme. The Act itself does not deal with the regulation of financial services.

[95] As Brewer J noted in *Vivier*:[18]

> It is important to recognise that the Act itself does not create a licensing regime for the provision of financial services. Nor does it regulate the provision of financial services. Other legislation does that.[19]

[96] I consider that if the Act were to be applied in the way Excelsior advocates, the purposes of ss 18A and 18B would be significantly undermined. Those sections were enacted because Parliament recognised that there could be situations where entities were registered as financial service providers but that might not mean their services were regulated by other legislation or regulations. Parliament recognised that, of itself, registration did not carry with it regulation. Accordingly, the FMA was given the power to consider the way in which a financial service provider was in fact operating in case, in its particular circumstances, registration could have the effect of creating a false or misleading appearance as to the extent to which the registered entity's activities of financial service would be regulated by New Zealand law.

[97] Mr Locke further submitted that the FMA's premise was incorrect because the Act applied to a company which had a place of business in New Zealand regardless of where the financial service was provided. He submitted the regulation inherent in the Act applied to Excelsior because it had a place of business in New Zealand and it did not matter that its financial services may have been provided overseas.

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18 *Vivier and Company Limited v Financial Markets Authority*, above n 2, at [7].

19 For example, the Financial Advisers Act 2008, the Reserve Bank Act 1989 and the Non-bank Deposit Takers Act 2013.

[98] The Act however deals only with registration and the requirement to participate in a dispute resolution scheme. The licensing, regulation and obligation to operate within the framework and subject to the sanctions of New Zealand law depend on its activities being conducted within the New Zealand jurisdiction.

[99] Mr Locke submitted, in relation to overseas-based providers, the FMA and the Registrar do have regulatory powers under s 11(2) of the Act. Mr Locke also submitted that with registration there was regulation because of the requirement that Excelsior be a participant in a dispute resolution scheme.

[100] Section 11 states:

> **11 No being in business of providing financial service unless registered and member of approved dispute resolution scheme**
>
> (1) A person to whom this Act applies must not be in the business of providing a financial service unless that person—
>
> (a) is registered for that service under this Part; and
>
> (b) is, if required by section 48, a member of an approved dispute resolution scheme.
>
> (2) Every person who knowingly breaches subsection (1) commits an offence and is liable on conviction,—
>
> (a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding $100,000, or to both; or
>
> (b)in the case of a person who is not an individual, to a fine not exceeding $300,000.

[101] That section relates to the requirement for a provider to be registered and to be a member of an approved dispute resolution scheme. It does not ensure its activities will be subject to regulation or New Zealand law.

[102] Ms Scholtens submitted that, because of the territorial scope within which the Act could be enforced, the obligation to participate in a dispute resolution scheme could not apply if its financial service activities were conducted outside the jurisdiction. She submitted that this was reflected in the rules of the scheme which it had agreed to participate in on being registered as a financial services provider. The

scheme is referred to on the Companies Office Register for Excelsior as "Financial Dispute Resolution (the reserve scheme), Level 9, 109 Featherstone Street, Wellington 6011, http:\\www.fdr.org.nz. Membership number: FM2446".

[103] In order for the Minister to approve a dispute resolution scheme under the Act, the Minister must have regard to the adequacy of the rules about the scheme and their compliance with the requirements of s 63.[20] This section mandates that the rules must set out how complaints about a member may be made for resolution by the scheme.[21] The only jurisdictional requirement of s 63 is that the proposed scheme's rules must provide that the scheme has jurisdiction in respect of certain prescribed matters.[22]

[104] Rule 6.2(b) of the scheme with which Excelsior participates (outlined above) provides that a complaint is covered by the scheme if "it is about any conduct of a financial service provider in relation to providing a financial service in New Zealand".

[105] I do not accept that the requirement for Excelsior to participate in a dispute resolution scheme so that the resources of that scheme could be available to its customers overseas means that its activities are thus subject to the laws and regulations of New Zealand if those activities are conducted outside the jurisdiction. An obligation to participate in dispute resolution within New Zealand does not carry with it an assurance that Excelsior's activities would be regulated by the legislation which does cover those offering or providing financial services in New Zealand. It does not ensure that any dispute arising out of its activities would necessarily be resolved in accordance with New Zealand law.

[106] Mr Locke also submitted that Excelsior would be subject to the "fair dealing" provisions of part 2 of the Financial Markets Conduct Act 2013 (the FMCA). As stated in the overview provided by s 17, ss 19-33 "prohibit misleading or deceptive conduct, the making of false or misleading representations, and the making of unsubstantiated representations". Sections 34-37 prohibit offers of financial

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20 Financial Service Providers (Registration and Dispute Resolution) Act 2008, ss 52(1)(g) and 53.
21 Section 63(1)(d).
22 Section 63(1)(g)(i)-(iii).

products in the course of unsolicited meetings. Section 33 says that ss 19-23 apply to:

> (a) *conduct in New Zealand*; and
>
> (b) conduct outside New Zealand by any person resident, incorporated, registered, or carrying on business in New Zealand to the extent that that conduct relates to dealing in financial products, or the supply of a financial service, that occurs (in part or otherwise) *within New Zealand*.
>
> (Emphasis added.)

[107] Section 34 prohibits offers in the course of unsolicited meetings with persons acting otherwise than in trade. Section 34(3) says the section applies to offers of financial products received by persons in New Zealand.

[108] Section 5 states that there are detailed provisions in part 2 of the FMCA which provide for fair dealing in relation to financial products and financial services, and similar provisions as to the prohibition of misleading or deceptive conduct and the offer of financial products in the course of some unsolicited meetings as in the Financial Advisers Act 2008 (the FAA). Pursuant to s 47 of the FMCA, that part of the FMCA applies only to offers of financial products in New Zealand. Part 6 of the FMCA, which provides for the licensing of market services and regulates the provisions of market services by licensees and other persons, applies to services received by an investor in New Zealand.

[109] Mr Locke submitted that Excelsior's activities overseas would be subject to ss 117-119 and ss 134B to 135 of the FAA 2008. Section 117 creates offences with regard to failure to make disclosure in accordance with disclosure obligations under the FAA and misleading or deceptive conduct by financial advisors or brokers. Those provisions apply to persons licensed as financial advisors, brokers or qualifying financial entities. Section 134B makes it an offence to receive money where the offer for subscription has been illegal. Section 135 makes it an offence to fail to comply with the FMA's direction in respect of a breach of disclosure or conduct obligation. Section 157 says the FAA applies to a financial advisor service or broking service received by a client in New Zealand, regardless of where the person providing the service is resident, is incorporated, or carries on business.

[110] The FAA 2008 is an Act "to promote the sound and efficient delivery of financial adviser and broking services and to encourage public confidence in the professionalism and integrity of financial advisers and brokers".[23] Its comprehensive and detailed provisions intended to achieve that purpose have no application to the way Excelsior is marketing its services to people overseas.

[111] Section 9 of the Act states that one of the purposes of part 2 of the Act – the registration scheme – is to conform with New Zealand's obligations under the Financial Action Task Force on Money Laundering Recommendations (the FATF Recommendations). In December 2014, the DIA concluded that Excelsior was not captured as a reporting entity in New Zealand under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML Act). This was because the DIA had concluded that, on the information provided to it, Excelsior was not conducting financial activities in New Zealand in the ordinary course of business, given the definition of "financial institution" in s 5 of the AML Act.

[112] Under the AML Act, a "reporting entity" includes a financial institution. A "financial institution" includes a person who, in the ordinary course of business, is trading for the accounts of customers in foreign exchange.[24] The AML Act does not specify a territorial scope for the financial institutions referred to in the Act who will then be subject to the obligations set out in the Act. As Ms Scholtens submitted, where enactments do not specify a territorial scope, there is a presumption that Parliament does not assert jurisdiction that goes beyond its territorial limits. On that basis, general words in an Act are presumed to be limited and to have effect only within the effective jurisdiction of Parliament.[25] The DIA applied the AML Act in that way.

[113] I accept that the DIA was correct in doing so. This was in fact accepted by Excelsior. As a result, because Excelsior was not trading for the accounts of customers in foreign exchange within New Zealand, its activities were not subject to the obligations of the AML Act. In that significant way, its business services were not subject to regulation within New Zealand.

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23 Financial Advisers Act 2008, s 3(1).
24 Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 5(a)(vii)(B).
25 *Laws of New Zealand* Statutes (online ed) at [85], [97], [176].

[114] In my view, the fact that Excelsior was registered as a financial service provider on a Register under the control of the Registrar appointed under New Zealand legislation could well suggest to interested people and agencies that the business activities of Excelsior, particularly with regard to its involvement in money transactions, were subject to official scrutiny, regulation and the laws of New Zealand and thus New Zealand's obligations under the FATF Recommendations. This was not in fact the case with its financial services being provided overseas. In that way, registration could be misleading.

[115] Ms Scholtens submitted for the FMA that, in summary, Excelsior provided administrative support services from a place of business in New Zealand for the purpose of financial services it provided to clients abroad. Those services provided to people overseas are not regulated by New Zealand law because they fall outside New Zealand's territorial ambit.

[116] Sections 18A and 18B recognise the possibility that, despite registration as a financial services provider, this may be the case. I accept that, for the reasons relied on by the FMA and for the reason advanced on behalf of the FMA in submissions to me, Excelsior's financial service business was being conducted substantially, if not wholly, outside New Zealand. That has meant that its financial services are not in fact subject to regulation by New Zealand law. Accordingly, I agree with the FMA's conclusion that Excelsior's registration was likely to have the effect of creating a false or misleading appearance as to the extent to which it is or would be regulated by New Zealand law in relation to the financial service it was providing.

**Necessity or desirability of deregistration**

[117] After having regard to s 18A, and particularly s 18A(a)(ii) and (iii), the FMA considered, pursuant to s 18B(2), whether it was necessary or desirable for a Excelsior to be deregistered. I find that the facts before it provided a sufficient and proper basis for the FMA's ultimate decision that such a direction was necessary. Whether or not it issued such a direction was ultimately a matter for the FMA's discretion. I do not consider that there was any error in the way the FMA exercised its discretion.

[118] To the extent that this appeal is by way of a rehearing of the issues that arise with regard to whether or not there was sufficient factual basis for a direction to deregister, I consider the information on which the FMA acted was sufficient justification for the FMA's direction. The further evidence made available to me through Mr Green's affidavit further satisfies me that the grounds referred to in s 18A had been established to enable the FMA to direct the Registrar to deregister Excelsior as a financial services provider. There is actual evidence, through the documents annexed to Mr Green's affidavit, of how Excelsior has used its registration to mislead a financial institution overseas, an institution which also has dealings with other major financial corporations such as Goldman Sachs, UBS and Barclays.

[119] In giving its reasons for requiring deregistration, the FMA did not refer expressly to s 18A(b)(i) and (ii). Nevertheless, I am satisfied continued registration of Excelsior as a financial services provider in New Zealand would be likely to have the effect of damaging the reputation of New Zealand's financial markets or New Zealand's law or regulatory arrangements for regulating those markets. The way in which Excelsior opened an account with the CFH Clearing House in London provides specific evidence as to how this could happen.

[120] In this instance, it would appear that Excelsior was a party to arrangements that would enable people overseas to deal in foreign exchange using bank accounts so that the source of the funds being invested was not known to those dealing with the investments. There was thus the potential for transactions to take place contrary to New Zealand's obligations in terms of the FATF Recommendations. If this was being done in part through the auspices of an organisation which had the respectability and sanction that others would see as being implicit in it being registered in New Zealand as an FSP, I would accept and do accept without further evidence that it is likely there would inherently be damage to the integrity or reputation of New Zealand financial markets.

[121] The FMA and I have decided that deregistration was justified, in accordance with ss 18A and 18B, essentially because most, if not all, of Excelsior's financial services were provided outside New Zealand. Because of this, its financial service

activity was not subject to the regulation and laws of New Zealand. That made it undesirable for Excelsior to remain registered in New Zealand as a financial services provider.

**Differences from Court's approach in *Vivier***

[122] I acknowledge that Brewer J held that the FMA could not rely solely on the fact that a financial services provider did not provide services in or from New Zealand in order to come to the conclusion that deregistration was necessary or desirable.[26] He was of that view because, in enacting s 18A, Parliament had chosen not to alter the qualifications for registration. A company based in New Zealand providing all its financial services overseas still had to be registered. He also went on to say that the FMA must thus have satisfactory evidence to demonstrate that registration of the particular financial services provider creates or causes a misleading appearance with respect to the extent to which it provides financial services in or from New Zealand, or is regulated by New Zealand law.

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

[124] Brewer J stated that the FMA was required to assess whether Vivier's registration misrepresents the extent to which it provided those services in or from New Zealand, or the extent to which those services are regulated in New Zealand. In my view, if the FMA concluded Excelsior's financial services were being provided almost wholly outside New Zealand, that could provide a sufficient basis for the FMA to conclude that there could be a misrepresentation as to the extent to which those services were regulated in New Zealand.

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[26] *Vivier and Company Ltd v Financial Markets Authority*, above n 2, at [69].

[125] In *Vivier*, the FMA, in deciding the company should be deregistered, in its reasons referred to the company's registration as being likely to damage the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets. With Excelsior, the FMA did not refer to this ground in giving notice as to deregistration. It was referred to in submissions by Ms Scholtens before me. With this part of the appeal proceeding by way of rehearing, I have held that it provided a further ground for deregistration.

[126] I differ from Brewer J in that I do not consider there would have to be evidence as to how the particular way in which the company was carrying on its business would be likely to cause such damage. The FMA is a body with specialist knowledge as to how financial markets operate, both in New Zealand and internationally. Parliament has chosen to give the FMA the required authority to make decisions about whether such harm is likely to be caused. I consider that its decisions in this regard should be respected provided the decision can be explained on a reasonable basis, having regard to the evidence and the purposes of the legislation.

[127] I see the position of the FMA as being analogous to that of a body such as the Lawyers and Conveyancers Disciplinary Tribunal. That tribunal is expected to rely on its own knowledge, experience and expertise in deciding whether a practitioner's conduct amounts to professional misconduct. So, here, the FMA should be able to rely on its own specialist knowledge in deciding whether a proved set of circumstances would be likely to cause damage to the reputation and integrity of New Zealand financial markets.

**Unreasonableness**

[128] As a separate ground of appeal, Excelsior contends that the direction of the FMA was unreasonable because:

(a) it took into account an irrelevant consideration, namely a mistaken understanding of the way Excelsior's services were provided;

(b) it involved a misinterpretation of the Act as being inapplicable to financial services provided to overseas clients;

(c) it involved a misdirection as to the meaning of the Act as limiting the proportion of business that a financial service provider could transaction overseas; and

(d) it made an error of law in proceeding on the premise that the offer of financial services from New Zealand to overseas clients was not regulated by New Zealand law.

[129] I have discussed these contentions already in dealing with the other points on appeal. I do not consider the FMA was mistaken in the way it summarised how Excelsior carried on its business and concluded that, to the extent it was providing financial services, this was at least primarily extra-territorial and the work done in New Zealand was of only an administrative or support nature.

[130] I do not accept that the FMA misinterpreted the Act as being inapplicable to financial services provided to overseas clients. In terms of registration, the FMA proceeded on the basis that Excelsior, being based in New Zealand, was registered as a financial services provider in New Zealand. The issue was whether or not, given the way Excelsior operated, there was grounds for deregistration having regard to s 18A.

[131] I do not consider the FMA proceeded on the basis that the Act required a certain proportion of its financial services business to be conducted within New Zealand. In the particular circumstances of Excelsior, the FMA did decide that, with such financial services as it was offering or providing being substantially, if not wholly, provided outside New Zealand, having regard to s 18A, there were grounds for deregistration. However, I do not consider there was any misdirection as to the meaning of the Act in its doing this.

[132] I do not accept that the FMA was mistaken in its determination as to the extent to which Excelsior's financial service business was regulated by New Zealand law.

[133] I thus reject this as a ground of appeal.

**Conclusion**

[134] For all the above reasons, the appeal is dismissed.

[135] I anticipate costs will follow the event. If there is no agreement, the respondent's memorandum as to costs is to be filed by 29 January 2016. The appellant is to file a memorandum by 12 February 2016. Each memorandum is to be no longer than five pages.

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