IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-513
[2015] NZHC 2337

IN THE MATTER	of an appeal under s 42 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008
BETWEEN	VIVIER AND COMPANY LTD Appellant
AND	FINANCIAL MARKETS AUTHORITY Respondent

Hearing: 24 August 2015

Counsel: A N Riches for Appellant
M T Scholtens QC and C R Allan for Respondent

Judgment: 25 September 2015

JUDGMENT OF BREWER J

This judgment was delivered by me on 25 September 2015 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors: Saunders & Co (Christchurch) for Appellant
Financial Markets Authority (Auckland) for Respondent

Counsel: Mary Scholtens QC

Introduction

[1] The Financial Services Providers (Registration and Dispute Resolution) Act 2008 ("the Act") establishes a register of financial service providers ("the Register"). The appellant ("Vivier") was registered as a financial service provider on 21 March 2014.

[2] On 26 June 2015, the Financial Markets Authority ("FMA") directed the Registrar of Financial Service Providers to deregister Vivier.[1] That direction is now appealed by Vivier.

The Act

[3] The purposes of the Act are:[2]

> (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.

[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.[3]

[6] Among the prescribed purposes of the Register is:[4]

> (c) to conform with New Zealand's obligations under the [Financial Action Task Force on Money Laundering established in Paris in 1989] Recommendations.

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1 On 6 July 2015, Collins J stayed the direction and ordered Vivier reinstated on the Register until further order of the Court.
2 Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 2A.
3 Section 9(a).
4 Section 26(c).

[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.[5]

[8] The Government became concerned about the use of the registration provisions in the Act by some offshore based entities. This concern led to the amendment of the Act on 1 July 2014.[6] Ms Scholtens QC for the FMA included in her bundle of authorities a (slightly redacted) Cabinet paper which sets out the concern.[7] It was not objected to by Mr Riches for Vivier and I think it gives useful background to the amendments to the Act – most of which are self-evident as to purpose.

[9] In summary, the concern was that by becoming registered as Financial Service Providers, but not carrying on business as such in New Zealand – which would have required submission to and compliance with the regulatory regimes specific to the various categories of financial services – offshore entities could give the impression to offshore customers that they were resident in and/or regulated in New Zealand:

> This presents a risk to New Zealand's reputation as a well regulated jurisdiction and to the reputation of legitimate New Zealand-based financial service providers.

[10] The 2014 Amendment Act inserted provisions which are at the heart of the appeal:

> **18A Purpose of FMA's powers relating to deregistration**
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> The purpose of section 18B is to provide for the deregistration of a person (A) if A's registration has, will have, or is likely to have the effect of—
>
> (a) creating, or causing the creation of, a false or misleading appearance with respect to the extent to which A—
>
> (i) provides, or will provide, financial services in New Zealand; or

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

6 Financial Service Providers (Registration and Dispute Resolution) Amendment Act 2014 (2014 No. 34).

7 Cabinet Economic Growth and Infrastructure Committee "Financial Service Provider Registration Amendments" (16 February 2013).

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

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

(b) otherwise damaging the integrity or reputation of—

(i) New Zealand's financial markets; or

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

18B Consideration of deregistration of financial service provider by FMA

(1) The FMA—

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

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

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

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

(a) give the financial service provider—

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

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

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

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

(c) either,—

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

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

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

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

(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).

The deregistration of Vivier

[11] On 28 February 2015, a member of the public sent an email to the FMA attaching a copy of an electronic news article about Vivier. The first paragraph gives the flavour:

> A New Zealand company accused in an Irish TV investigation of tax fraud and money laundering is poised to drop completely off the radar screen of this country's anti-money laundering regulations.

[12] In the body of the article reference was made to New Zealand regulatory legislation:[8]

> A spokesman for the Department of Internal Affairs (DIA) told interest.co.nz DIA supervises Vivier and Company for compliance with New Zealand's Anti-Money Laundering and Countering Financing of Terrorism Act (AML/CFT Act). However, this won't be the case for much longer.
>
> "The Department of Internal Affairs initiated a desk-based review of Vivier and Company Limited's AML/CFT programme under New Zealand's Anti-Money Laundering and Countering Financing of Terrorism Act 2009 late last year. In the course of carrying out the review we have established that Vivier is not currently carrying on any financial activity in the ordinary course of business in or from New Zealand. Their financial activity is outside the territorial scope of the AML/CFT Act", the DIA spokesman said.
>
> "This means they are currently not captured by the AML/CFT Act. We will be reviewing the list of DIA's reporting entities on our website in March, which will include deleting Vivier as one of our reporting entities".
>
> DIA is one of three New Zealand AML/CFT Act supervisors alongside the Reserve Bank and Financial Markets Authority (FMA). Each of the three supervises compliance by different entities. See more on this here.
>
> Asked about Vivier and Friends Mutual, an FMA spokesman said the FMA isn't currently actively monitoring either entity and there are no specific matters of concern relating to the FMA's regulatory jurisdiction that have been raised with it.

[13] Further reference was:[9]

> As a registered New Zealand financial services provider, Vivier is a member of Financial Services Complaints Limited (FSCL), which its website notes is a New Zealand Government approved Dispute Resolution Scheme.
>
> FSCL CEO Susan Taylor told me FSCL hasn't received any complaints about Vivier and Company or Wewege.

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8 Agreed record of decision, at 42.

9 Ibid.

> "When processing and accepting applications from financial service providers to become FSCL participants, we rely on the fact that the participant has successfully registered on the Financial Service Providers register (overseen by the Ministry of Business, Innovation & Employment, or MBIE). In other words, The Registrar is satisfied the financial service provider is fit to be registered and has completed the criminal check etc", Taylor said.
>
> "As a dispute resolution scheme, we can only investigate complaints brought to us by an individual or group of individuals who claim they have suffered a financial loss as a result of the financial service provider's actions or advice", Taylor says.
>
> For its part an MBIE spokesman says the Companies Office doesn't currently have any specific concerns about the activities of Vivier and company or Wewege.
>
> "However, it does intend to make enquiries of the company to ensure that it is complying with its obligations under the Companies Act 1993 and Financial Service Providers (Registration and Dispute Resolution) Act 2008. If anyone has information about potential offending in New Zealand relating to this company they should refer that to the Companies Office Registries Integrity and Enforcement Team (at) http://www.business.govt.nz/companies/about-us/enforcement", the MBIE spokesman says.

[14] As a result of receiving this article, Mr Brunton of the FMA began to make inquiries. First, he contacted the Ministry of Business, Innovation & Employment ("MBIE"). He asked whether the inquiries that the article said MBIE intended to make would be made and, if so, whether they would include consideration of s 18A of the Act.[10]

[15] The next day, MBIE replied that it intended visiting Vivier's address "this week to try and ascertain exactly what the business is doing from its Auckland office and who the staff are".[11]

[16] On 24 March 2015, MBIE emailed Mr Brunton to tell him about the visit to Vivier's office:[12]

> I can relay the following.
>
> There is an employee present at the Servcorp office of Level 31, 48 Shortland Street, Auckland, his name is Ali Hashemifar. He's been with Vivier and Company Limited just three weeks. He says he holds a masters degree in Finance and has worked in the Forex business for some time. He

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10 Email dated 16 March 2015, at 76.
11 Email dated 17 March 2015, at 76.
12 At 75.

used to work for Solving Limited – FSP246005 (now deregistered) but he said many of the Forex businesses went offshore once the FMA license requirement came into effect.

He does have access to client files through dropbox and he prints off their ID documents and proof of residence and keeps these as paper copies in a file draw which he showed us.

The business does not accept clients from NZ or the USA.

From what he has seen of the client files they appear to be all from Europe and in particular Spain.

When asked how he secured this employment position he said through connections.

Ali said he sees one director, Michael Hart now and then, sometimes Mr Hart will pop into the office but does not regularly work there. He said director Luigi Wewege lives in the states now. I pointed out that Mr Wewege still lists a NZ residential address but that we would get hold of him to amend this.

The office is very small and just fits the two desks and three chairs in there. It has no view and Mr Hashemifar commented that he gets bored with no one to talk to and no view. It appeared as though very little is done from the NZ office.

Ali works normal business hours and is there Mon-Fri.

[17] Mr Brunton then asked in reply:[13]

Will you be referring this company to FMA under section 18(1A) of the FSP Act, or considering taking that action? I am aware that FMA can consider the matter at its own discretion under section 18B(1)(b) of the FSP Act.

[18] The response, some 16 minutes later, began:[14]

Yes I think we do need to consider referring it as it appears not much is occurring in NZ and given the media article overseas then the business itself needs looking into.

[19] On 8 April 2015, Mr Brunton, in an email, advised MBIE that:[15]

As FMA has a complaint regarding Vivier and Company Limited we are considering its registration as a FSP under section 18B(1)(b) of the FSP Act. Can you clarify for me please from your site visit on 24 March whether Vivier has its own office at 48 Shortland Street or using Servcorp's office, and whether Mr Hashemifar is an employee of Servcorp or Vivier.

[20] Later that morning, MBIE replied:[16]

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13 Email dated 26 March 2015, at 75.
14 Email dated 26 March 2015, at 74.
15 Email dated 8 April 2015, at 74.
16 Email dated 8 April 2015, at 74.

> I've attached my site visit report. Yes I can confirm that Vivier has its own office within the Servcorp floor. It's small but does have two desks in there. Mr Hashemifar works for Vivier, but has only been there a few weeks.

[21] Later that day, Mr Brunton made inquiry of the Department of Internal Affairs ("DIA") concerning the news article. He wanted to know whether the statements attributed to the DIA in the article came from the DIA. He explained that this was in the context of "currently considering the complaint" and the information he was seeking was to assist in FMA inquiries "particularly regarding the provision of sections 18A and 18B of the FSP Act".[17]

[22] At 12:48 pm on 8 April 2015, DIA replied to Mr Brunton, relevantly:[18]

> The desk based review took place in September/October 2014. At the time of our review we formed the opinion that the entity was operating outside our territorial scope for AML/CFT purposes. The filed annual AML/CFT return received during August 2014 indicated no New Zealand financial activity.

[23] On 21 April 2015, Mr Brunton gave a memorandum to FMA's General Counsel recommending that the FMA:[19]

> - **Determine** that it is necessary or desirable for Vivier and Company Limited to be deregistered under the FSP Act; and
>
> - **Give written notice** to Vivier and Company Limited that FMA intends to give a direction to the Registrar of Financial Service Providers to deregister Vivier and Company Limited from the Financial Service Providers' Register (FSPR).

[24] The memorandum does not refer to the news article. By way of background, it sets out the information gained from MBIE and DIA. It then refers to Vivier's website and paraphrases its content.

[25] Under the heading "Legal framework", reference is made to ss 18A and 18B. The memorandum says:[20]

> 7. We consider that the circumstances of this matter, whereby Vivier and Company Limited does not have any substantive operations in

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17 Email dated 8 April 2015, sent at 11:23 am, at 80.
18 Email dated 8 April 2015, at 79.
19 At 82.
20 Memorandum to Recommend Issuing a Notice of Intention to Give a Direction to the Registrar of Financial Service Providers, at 84.

NZ and is not subject to supervision of the services which it provides exclusively outside NZ, support the view that it is necessary or desirable to remove Vivier and Company Limited from the FSPR.

[26] Under the heading "Our Comments and recommendation", the following paragraphs appear:[21]

> 10. In circumstances where –
>
> - the financial service provider does not have any substantive operations in New Zealand;
> - the substantive operations of the financial service provider are web-based or otherwise substantially overseas;
> - the financial services are not, or are not primarily aimed at people in New Zealand; and
> - only back office administration services are provided from the New Zealand place of business;
>
> we consider that registration as a financial service provider will or is likely to create a false or misleading appearance that financial services are provided from a place of business in New Zealand and that the financial service provider is regulated by New Zealand law in relation to all the financial services it provides.
>
> 11. The above circumstances apply in the case of Vivier and Company Limited, Further, registration of the Vivier and Company Limited in such circumstances is also likely to be damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets because of the misleading appearance that it would be regulated by New Zealand law for all the services it provides.
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> 12. We note that while we have not received any specific complaints about Vivier and Company Limited, we have received many complaints and enquiries from investors overseas who believe that registration on the FSPR means that the provider is regulated here by the FMA for all of the services they provide. Invariably this reflects badly on New Zealand's financial markets and regulatory arrangements.
>
> 13. In light of the above, we are of the view that it is necessary or desirable to deregister Vivier and Company Limited under the FSP Act and, accordingly make the recommendations set out on the front page of this memorandum.

[27] The General Counsel for the FMA approved the recommendation on 23 April 2015. On the same day, a notice of intention to deregister was emailed to the

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[21] At 85.

directors of Vivier. The notice included advice that Vivier could make written submissions by 26 May 2015. The reasons given for issuing the notice are:[22]

> 4. We consider that the registration of Vivier and Company Limited on the FSPR is likely to have the effect of creating a false or misleading appearance of the extent to which Vivier and Company Limited provides financial services in New Zealand, provides financial services from a place of business in New Zealand and the extent to which it is regulated by New Zealand law in relation to those services.
>
> 5. We understand that Vivier and Company Limited's New Zealand address is a two desk office on Level 31, Vero Centre, 48 Shortland Street, Auckland. One person, an employee since early March 2015, maintains hardcopy files of clients' identification documents and proof of residence that are obtained from clients' online files. There appears to be no other services being provided from the office, in particular no financial services. Client files indicated that clients are based in Europe, particularly Spain. No other person works from the office although one of the NZ directors visits the office occasionally.
>
> 6. The content of Vivier and Company Limited's website https://vivierco.com includes statements that it has a near 15 year tradition, is expanding its operations worldwide, offers services to clients anywhere in the world resident outside of New Zealand and the USA, is a sub-custodian of funds using the world's largest banks, and maintains a high degree of management attention to ensure investments are secure. The fact that the Company was incorporated in 2001 and is a boutique Financial Service Provider registered in New Zealand, also appears in the website content.
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> 7. Thus, our understanding is that the financial services provided by Vivier and Company Limited are provided outside of New Zealand to clients outside New Zealand. We also note that Vivier and Company Limited is not regulated by New Zealand law in relation the financial services provided to overseas clients. In such circumstances, when the services are provided by an entity registered in New Zealand, we believe it is likely that the appearance is created that the services are provided from New Zealand and that the New Zealand registered entity is subject to regulation in New Zealand. This view is supported by complaints made to the FMA, which show that in such circumstances clients mistakenly believe registration as a financial service provider in New Zealand means that services are provided from New Zealand and the entity is regulated in New Zealand for the services provided.
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> 8. We also believe that when clients discover that a New Zealand registered financial service provider is not regulated by New Zealand law in relation to the financial services it provides that is also likely to result in damage to the integrity and reputation of New Zealand's financial markets and the law and regulatory arrangements in relation to those markets.

[22] Letter dated 23 April 2015, at 88-89.

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

[28] Under the heading "Submissions", Vivier was told:[23]

11. In addition to receiving submission generally in response to the reasons set out above, we would be particularly interested in receiving submissions on why it is necessary for Vivier and Company Limited to be registered as a financial service provider in New Zealand when the financial services it provides are substantively provided outside of New Zealand to clients outside New Zealand. In that regard it is our view that a principal purpose of Vivier and Company Limited being registered in New Zealand is to create the appearance that financial services are provided from a place of business in New Zealand and that Vivier and Company Limited is regulated by New Zealand law in relation the financial services it provides (including in relation to anti money laundering).

12. We are also concerned about whether Vivier and Company Limited is complying with laws relating to the provision of financial services and/or the offer of financial products in the jurisdictions its clients reside in. In our view it is likely to be damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets if, as a New Zealand registered financial service provider, Vivier and Company Limited is illegally providing financial services or illegally offering financial products to people in other countries. We would therefore also be particularly interested in receiving submissions on:

- Vivier and Company Limited's compliance with the regulatory requirements for providing financial services and offering financial products to people in each of jurisdictions in which its clients reside or in which it offers financial services or financial products; and

- the steps taken to ensure Vivier and Company Limited does not provide financial services to, or allow offers of financial products to be accepted by, people in all other jurisdictions.

13. After the close of the submission period FMA will make its final decision, whether to proceed to deregister Vivier and Company Limited based on the information available to it. We therefore recommend that your submissions, if any, are fully supported by the necessary documentary evidence. The FMA is not obliged to request additional information after this period.

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[23] At 89-90.

[29] On 26 May 2015, Mr Hart, a director of Vivier, replied on behalf of the company. The reply was in the form of a table which juxtaposed extracts from the notice with Mr Hart's replies. Broadly, Mr Hart challenged the notice for imprecision and lack of supporting evidence. He asked questions. He repeatedly averred that Vivier's website is accurate. The tenor of Mr Hart's response can be discerned from the following extracts:[24]

One person, an employee since early March 2015, maintains hardcopy files of clients' identification documents and proof of residence that are obtained from clients' online files	5.2 Your Notice accurately reflects the work conducted by one of VCL's personnel. However, it fails to note that this work is a core element of financial services and entirely consistent with that permitted to be done by an FSP. Again, how does this support your contentions of a company operating in some covert manner or outside the confines of the law? 5.3 As VCL is not permitted to deal with clients residing inside our country, in complete compliance with the legislation, it naturally also has personnel based overseas.
There appears to be no other services being provided from the office, in particular no financial services.	5.4 You clearly did not conduct your investigation very carefully. Although VCL only deals with clients residing outside our country, in complete compliance with the legislation, every single aspect of the company's business is ***controlled*** from Auckland. Its Directors control all its investment management, its extensive KYC/AML procedures, the due diligence on all its investments, its finance, marketing, statutory, legal and HR matters and – above all – the funds in and out of its bank accounts. What else would one reasonably expect of an FSP? 5.5 In the same manner as practically all financial institutions, VCL's documentation is kept electronically, yet you did not ask for any examples of this nor did you pose any questions of the company. Instead, based on a cursory glance at the physical files which, again, are maintained fully in compliance with the legislation, you have reached wholly erroneous conclusions. 5.6 The pre-implementation bill which resulted in the Act contained a provision restricting registration only to FSPs providing financial services in New Zealand. However, this provision was rejected by our legislators. 5.7 Without prejudice to the fact that VCL is providing financial services from our country, the current Act (S8A) and the face of the Registrar's website cited at §4 above make it clear that companies are obliged to register as

[24] At 96-98.

	FSPs ***regardless of where the financial service is provided***. 5.8 It is equally completely inappropriate to criticise VCL for its lack of services other than financial. They are the only services that VCL is registered to and should offer.
Client files indicated that clients are based in Europe, particularly Spain.	5.9 You are taken to have made no criticism here, express or implied, given that the residence of these clients is in complete compliance with the legislation.
No other person works from the office although one of the NZ directors visits the office occasionally.	5.10 Again, you have come to this erroneous conclusion on the basis of a few minutes' visit. In fact, VCL's chairman visits the office virtually every day, whilst the other directors and various personnel visit and/or work there as and when required. 5.11 Although you appear to criticise the limited number of VCL's New Zealand based employees, this is a natural corollary of complying with the legislation, which prevents an FSP doing business with our country's residents. Or are you implying something unlawful about the manner in which VCL complies with this regulation? 5.12 Viewed in isolation and out of context, your comment gives a misleading picture of VCL's business model. Would it not be surprising to find cohorts of staff to deal with non-existent clients in the jurisdiction? That might give you a real reason to pose questions. 5.13 In fact, the Notice fails to take account of the numerous members of staff – for a relatively small organisation – retained by VCL around the world, as evidenced by the ***enclosed organogram***.
	5.14 In summary here, your criticism is simply incomprehensible: the Act applies to a person, including a body corporate (s4), who is ordinarily resident in New Zealand or has a place of business in New Zealand, ***regardless of where the financial service is to be provided*** (s8A). The Act does not define "place of business". Accordingly that phrase is to be given its common, everyday meaning. VCL's place of business is, as the Notice states, in Auckland. Plainly therefore the Act applies to VCL. All the evidence shows how VCL operates correctly and in good standing, yet you seek to import some kind of disapproval.
	5.15 Above all, you have completely failed to substantiate your contention that VCL gives a false or misleading appearance of the extent to which it provides financial services from a place of business in our country. It states openly and honestly what it does and does what it says.

[30] Mr Hart did explain why Vivier is incorporated in New Zealand:[25]

	11.4 Separately, although several of its personnel afford the company direct ties to our country, VCL sets out below the main reasons for incorporating in New Zealand: • It provides all the advantages of traditional 'offshore' financial centres, but is recognized as a true mainstream 'onshore' financial centre, which has NOT been 'black listed' by any jurisdiction or authority in the World. It is not perceived by OECD as a harmful tax jurisdiction, and has no connotations as a tax haven. Indeed, it is a member of the OECD and the World Trade Organization. • It is not a member of the EU and is thus not influenced by the EU Savings Tax Directive or any future developments, whether they are extended to companies or trusts. It is a signatory to the 1922 Hague Convention and can provide apostilled as well as notarised documentation. • New Zealand is a member of the British Commonwealth, uses English as its main language, has a common law system and has founded the majority of its legislation, including trust law, on British law. • It has a Westminster style Government and is stable and competent. • It has a well-developed infrastructure, including a progressive and robust economy, efficient telephone and internet services, competitive and frequent air travel, reliable internet global banking services, experienced, reliable professionals serving global clients with trust and company requirements which include legal opinions on tax, trust and company matters.

[31] On 25 June 2015, Mr Brunton recommended to the FMA's General Counsel that Vivier should be deregistered and that a direction to the Registrar to that effect be given. In the memorandum incorporating the recommendation, Mr Brunton summarised Vivier's submissions and comments on them. He said:[26]

> Given that no financial services are being provided to New Zealand clients and the nature of services provided from the place of business in

[25] At 103-104.

[26] Memorandum to Recommend Giving a Direction to the Registrar of Financial Service Providers, at 123.

> New Zealand are administration type services we are of the view that the circumstances mentioned in section 18A apply to the company.

[32] Mr Brunton went on to say:[27]

> - in the event that some financial services are provided from its place of business in New Zealand, in circumstances where financial services are substantially provided outside of New Zealand, by staff based outside of New Zealand and via a website to clients outside of New Zealand we remain of the view that registration as a financial service provider in New Zealand would or would be likely to create a false or misleading appearance that all of its services are provided from a place of business in New Zealand and that the provision of those services even to overseas clients would be regulated by New Zealand law, when clearly this is not the case. This in turn would or is likely to be damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets;
>
> - we consider that the process followed in providing the notice of intention, the opportunity to make submissions and our consideration of the submissions accords with the requirements of the FSP Act (section 18A); and
>
> - while some information is provided about the applicable banking laws of Netherlands, Cyprus and Austria the company is however not a registered bank in New Zealand. The information provided therefore is irrelevant. Further, the company offers its services to clients anywhere in the world who are resident outside New Zealand and the USA but no information is provided on its compliance with the regulatory requirements for providing financial services to people in each of the jurisdictions its clients reside. In fact, the company submits that querying a company about compliance with the laws of other jurisdictions is beyond FMA's remit.

[33] On 26 June 2015, General Counsel signified his acceptance of the recommendation to deregister Vivier and direct the Registrar accordingly. On the same day, Vivier was informed by letter sent electronically that the FMA had directed the Registrar to deregister Vivier. Reasons were given consistent with the passage appearing in the memorandum as quoted above.

The appeal

[34] This being the first appeal under this legislation, I have to decide the approach I should take to it. Is it an appeal against the exercise of a discretion (in

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[27] At 123.

which case I approach it on an "error" basis), or is it a general appeal (in which case I have to make my own judgment on the merits)?

[35] Section 42 of the Act contains the right to appeal Registrar decisions and FMA directions:

> (1) A financial service provider who is not satisfied with any of the following decisions of the Registrar may appeal to the High Court:
>
> (a) not registering an applicant as a financial service provider under section 16:
>
> (b) a deregistration under section 18:
>
> (c) a decision of the Registrar or a person authorised by the Registrar under section 37.
>
> (1A) A financial service provider who is not satisfied with any direction given by the FMA under section 15B or 18B may appeal to the High Court.
>
> (2) The time within which an appeal under subsection (1) may be made is 20 working days after the date of notification of the decision or direction, or within any further time that the court allows.
>
> (3) On appeal, the court may do any of the following:
>
> (a) confirm, modify, or reverse the decision or direction or any part of it:
>
> (b) exercise any of the powers that could have been exercised by the Registrar or the FMA in relation to the matter to which the appeal relates:
>
> (c) refer the decision or direction back to the Registrar or the FMA (as the case may be) with directions to reconsider the whole or a specified part of the decision or direction.

[36] Ms Scholtens submits that the appeal is against the exercise of a discretion. She says that the FMA is a specialist body and therefore the approach set out by the Supreme Court in *Kacem v Bashir*[28] is apposite. In summary, the Supreme Court held that criteria for a successful appeal are stricter, and are limited to:[29]

> (a) error of law or principle.
>
> (b) taking into account irrelevant considerations.

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[28] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.
[29] At [32].

(c) failing to take account of relevant considerations.

(d) where the decision is plainly wrong.

Legal principles

[37] As the Supreme Court in *Kacem v Bashir* commented, "the distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract".[30] The Court does not attempt to clarify what the distinction is apart from saying that the fact that a decision requires the making of a value judgment is not enough to render the decision discretionary.[31]

[38] The nature of a discretionary power has been given judicial consideration by the Courts of England and Wales. Lord Fraser in *G v G* said that a Judge has a discretion in cases where "there are often two or more possible decisions, any one of which might reasonably be thought to be best, and any one of which therefore the judge may make without being held to be wrong".[32] In coming to this view, Lord Fraser relied on *Bellenden (formerly Satterthwaite) v Satterthwaite* where Asquith LJ explained:[33]

> We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.

[39] The New Zealand Courts have also given some consideration to the issue. The Court of Appeal has noted that a "key indication of a discretion is whether the area for personal appreciation by the first instance Court or decision maker is large".[34] But in cases where "ultimately one view is legally possible, even if there is scope for considerable argument as to what it is" then "the decision maker does not have the margin of appreciation inherent in discretion".[35]

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30 At [32].
31 Above.
32 *G v G* [1985] 2 All ER 225 (HL) at 228.
33 *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345.
34 *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [37].
35 Above.

[40] More recently, this Court has held that appeals against the exercise of a discretion are usually appeals from decisions involving the "careful evaluation of options and the choosing of the most suitable option available" and where the decision maker is not required to reach any particular outcome.[36] By contrast, general appeals are usually appeals from decisions made in circumstances where the decision-maker is required to reach a particular outcome by carrying out an objective assessment of decided facts against a defined test.[37]

[41] In ascertaining whether an appeal is against the exercise of a discretion, the focus is properly on the nature of the decision-making power conferred upon the first instance Court or decision maker, rather than on the appellate body's powers on appeal.[38] In this case, even though s 42(3) gives the Court wide powers on appeal, that does not mean that the appeal right is a general appeal right. Not if, on proper construction, the exercise of power appealed against is of a discretionary nature.

Discussion

[42] In my view, having regard to ss 18A and 18B, the appeal must be treated as an appeal against the exercise of a discretion. My reasons are:

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[36] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [43].

[37] *Auckland Council v Abraham* [2015] NZHC 415 at [8].

[38] This is illustrated in the analysis that the Supreme Court carried out in *Kacem v Bashir*, above n 28, [35] and that Court of Appeal undertook in *Ophthalmological Society of New Zealand Inc v Commerce Commission*, above n 34, [38]. There are many recent examples of the exercise of this principle in practice in the High Court. So, in *Broadlands Finance Limited v Reserve Bank of New Zealand* [2013] NZHC 3147 at [16]-[21], Keane J held that, despite the Court having wide powers on appeal under s 115 of the Summary Proceedings Act 1957, the decision whether to grant or withhold a discharge without conviction has always been considered to be discretionary, and it was the discretionary nature of the power which is "decisive as to the nature and scope of an appeal". Accordingly, an appeal against the refusal to grant a discharge without conviction is an appeal against a discretion. A similar example is *Coughlan v Abernethy* HC Auckland CIV 2009-004-2374, 20 October 2010. Justice White held that the approach to general appeals in *Austin, Nichols & Co Inc v Stichting Lodestar* usually applies to appeals of a determination of the Weathertight Homes Tribunal. However, if the Weathertight Homes Tribunal reached the impugned decision through the exercise of a discretionary power conferred upon it under the Act, then a successful appeal of that decision requires the satisfaction of the stricter criteria in *Kacem v Bashir*. Similar to the present case, the High Court on appeal from the Tribunal has the power to confirm, modify or reverse the determination or any party of it and may exercise any of the powers that could have been exercised by the Tribunal in relation to the claim to which the appeal relates: see Weathertight Homes Resolution Services Act 2006, s 95(1).

(a) First, the FMA, when deciding whether to issue a direction, does not have to objectively apply a defined legal test to established facts so as to reach a certain result. Rather, the decision to issue a direction appears to require the "careful evaluation of options". If the FMA decides to give a direction, it "must after taking into account section 18A, *consider* whether it is necessary or desirable for a financial service provider to be deregistered".[39] Whether it is "necessary or desirable" to deregister an FSP is a mandatory relevant consideration, not a legal test. The FMA must then give notice and, again, "*consider* any submissions received".[40] If the FMA remains of the view that the FSP should be deregistered, it may direct the Registrar to do so.[41]

(b) Second, the FMA is an expert body. Deference should be given to its evaluation of options. As set out in the Cabinet Paper which proposed giving the FMA the power to deregister, the reason for the power was that the FMA is "well placed to make determinations on this matter due to its main objective being the promotion and facilitation of the development of fair, efficient and transparent financial markets".[42]

(c) Third, the focus is on the nature of the decision-making power conferred upon the first instance Court or decision maker, rather than on the appellate body's powers on appeal.

[43] In reaching this view, I take into account that 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 depending on the nature of the impugned decision.[43] The Supreme Court and Court of Appeal have made it clear that appeals against all decisions of the Registrar of Companies (or Registrar of Incorporated Societies)

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39 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 18B(2).
40 Section 18B(3)(b).
41 Section 18B(3)(c)(i).
42 Cabinet Economic Growth and Infrastructure Committee "Financial Service Provider Registration Amendments" (16 February 2013) at [24].
43 See, for example, *Coughlan v Abernethy*, above n 38; *Rabih v Professional Conduct Committee of the Dental Council* [2015] NZHC 1110; *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*, above n 36.

proceed by way of general appeal.[44] The Registrar of Financial Service Providers is also the Registrar of Companies. It follows that appeals against the decision of the Registrar of FSPs must be general appeals. The appellate powers of the Court under s 42(3) against a decision of the Registrar are the same as its powers on appeal against a direction of the FMA. However, it would not be unusual to read the language in s 42 as giving rise to a general appeal under s 42(1)(b) and an appeal against discretion under s 42(1A). To treat appeals from decisions of the Registrar differently to appeals from FMA directions is consistent with the nature of the decision-making powers that Parliament has conferred upon the Registrar and the FMA respectively. The Registrar has the power to deregister an FSP under s 18 only where established objective criteria are met, or where the FMA has directed him/her to do so. By contrast, in my view the FMA's decision as to whether it should make a direction requires it to exercise a discretion.

[44] I do not accept that the nature of this appeal is analogous to appeals made under s 59 of the Charities Act 2005 as has been argued. The Courts have determined that an appeal of a decision of the Charities Registration Board[45] (the Board) to direct a charity to be removed from the Register of Charitable Entities proceeds by way of general appeal.[46] But the grounds for removal, set out in s 32 of the Charities Act, require the Board to make an objective assessment of fact against a defined test. It is only when a ground for removal is satisfied that the Board can elect whether or not to deregister a charitable entity. By contrast, there are no grounds for removal that must be satisfied before the FMA can direct a deregistration under the Financial Service Providers (Registration and Dispute Resolution) Act. Instead, the FMA only has to have regard to mandatory relevant considerations before electing whether or not to direct deregistration.

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44 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141; *Federated Farmers of New Zealand Inc v Federated Farmers of New Zealand (Northland Province) Inc* CA162/05, 19 September 2006; *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600 (CA).

45 Formerly the Charities Commission.

46 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [15]; *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) at [6]; *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 (HC) at [1]; *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 at [8]; *Re New Zealand Computer Society Inc* (2011) 25 NZTC 20-033 at [18]; *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [8]; *Re Greenpeace of New Zealand* [2011] 2 NZLR 815 at [60].

[45] Accordingly, I will approach this appeal as an appeal against the exercise of a discretion.

Issues

[46] The issues arising from the exercise of the FMA's discretion to deregister Vivier are:

(a) Did the FMA make errors of fact in reaching the conclusion that Vivier should be deregistered?

(b) Did the FMA fail to observe Vivier's rights to natural justice?

Did the FMA make errors of fact in reaching the conclusion that Vivier should be deregistered?

[47] Vivier argues that the FMA erred in concluding, pursuant to s 18A of the Act, that it is necessary and desirable to direct the Registrar of FSPs to deregister it as an FSP. In particular, Vivier alleges the FMA erred in the following findings of fact:

(a) that Vivier does not carry on a financial service in New Zealand; and

(b) that the fact of Vivier's registration under the Act creates a misleading impression that Vivier provides financial services from a place of business in New Zealand or that it is regulated by New Zealand law.

Section 18A

[48] The Act provides that the FMA may consider giving a direction that an FSP be removed from the register at its own discretion.[47] If the FMA decides to consider giving a direction, then it "must, after taking into account s 18A, consider whether it is necessary or desirable for a financial service provider to be deregistered".[48]

[49] There is no case law on s 18A. Accordingly, I am assisted in understanding the section by its legislative history and the wider context of the Act.

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47 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 18B(1).
48 Section 18B(2).

[50] In a Cabinet Paper dated 16 February 2013 presented to the Cabinet Economic Growth and Infrastructure Committee on 4 March 2013, the Minister for Commerce explained the rationale behind the FMA's power to direct deregistration:[49]

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

[51] The Minister also said:[50]

> This amendment would allow the Registrar, on instruction from the FMA, to decline registration or to de-register in situations where offshore FSPs have established superficial New Zealand operations purely to meet the registration requirements for unlicensed services.

[52] Importantly, the Minister made it clear that the amendment was not going to interfere with the existing requirements that an FSP must fulfil before it is registered:[51]

> I have considered whether there should be a substantive change to the FSPA's registration qualifications and scope provisions. However, any change to the scope would need to be carefully considered. One of the important features of the registration system is for it to be broad in its scope of who it captures and requires to be registered. This is one of the key planks for monitoring FSPs and one of the bases for links to the AML-CFT legislation.
>
> There are significant risks that changes to the scope provisions might inadvertently either impose costs on all legitimate New Zealand FSPs

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49 Cabinet Economic Growth and Infrastructure Committee "Financial Service Provider Registration Amendments" (16 February 2013) at [4]-[5].

50 At [24].

51 At [34]-[35].

> seeking to register or create a loophole by which actual New Zealand based FSPs could avoid registration. Given these risks, I do not propose any changes to the scope provisions of the Act but have asked my officials to undertake further work on this.

[53] 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:[52]

> 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).

[54] The overall purpose of s 18A can be discerned from the Minister of Consumer Affairs' statement on the third reading of the Financial Service Providers (Registration and Dispute Resolution) Amendment Bill 2014:

> The legislation also makes changes to financial 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 well-regulated jurisdiction. This change is important in maintaining the international reputation of our regulatory system.

[55] This statement is consistent with the purposes of the Act which I quote at [3] and for convenience repeat:

> (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.

[56] There are two further aspects of the Act that are important. The first is that s 3(1) of the Act requires all FSPs to be registered. The second is the Act's territorial scope. When first enacted, s 46 of the Act provided:

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[52] Commerce Committee's Report on the Credit Contracts and Financial Services Law Reform Bill 2013 (17 March 2014) (which would later become the Financial Service Providers (Registration and Dispute Resolution) Amendment Bill 2014) at 15.

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

[57] Section 46 was repealed on 1 July 2010 by s 25 of the Financial Service Providers (Registration and Dispute Resolution) Amendment Act 2010. The purpose of the repeal is set out in the Select Committee Report:[53]

> We recommend that the FSPA apply to all people providing financial services based in New Zealand, regardless of where the client is located.

[58] The replacement provision is s 8A, which provides:

> This Act applies to a person who—
>
> (a) is ordinarily resident in New Zealand (within the meaning of section 4 of the Crimes Act 1961) or has a place of business in New Zealand, regardless of where the financial service is provided; or
>
> (b) is, or is required to be, a licensed provider under a licensing enactment; or
>
> (c) is required to be registered under this Act by any other enactment.

[59] For completeness, I note that the Act stipulates two requirements that must be met before an FSP is qualified for registration. These were not changed when s 18A was enacted. The first is that the person not be a disqualified person.[54] Essentially, the person must not be an undischarged bankrupt, prohibited from being a director or promoter, subject to management banning, or have been convicted of a dishonesty offence, money laundering or similar crime against rights of property.[55] The second, is that the FSP be licensed under the relevant enactment where the financial service it provides requires it to be licensed.[56]

[60] To summarise, I draw a number of conclusions from the legislative history of s 18A and its statutory context:

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53 Financial Service Providers (Pre-Implementation Adjustments) Bill (109-2) reported from the Commerce Committee on 11 June 2010 at 6.

54 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 13(a).

55 Section 14.

56 Section 13(c).

(a) All providers of financial services who have a place of business in New Zealand must be registered under the Act irrespective of whether the financial service is provided in New Zealand or overseas.

(b) When enacting s 18A, Parliament did not alter the requirements for registration. It is not a requirement for registration that the services be provided in New Zealand or be regulated by New Zealand law.

(c) 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.

Relevant considerations

[61] The Court will allow an appeal against the exercise of a discretion where the decision-maker fails to consider relevant considerations.[57] Section 18A was included in the Act out of a concern that the power to deregister was not suitably constrained. It clarifies the extent of the FMA's powers.[58] Accordingly, I consider that s 18A is a mandatory consideration that the FMA must take into account before considering whether to give a direction.[59]

[62] Further, the FMA must again turn its mind to s 18A after receiving the submissions of an FSP to which it has given notice of an intention to deregister. That is because s 18B(3)(c)(i) provides that "if the FMA *remains* of the view that the financial service provider should be deregistered" it may direct the Registrar to deregister the provider. For a view to *remain* it must have been re-examined.

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57 *Kacem v Bashir*, above n 28, at [32].

58 This is reflected in the Commerce Committee's Report on the Credit Contracts and Financial Services Law Reform Bill 2013 (17 March 2014) (which would later become the Financial Service Providers (Registration and Dispute Resolution) Amendment Bill 2014) at 15.

59 For a discussion of mandatory considerations see *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

[63] There is a requirement on decision-makers to approach mandatory relevant considerations with an open-mind in order to ensure that the statutory process is not "some idle exercise".[60] Mandatory relevant considerations must guide the decision-making process. They must be taken into account, considered and given due weight.[61] It is not disputed that the FMA took into account s 18A before deciding to exercise its discretion to direct that Vivier be removed from the register. The real question on appeal is whether the FMA gave it appropriate weight.

[64] I say this because although the weight given to mandatory relevant considerations is a matter for the decision maker,[62] the weighing and balancing of them can still result in error of law. An example is where the decision-maker makes factual findings, in the process of balancing considerations, which are clearly untenable. In *Bryson v Three Foot Six Ltd*, the Supreme Court said:[63]

> An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[64]

[65] The Supreme Court has since emphasised that a Court on appeal must be cautious in assessing whether the decision-maker has reached an untenable conclusion on the facts. It does not matter whether the appellate court would have reached a different conclusion. Rather, what matters is "whether the decision under appeal was a permissible option".[65]

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60 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551.

61 See, for example, *Staunton Investments Ltd v Chief Executive of Ministry of Fisheries* [2004] NZAR 68 (HC) at [19].

62 *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 15 PRNZ 361 (CA) at [14].

63 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]-[26].

64 *Edwards v Bairstow* [1956] AC 14 at 36. Lord Radcliffe was adopting dicta of the Lord President (Normand) in *Inland Revenue v Fraser* [1942] SC 493 at 497 and Lord Cooper in *Inland Revenue Commissioners v Toll Property Co Ltd* [1952] SC 387 at 393.

65 *Piggott Brothers and Co Ltd v Jackson* [1992] ICR 85 (EWCA) at 92, cited with approval in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [53].

[66] 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.

Factual findings under s 18A

[67] I make some general observations about the sufficiency of evidence required for factual findings to be made pursuant to s 18A prior to directing deregistration. These observations are informed by the law in relation to relevant considerations and by the conclusions I have drawn from the legislative history and the context of the Act.

[68] First, the evidence upon which the FMA relies to make a finding must relate to registration of the *particular* FSP. The FMA cannot properly rely on generalisations and complaints relating to other FSPs to reach the conclusion that it is necessary and desirable to deregister the impugned FSP. This is made clear by the words of s 18A.

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

[70] That something more must relate to the mischief at which s 18A is directed. The purpose of the section is to allow the FMA to direct deregistration in situations where an FSP, by virtue of the fact of its registration, creates a misleading appearance as to the extent to which it is licensed or regulated by New Zealand law, or otherwise damages the reputation and integrity of New Zealand's financial markets.

[71] So, if the FMA relies on the scenarios contained in s 18(a) to come to the conclusion that an FSP ought to be deregistered, the FMA must have satisfactory evidence to demonstrate that the registration of the particular FSP creates or causes a misleading appearance with respect to the *extent* to which the FSP provides financial services in or from New Zealand, or is regulated by New Zealand law. In other words, the evidence must go to whether the registration of the FSP is misleading, not the fact that the FSP exclusively provides services overseas.

[72] Similarly, if the FMA relies on the scenarios contained in s 18A(b) to justify a direction to deregister, the FMA must have satisfactory evidence to demonstrate that the fact of the particular FSP's registration damages the integrity or reputation of New Zealand's financial markets, or New Zealand's law or regulatory arrangements for regulating those markets. Again, the evidence must go to how the particular FSP's registration damages the financial markets' integrity or reputation.

Did the FMA err in reaching the conclusion that Vivier should be deregistered?

[73] Vivier challenges the factual findings made by the FMA when considering s 18A. Because the weight given to the s 18A considerations is a matter for the FMA, Vivier's appeal can only succeed if it can show that the factual findings made by the FMA in relation to the s 18A considerations are not based on satisfactory evidence with the resulting findings being entirely unsupportable. I now turn to analyse the factual findings against the framework I have set out.

[74] The notice of intention to deregister and the decision to issue the direction do not specify a s 18A scenario relied on to justify deregistration. I must, therefore, consider all the scenarios.

[75] The FMA had the following evidence[66] from which it concluded that it was appropriate to give to Vivier notice of its intention to deregister:

(a) The Irish news article accused Vivier of engaging in tax fraud and money laundering. The article said also that the illegal conduct would slip under the radar of New Zealand's anti-money laundering regulations.

(b) The account of a staff member from MBIE who visited Vivier's office in Auckland on 24 March 2015. The staff member found that there was one employee present who had only worked there for three weeks. The employee was responsible for maintaining hardcopy files of clients' identification documents and proof of residence that are obtained from clients' online files. The staff member reported that there appeared to be no other services being provided from the office and that client files indicated that clients are based in Europe. The employee advised the staff member that no other person works from the office but one of the New Zealand directors visits the office occasionally.

(c) An email from the Team Leader of the Financial Integrity Team of the Department of Internal Affairs ("DIA") advising that his team conducted a desk based review of Vivier in September October 2014. The DIA formed the view that Vivier was operating outside the DIA's territorial scope. The filed annual Anti-Money Laundering and Countering Financing Terrorism return received during August 2014 indicated no New Zealand financial activity.

(d) The content of Vivier's website. This includes statements that it has a near 15 year tradition, is expanding its operations worldwide, offers services to clients anywhere in the world resident outside of New Zealand and the USA, is a sub-custodian of funds using the world's largest banks, and maintains a high degree of management

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66 See [11]-[28].

attention to ensure investments are secure. It states that Vivier was incorporated in 2001 and is a boutique Financial Service Provider registered in New Zealand. The website says that: "New Zealand is a politically stable and economically safe country with Standard & Poors AA credit rating, giving your business a positive image to counterparties".

(e) The products Vivier purports to offer: savings accounts, current accounts, MasterCard Debit Cards and Forex Trading. These are services that may require regulatory oversight in the form of registration, authorisation or licensing in the jurisdictions in which the financial services are provided.

(f) Complaints indicating that clients of FSPs mistakenly believe registration as an FSP in New Zealand means that services are provided from New Zealand and the entity is regulated in New Zealand for the services provided. However, no complaints had been received relating to Vivier.

[76] The FMA also had to consider Vivier's response to the notice of intention to deregister.[67] This included advice to the effect:

(a) Vivier is a company registered in New Zealand, with its only physical offices in New Zealand, two New Zealand-based directors, the majority of its personnel based in New Zealand and its only bank account in Auckland.

(b) Although VCL only deals with clients residing outside of New Zealand, every single aspect of the company's business is *controlled* from Auckland. Its Directors control all its investment management, its extensive KYC/AML procedures, the due diligence on all its investments, its finance, marketing, statutory, legal and HR matters and the funds in and out of its bank accounts.

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[67] See [29]–[33].

(c) The site visit that the FMA relied on as evidence took the form of a single unannounced call at the Auckland headquarters of Vivier by MBIE, which made no effort before or afterwards to contact the directors of Vivier. The site visit recorded scanty and/or incorrect information which was subsequently included in MBIE's report.

(d) VCL's documentation is kept electronically. The FMA has not asked for an example of this, nor has it posed any questions to Vivier. Instead, the FMA has formed an opinion based on a cursory glance by the site visitor at physical files.

(e) VCL's chairman visits the office virtually every day, whilst the other directors and various personnel visit and/or work there as and when required.

(f) The New Zealand Police Financial Intelligence Unit has registered Vivier as a reporting entity under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

(g) On 20 October 2014, a conversation took place between Vivier's Executive Chairman and Stephen Balmer of the DIA in which Mr Balmer conveyed to Vivier the DIA's opinion that, if the company is subject to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, it is supervised by the Reserve Bank of New Zealand or the FMA. Vivier responded promptly to Mr Balmer's request that he be provided with the company's Anti-Money Laundering programme. Having reviewed Viver's documentation, the DIA passed it to the two regulatory bodies. Nothing had been heard by Vivier from the FMA or Reserve Bank in the six months before the notice of deregistration was issued.

(h) In November 2014, the contents of Vivier's website became the subject of correspondence with the FMA. Vivier claimed on its website that it was supervised by the FMA. The FMA was concerned

that the website content was creating a false and misleading appearance of the extent Vivier is regulated by New Zealand law. Vivier responded to Mr Brunton, advising that it had made the required amendments to its website by removing the text objected to. On 30 November 2014, Mr Brunton agreed that Vivier had complied fully with the FMA's demands and stated that the file had been closed.

(i) The reasons why Vivier incorporated in New Zealand include that:

(i) New Zealand provides all the advantages of traditional "offshore" financial centres, but it is recognised as a true mainstream "onshore" financial centre, which has not been "black listed" by any jurisdiction or authority in the World. It is not perceived by the OECD as a harmful tax jurisdiction, and has no connotations as a tax haven. It is a member of the OECD and the World Trade Organisation.

(ii) New Zealand is not a member of the EU and is not influenced by the EU Savings Tax Directive or any future developments, whether they are extended to companies or trusts. It is a signatory to the 1922 Hague Convention and can provide apostilled as well as notarised documentation.

(iii) New Zealand is a member of the British Commonwealth, uses English as its main language, has a common law system and has founded the majority of its legislation, including trust law, on British Law.

(iv) New Zealand has a Westminster Style Government and is stable and competent.

(v) New Zealand has a well-developed infrastructure, including a progressive and robust economy, efficient telephone and internet services, competitive and frequent air travel, reliable

> internet global banking services, experienced, reliable professionals serving global clients with trust and company requirements which include legal opinions on tax, trust and company matters.

[77] It was on this evidence that the FMA decided that it was necessary and desirable to deregister Vivier, and directed the Registrar of FSPs to do so.

[78] In my view, the evidence that the FMA had in its possession primarily went to whether or not Vivier provides financial services in or from New Zealand, and whether those services are regulated by New Zealand law. That is not sufficient. Parliament decided that FSPs must register under the Act even if they do not provide financial services within New Zealand. That is why Vivier was registered as an FSP. 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.

[79] Insofar as the FMA did have information as to whether Vivier's registration misrepresents the extent to which it provides financial services in New Zealand or from a place of business in New Zealand, or misrepresents the extent to which it is regulated by New Zealand law, that information consisted of general complaints and perceived general confusion unrelated to Vivier itself. This was not sufficient evidence to make its factual findings. There needed to be specific problems with the way in which Vivier promotes itself before the satisfactory evidence threshold could be crossed.

[80] Upon receiving Vivier's Opposition, the FMA had a legal obligation to ask itself "whether it has in front of it – in its opinion – sufficient information to enable it to make the statutory determination".[68] If a decision maker exercising a discretion has before him material that is inadequate or incomplete, or there is a conflict in the evidence furnished which is sufficient to have a bearing on the findings of the decision-maker in relation to the exercise of the discretion, then the rules of natural justice require the decision maker to make further inquiry before reaching a

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[68] *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 (CA) at [47].

decision.[69] The FMA simply put Vivier's Opposition to one side as irrelevant. Yet the contents of the Opposition raised real issues with the reliability of the information that the FMA had in its possession as to whether Vivier was actually contributing to the perceptions which prompted the power to deregister being enacted. The FMA was obliged to re-examine its findings once the Opposition was received. Further insight was necessary.

[81] Accordingly, I am of the view that the FMA erred in failing to acquire a sufficient evidential basis to properly weigh the s 18A considerations before it reached its conclusion that Vivier should be deregistered.

Did the FMA fail to observe Vivier's rights to natural justice?

Vivier's submissions

[82] Vivier submits that the FMA did not adhere to the principles of natural justice in issuing the Notice of Intention to deregister. Its submissions give rise to two issues:

(a) Did the FMA act in breach of natural justice in failing to inform Vivier that its decision was based on a complaint concerning Vivier's registration?

(b) Did the FMA act in breach of natural justice by ignoring Vivier's requests for further information?

Natural justice

[83] In making decisions, public administrators are bound by procedural obligations known as the rules of natural justice. The rules of natural justice can be separated into two main principles.[70] First, that the administrator must not be biased when making his or her decision. Second, the person affected by the decision must be given a fair hearing.

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69 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 125 (per Richardson J).
70 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423.

[84] Section 18B(3) of the Act gives to Vivier fair hearing rights. But s 18B(3) is not exhaustive. The common law will impose addition natural justice rights where it is appropriate in the circumstances.[71] I am required to look at the purposes of the Act because common law natural justice rights are trumped by statute.[72] I must bear in mind also that a careful balance must be struck between administrative efficiency and ensuring that the interests of Vivier are adequately protected.[73] Accordingly, in order to ascertain the extent of Vivier's natural justice rights I will carry out a contextual assessment that considers: (i) the statutory framework, (ii) the nature of the decision and the decision-maker, and (iii) the effect of the decision on individual.[74]

(a) Did the FMA act in breach of natural justice in failing to inform Vivier that its decision was based on a complaint concerning Vivier's registration?

[85] Mr Riches submits that, in breach of s 18B, the FMA:

(a) did not advise that a specific complaint had been received regarding Vivier's registration;

(b) did not advise that the complaint was based on a news article;

(c) did not set out the issues contained in the complaint;

(d) did not give Vivier the opportunity to respond to the complaint; and

(e) did not advise that the Notice was triggered by the complaint.

[86] Having regard to s 18B(3) of the Act, I do not think that it would be inconsistent with the statutory purpose to require the FMA to disclose all the relevant information on which the FMA has relied to reach the view that it should consider issuing a direction. Disclosure of such information would allow the affected FSP the

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71 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141 (per Cooke J).
72 Above.
73 *Wyeth (NZ) Ltd v Ancare New Zealand Ltd & Anor* [2010] NZSC 46, [2010] 3 NZLR 569 at [41].
74 *Durayappah v Fernando* [1967] 2 AC 337 (HL).

opportunity to respond to it properly.[75] Indeed, given that if an FSP is deregistered it can no longer provide financial services in New Zealand, I think that it is imperative that the FMA provides all relevant information in its case against the FSP.

[87] So, if the FMA notifies an FSP of its intention to deregister it, the FMA must disclose all the relevant information it has in its possession upon which its intention to deregister is based.

[88] Applying this principle to the present case, whether the failure to disclose the complaint and article amounts to a breach of natural justice depends on the extent to which the complaint was relevant to the FMA's decision to issue a direction.

[89] Vivier submits that it is clear from the evidence that the allegation was being actively considered and relied upon by the FMA as a complaint of misconduct. It points to the FMA's communications with the complainant and other government departments:

(a) The FMA wrote to the complainant in an email dated 6 March 2015 to say: "The information you provided is important to us and has been considered".

(b) The complaint was recorded under the case template "misconduct reports", instead of contacts, as previous enquiries had been treated.

(c) In another email dated 9 March 2015, the FMA said to the complainant: "we are aware of the allegations made in the article and these are being considered"

(d) In an email dated 16 March 2015, Stephen Brunton on behalf of the FMA emailed MBIE saying "We have received the complaint below regarding Vivier and Company (FSP353366) and we have engaged with the complainant". On 26 March 2015, MBIE emailed Mr Brunton stating "… given the media article overseas then the

[75] See, for example, *Daganayasi v Minister of Immigration*, above n 71, and *Mockford v New Zealand Milk Board* HC Dunedin A44/80, 14 October 1981.

business itself needs looking into". The complaint then triggered a site visit by the same MBIE employee who made reference to the media article overseas.

[90] In response, Ms Scholtens says that the complaint was irrelevant to the process. The trigger for the investigation by the FMA was the reference in the newspaper article to DIA concluding that no financial service was being provided from or in New Zealand. Ms Scholtens submits that the internal memorandum recommending the issue of a notice of intention to deregister specifically notes that no complaints have been received about Vivier. Further, Ms Scholtens submits that the reasons for deregistration do not include reference to the "tax fraud" or money laundering, which was the primary subject of the article. Those allegations were not the subject of any inquiry by the FMA. Rather, the documents focus on the primary reason for the FMA's view that deregistration is necessary or desirable, being the fact that Vivier does not offer financial services in New Zealand, and that the concerns flow from that. Consequently, she says, it is plain that no weight was given to the "complaint" as alleged by Vivier.

[91] I disagree. I believe it is apparent from the FMA's notice to Vivier that the complaint was an important consideration in reaching its decision. Otherwise I do not see why the FMA would have said:

> We are also concerned about whether Vivier and Company Limited is complying with laws relating to the provision of financial services and/or the offer of financial products in the jurisdictions its clients reside in. In our view it is likely to be damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements for regulating those markets if, as a New Zealand registered financial service provider, Vivier is illegally providing financial services or illegally offering financial products to people in other countries. We would therefore also be particularly interested in receiving submissions on:
>
> - Vivier and Company Limited's compliance with the regulatory requirements for providing financial services and offering financial products to people in each of jurisdictions [sic] in which its clients reside or in which it offers financial services or financial products;
>
> - the steps taken to ensure Vivier and Company Limited does not provide financial services to, or allow offers of financial products to be accepted by, people in all other jurisdictions.

[92] As a result of the FMA's failure to disclose the article and complaint, Vivier was unable to directly confront the allegation that it was engaged in money laundering in Ireland. Vivier's compliance with foreign regulations was clearly important to the final decision it reached as made clear in the general counsel's letter to Vivier:

> The information provided about compliance with the laws of Netherlands, Cyprus and Austria relate to applicable banking law. However, VCL is not a registered bank in New Zealand nor is it a licensed non-bank deposit taker and as such the information appears irrelevant. Further, VCL's website offers services to clients anywhere in the world who are resident outside New Zealand and the USA but no information is provided on its compliance with the regulatory requirements for providing financial services to people in each of the jurisdictions its clients reside. Most jurisdictions have laws governing taking deposits, overing [sic] debt securities and lending. We consider that information about compliance with laws of overseas jurisdictions in which services provided to be relevant because if the services are being provided in breach of the laws of those jurisdictions by an entity registered on the FSPR in New Zealand it is likely to be damaging to the integrity and reputation of New Zealand's financial markets and New Zealand's law and regulatory arrangements fro regulating those markets. We therefore sought some positive assessment of rules that apply and evidence of compliance with systems and controls. You have not provided this and so we can only conclude that you do not know whether or not VCL complies with relevant laws. In our view VCL is therefore likely to be in contravention of some overseas laws relating to offering securities, accepting deposits and/or lending.

[93] I do not see why such emphasis would be given to compliance with foreign jurisdiction regulation if the article was not relevant to the FMA's decision. I conclude that the FMA failed to provide to Vivier relevant information. This breached Vivier's natural justice rights and resulted in the FMA committing an error of law.

(b) Did the FMA act in breach of natural justice by ignoring Vivier's requests for further information?

[94] Vivier submits that a further breach of natural justice arises from the FMA ignoring Vivier's requests for further information in its Objection. The FMA submits that there is no expectation in the Act that there will be an on-going dialogue between the FMA and the FSP. On the contrary, the scheme is for the FMA to set out its intention and the reasons for it, and the FSP to then make any submissions within

the time period allocated. A decision that has regard to those submissions is then anticipated.

[95] In my view, s 18B(3) gives a consultation right to the FSP. The purpose of the right is to ensure that the FMA has in its possession as much relevant information as possible to consider whether it is necessary and desirable to issue a direction that the FSP is deregistered. The Court of Appeal has made it very clear that proper consultation requires the party who is under the obligation to consult to "provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses".[76] Natural justice will require the further disclosure of information where relevant information is not disclosed so as to allow the affected party to respond to the essential issues in the decision-making process.[77]

[96] If the FSP is not given cogent, clear reasons as to why the FMA intends to deregister, then it will not be able to effectively provide relevant information. In such circumstances, Parliament must have intended the FMA to furnish additional information to ensure adherence to FSP's fair hearing rights. I am satisfied that this must be the case given the severity of the consequences of deregistration (that the FSP cannot provide financial services in New Zealand), and also the fact that each decision of the FMA affects one entity. The FMA is not issuing decisions of general effect so that it would be burdensome or administratively inefficient to receive additional submissions or engage in an on-going dialogue. Further, s 18B(3) provides a minimum period of time that must be given to the FSP to respond but puts no cap on the time period the FMA can set. Parliament must have understood that the consultation process could take longer than the minimum period.

[97] I now consider the nature of the notice and whether it gave rise to an obligation on the FMA to provide further information. I begin by briefly summarising the notice:

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[76] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676. See also: *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 566; *McInnes v Minister of Transport* [2001] 3 NZLR 11 (CA) at [11].

[77] See, for example, *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) at [114] and [155].

(a) The notice states:

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

It does not clearly specify the scenario in s 18A of the Act upon which the FMA has relied in considering whether it is "necessary or desirable" to direct deregistering Vivier.

(b) The notice then summarises the impression of Vivier's operations as obtained through the site visit. It also summarises the content of Vivier's website. This is the only factual evidence contained in the notice.

(c) The notice then gives the opinion that Vivier does not provide financial services in New Zealand, does not provide financial services from a place of business in New Zealand and is not regulated by New Zealand law. It states that this is likely to create the appearance that the services are provided from New Zealand and that the New Zealand registered entity is subject to regulation in New Zealand.

(d) The notice bases the opinion on general complaints made to the FMA which show that in such circumstances clients of FSPs mistakenly believe registration as an FSP in New Zealand means that the services are provided from New Zealand and the entity is regulated in New Zealand for the services provided.

(e) The notice then seeks submissions on:

(i) why Vivier is registered in New Zealand when it provides financial services substantially overseas; and

(ii) how Vivier complies with overseas legislation.

[98] As can be seen from the summary, the notice is vague and lacks sufficient particulars. It was not adequate to allow Vivier to make meaningful submissions. Vivier's Opposition makes clear its position where it seeks further information including:

(a) The evidence upon which the FMA relies for its allegation that the registration of Vivier on the FSPR is likely to have the effect of creating a false or misleading appearance of the extent to which Vivier provides financial services in New Zealand.

(b) Clarification as to whether the contention is that Vivier gives a false or misleading appearance of providing either greater or fewer financial services in New Zealand than is the case.

(c) The evidence upon which the FMA relies that the registration of Vivier on the FSPR is likely to have the effect of creating a false or misleading appearance of the extent to which Vivier provides financial services from a place of New Zealand.

(d) Clarification as to whether the contention is that Vivier gives a false or misleading appearance of providing financial services from a place of business inside New Zealand or from a place of business outside New Zealand.

(e) The evidence upon which the FMA relies that the registration of Vivier on the FSPR is likely to have the effect of creating a false or misleading appearance that it is regulated by New Zealand legislation in relation to the services.

(f) Clarification as to whether the contention is that Vivier gives a false or misleading appearance that it is regulated by New Zealand law or that it is not regulated by New Zealand law.

(g) Clarification as to whether any of the complaints mentioned in the Notice were made by clients of Vivier.

[99] I am of the view that in order to properly comply with s 18B(3)(a), the FMA's notice to an FSP in contemplation of deregistration must:

(a) State the specific scenario(s) contained in s 18A of the Act applicable to the FSP which make it necessary and desirable to consider the FSP's deregistration.

(b) Set out all the relevant supporting evidence that the FMA has relied on to come to the conclusion that the specific scenario(s) in s 18A applies to the FSP's activities.

(c) Give reasons as to why the relevant supporting evidence has led the FMA to the conclusion that the specific scenario(s) in s 18A applies to the FSP's activities and why this makes it necessary and desirable to consider deregistration.

[100] Accordingly, I am of the opinion that the FMA breached Vivier's natural justice rights in failing to furnish it with more detailed evidence and information about why the FMA was seeking Vivier's deregistration.

Decision

[101] In my view, the FMA committed errors of law by:

(a) failing to have satisfactory evidence upon which to base its factual findings under s 18A;

(b) failing to disclose the fact of the complaint/news article; and

(c) failing to provide Vivier with further information about its reasons for seeking deregistration.

[102] The appeal is allowed. The direction to the Registrar to deregister Vivier is quashed.

[103] The decision to issue the direction is referred back to the FMA for reconsideration.

[104] Vivier is entitled to costs on a 2B basis. In the absence of agreement, Vivier is to file its memorandum by 12 October 2015 and the FMA its reply by 2 November 2015.

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Brewer J