IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-000686
[2023] NZHC 3210

IN THE MATTER OF	an appeal against a decision made under the Financial Markets Conduct Act 2013
BETWEEN	ROCKFORT MARKETS LIMITED Appellant
AND	FINANCIAL MARKETS AUTHORITY Respondent

Hearing:	11 July 2023
Appearances:	D H McLellan KC and J V R James for Appellant S McMullan, M Djurich and S Chapman for Respondent
Judgment:	14 November 2023
Public Version:	30 August 2024

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 14 November 2023 at 4.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Counsel/Solicitors:
D H McLellan KC, Auckland
Anthony Harper, Auckland
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TABLE OF CONTENTS

Relevant facts [4]
Conditions of licence [5]
2019 Review [9]
Advertising [14]
Censure [15]
Direction Order [16]
2021 Review [21]
Notice of intention and decision to cancel [23]
Statutory scheme [28]
Test for cancellation of licence [36]
Approach to the evidence [45]
Mr Greenslade's affidavit [46]
FMA report [57]
Is the appeal against the exercise of a discretion or a general appeal? [61]
Did the FMA wrongly decide there had been material contraventions of the market services licensee obligations? [74]
Admitted contraventions [76]
Standard Condition 5 [78]
Standard Condition 12 [96]
Specific Condition 1 [114]
Section 82 [122]
Did the FMA wrongly decide that Rockfort no longer met the requirements referred to in s 396(c) and (d) of the Act? [135]
Section 396(c) – performance requirement [139]
Advertising and disclosure [141]
Maintaining records [144]
Governance, capability, material issues and complaints [148]
Section 396(d) – contravention requirement [151]
Did the FMA wrongly decide that it should cancel Rockfort's licence under s 414 of the Act? [160]
Result [171]

[1] On 16 March 2023, the Financial Markets Authority (FMA) gave notice that it was cancelling the appellant's (Rockfort Markets Ltd, "Rockfort") derivative issuer licence (licence) under s 414(3) of the Financial Markets Conduct Act 2013 (Act). Cancellation was to be effective from 18 September 2023 with conditions imposed on the licence in the meantime.

[2] The FMA made the decision to cancel because it was satisfied that Rockfort had materially contravened eight of its market services licensee obligations and it no longer met the requirements for a licence being issued. Rockfort now appeals.

[3] There are four issues to be determined:

(a) Is the appeal against the exercise of a discretion or a general appeal?

(b) Did the FMA wrongly decide that there had been material contraventions of the following market services licensee obligations:

(i) Standard Condition 5.

(ii) Standard Condition 12.

(iii) Specific Condition 1.

(iv) Section 82 of the Act.

(c) Did the FMA wrongly decide that Rockfort no longer met the requirements referred to in s 396(c) and (d) of the Act?

(d) Did the FMA wrongly decide that it should cancel Rockfort's licence under s 414 of the Act?

Relevant facts

[4] Rockfort offers leveraged trading on "contracts for difference" for a range of underlying assets. Contracts for difference are a type of derivative. Derivatives are a

type of agreement where the amount of consideration or value of the agreement is determined by the value of something else.[1] They are complex financial instruments and trading in derivatives is inherently risky.

Conditions of licence

[5] Rockfort applied for its licence on 24 November 2016. It was granted on 26 February 2018. At that time, it had three directors who the FMA considered had the collective experience and skills to govern the business and oversee compliance with Rockfort's licence obligations.

[6] A derivatives licence is subject to the Standard Conditions (SC) for derivative issuers specified under the Act. Rockfort's licence was also subject to two Specific Conditions requiring it to:

(a) maintain the same or better standard of capability, governance and compliance as was the case when the FMA assessed its derivatives issuer application; and

(b) engage a third party, approved by the FMA, to conduct an independent and comprehensive review of Rockfort's internal risk and compliance framework, conflicts policy, and other policies relating to its proprietary trading operations as well as review Rockfort's compliance with these policies.

[7] In 2018 Rockfort engaged Strategi Limited (Strategi) to carry out the necessary review of its compliance framework and various policies. Mr Greenslade is the Executive Director of Strategi and has sworn an affidavit in support of Rockfort's appeal.

[8] On 30 October 2018, Rockfort submitted a report to the FMA by Strategi in compliance with the second of the Specific Conditions listed above. A remediation plan was also submitted which set out a pathway to implement the Strategi

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1 Financial Markets Conduct Act 2013, s 8(4).

recommendations. This plan included a review of Rockfort's "Compliance Assurance Programme".

2019 Review

[9] In June 2019 the FMA undertook a monitoring review to ascertain Rockfort's compliance with conditions of its licence (2019 Review). The FMA wrote to Rockfort following this review expressing concern that Rockfort did not meet several conditions. It made three "high priority" findings. Two are relevant to this appeal:

(a) Rockfort did not have a process in place to ensure that introducing brokers possessed the required authorisation, licence, or registration for the jurisdictions in which they operated (as per SC 1).

(b) Rockfort did not perform adequate initial and ongoing suitability assessments of products for retail clients (as per SC 12).

[10] Other "medium priority" findings were also made regarding Rockfort's culture and the management of accounts by intermediaries without proper authorisation. The FMA indicated to Rockfort that it was considering whether other regulatory action was appropriate.

[11] Rockfort responded by stating that it considered its processes were broadly consistent with others operating in the market. Nevertheless, it said it would implement a due diligence policy and perform up front checks before entering into business relationships with introducing brokers. It also confirmed it had begun addressing its product suitability assessments.

[12] Rockfort also produced an action plan which set out several deadlines by which certain steps would be taken. These steps included: reviewing existing introducing brokers; developing a due diligence policy for introducing brokers; and implementing a framework for assessing the suitability of products to meet the requirements of SC 12.

[13] Rockfort also advised the FMA that it had engaged Strategi to assist with the review of its "Compliance Assurance Programme" which had not been completed due to a change in compliance personnel and a forthcoming financial year end audit which Rockfort considered would give it useful input into the programme.

Advertising

[14] On 21 August 2019, the FMA wrote to Rockfort about various statements on Rockfort's website. It considered at least two statements were false and/or misleading and in breach of pt 2 of the Act. It asked Rockfort to immediately remove these statements. Despite assurances that they had been removed, both statements were only removed in December 2019, and only in response to further requests from the FMA.

Censure

[15] On 21 May 2020, the FMA censured Rockfort. This followed notification of its intention to do so and its invitation for submissions. The censure related to some of the compliance failures identified during the 2019 Review including failure to maintain the same or better standard of governance as at the time of submitting its derivative issuer application.

Direction Order

[16] Between August and October 2020, the FMA again engaged with Rockfort concerning certain statements made by it which the FMA considered were likely to mislead prospective clients contrary to pt 2 of the Act.

[17] On 23 October 2020, the FMA wrote in relation to six representations made by Rockfort on its website and in social media which the FMA considered were misleading and in contravention of pt 2 of the Act. The FMA requested Rockfort to immediately remove the offending statements.

[18] The FMA determined that there was only partial compliance with its requests. Consequently, on 23 December 2020, the FMA provided Rockfort with a notice of intention to issue a Direction Order under s 468 of the Act.

[19] On 25 January 2021, Rockfort contested some of the FMA's claims but indicated that whether a Direction Order was issued or not, it intended to take certain steps to ensure compliance with pt 2 of the Act. These included a full audit of Rockfort's marketing materials; a review of the advertising policy; an arrangement of external training on advertising compliance; and a review of its external advertising agency appointment.

[20] Despite these promises, the FMA concluded that Rockfort had contravened, and was likely to contravene in the future, various provisions of the Act. Accordingly, on 3 March 2021, the FMA issued a Direction Order directing Rockfort to remove offending material and take steps to ensure its marketing materials complied with the Act. This included not making statements suggesting that investing in derivatives was safe or free from risk or losses.

2021 Review

[21] The FMA conducted a further on-site monitoring review on 21 and 22 July 2021. During that review the FMA was informed that Rockfort only had one director between 9 April 2021 and 1 November 2021, and it was having difficulty recruiting others. Rockfort had also identified several gaps in its board's capabilities and competencies, including a lack of understanding of government legislation and legislative process.

[22] As described further below, many of the issues identified during this review form the basis of the FMA's decision to cancel the licence.

Notice of intention and decision to cancel

[23] A notice of intention to cancel the licence was issued on 12 August 2022 (Notice of Intention).

[24] The Notice of Intention identified ten material contraventions of licensee obligations and set out the FMA's view that Rockfort was no longer capable of effectively performing the services of a derivatives issuer and that it had reason to believe that Rockfort would likely contravene a market services licensee obligation in

the future. The FMA signalled an intention to cancel Rockfort's licence, with the imposition of conditions in the meantime.

[25] Rockfort subsequently engaged Strategi to assist it in responding to the Notice of Intention. On 4 November 2022 it provided submissions together with an "Action Plan" prepared by Strategi. Additional correspondence was sent to the FMA on 17 February 2023.

[26] The Action Plan outlined steps to be taken in response to each of the contraventions identified by the FMA. These steps included a review by Strategi of existing policies and procedures and the training of employees. Strategi was also engaged to provide monthly services and to assist with compliance until a new Head of Compliance was recruited. Rockfort's arrangements with Introducing Brokers were restructured so that contracts would be through a new company. Rockfort stopped all advertising and the onboarding of new clients pending the review of its policies and procedures.

[27] Following consideration of these submissions and the Action Plan, the FMA issued a final decision cancelling Rockfort's licence on 16 March 2023. The decision confirmed that the FMA maintained its position in relation to most, but not all, of the market services licensee obligations identified in the Notice of Intention. The reasons for cancellation were set out in the decision.

Statutory scheme

[28] The FMA was established in 2011. Its main objective is to "promote and facilitate the development of fair, efficient, and transparent financial markets".[2] Its functions include performing and exercising the powers conferred on it by the Act.

[29] The main purposes of the Act are to:[3]

> (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and

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2 Financial Markets Authority Act 2011, s 8.
3 Financial Markets Conduct Act 2013, s 3.

(b) promote and facilitate the development of fair, efficient, and transparent financial markets.

[30] Additional purposes of the Act include providing for timely, accurate, and understandable information to be given to investors to assist them in making investment decisions while avoiding unnecessary compliance costs.[4]

[31] The FMA has certain powers to regulate the breach of a market services licensee obligation. A market services licensee obligation is defined to include an obligation imposed under a condition of the licence or the Act.

[32] The provisions governing the FMA's powers where there has been a contravention of market services licensee obligations are set out in ss 414 and 415 which are found in subpt 3 of pt 6 of the Act. That subpart contains provisions relating to the monitoring and enforcement of licences.

[33] Section 414 of the Act provides:

> **414 FMA's powers in case of contravention of market services licensee obligation, material change, etc**
>
> (1) The FMA may exercise a power under subsection (2) if it is satisfied that—
>
> (a) a licensee or an authorised body has materially contravened a market services licensee obligation; or
>
> (b) a material change of circumstances has occurred in relation to a licence; or
>
> (c) the information provided under section 395 or 404 by a licensee is false or misleading in a material particular; or
>
> (d) a licensee or an authorised body is likely to materially contravene a market services licensee obligation or a material change of circumstances is likely to occur in relation to a licence.
>
> (2) The FMA may, by written notice to the licensee or an authorised body and otherwise in the prescribed manner, do 1 or more of the following:

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4 Financial Markets Conduct Act 2013, s 4 (a) and (c).

(a) censure the licensee or authorised body (or both):

(b) require the licensee or authorised body (or both) to submit an action plan to the FMA within the time and in the manner specified by the FMA:

(c) give a direction to the licensee or authorised body (or both).

(3) The FMA may also, by written notice to the licensee and otherwise in the prescribed manner, suspend (for a specified period or until a specified requirement is met and in relation to the licensee, any authorised body or bodies, or all of them) or cancel the licence of the licensee if it is satisfied that—

(a) subsection (1)(a), (b), or (c) applies; and

(b) the licensee or an authorised body does not meet, or no longer meets, the requirements referred to in section 396(a) to (g) or 400(1)(a) to (e) or (1A)(a) to (e) (where those provisions are applied with all necessary modifications as if references to the applicant or body corporate (or entity) were references to the licensee or authorised body respectively).

[34] Section 415 of the Act sets out the procedure for exercising powers under s 414. That section provides:

415 Procedure for exercising powers

(1) The FMA must not exercise a power under section 414 unless—

(a) the FMA gives the licensee or an authorised body no less than 10 working days' written notice of the following matters before it exercises the power:

(i) that the FMA may exercise the power; and

(ii) the reasons why it may exercise the power; and

(b) the FMA gives the licensee or authorised body or the licensee's or authorised body's representative an opportunity to make written submissions on the matter within that notice period.

(2) The FMA must, before exercising a power under section 414(3), consider whether, in the circumstances, it would be more appropriate to exercise a power under section 414(2).

[35] Section 414(3) refers to the requirements set out s 396(a) to (g) of the Act. Section 396 is found in subpt 2 of pt 6 of the Act. It governs when a licence must be issued. The FMA found that Rockfort no longer met the requirements referred to in s 396(c) and (d) of the Act which provide:

> **396 When licence must be issued**
>
> The FMA must, after receiving an application under section 395, issue a licence that covers a market service or the class of market service to which the application relates if the FMA is satisfied that—
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> …
>
> (c) the applicant is capable of effectively performing that service (having regard to the proposed conditions of licence); and
>
> (d) there is no reason to believe that the applicant is likely to contravene the market services licensee obligations; and…

Test for cancellation of licence

[36] The test for cancellation of a licence under ss 414 and 415 of the Act has three limbs:

(a) The FMA must be satisfied that either s 414(1)(a), (b) or (c) applies;[5] and

(b) The FMA must be satisfied that a licensee does not meet, or no longer meets, the requirements referred to in ss 396(a) to (g) or 400(1)(a) to (e) or (1A)(a) to (e) of the Act;[6] and

(c) The FMA must consider whether it would be more appropriate for the FMA to either censure the licensee; require it to submit an action plan; or give it a direction.[7]

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5 Section 414(3)(a). In this case, the FMA relies on s 414(1)(a), that is, that the licensee materially contravened a market services licensee obligation.

6 Section 414(3)(b). In this case, the FMA relies on s 396(a) and (d).

7 Section 415(2).

[37] The first and second limbs of this test require the FMA to be "satisfied" of the relevant thresholds. "Satisfied" does not import a burden or standard of proof but requires the decision-maker to "make up its mind".[8]

[38] Each of s 414(1)(a), (b) and (c) in the first limb of the test requires a "material" contravention of a market services licensee's obligation. Materiality is not defined but it is a phrase which appears in various statutory provisions in the Act. These other statutory provisions suggest that materiality involves something that has an affect or influence on either investors or licensees.[9]

[39] Drawing on the meaning attributed to materiality in other legislative contexts, the FMA submits that a material contravention requires more than a trivial or inconsequential contravention and must be a matter of moment or some significance.[10] I agree.

[40] Whether a contravention is "material" in the sense of being more than trivial or inconsequential will depend on the particular facts and circumstances of each case. Factors relevant to that assessment include: the main and additional purposes of the Act set out in ss 3 and 4; the nature of the contravention; the circumstances in which the contravention arises; and the nature of the risk posed by the contravention.

[41] The second of the three limbs directs the FMA to consider the requirements referred to in s 396. Section 396 is found in subpt 2 of pt 6 of the Act which governs when a licence must be issued. Section 393 is also found in that subpart and sets out the principles which guide the way in which the FMA must exercise its powers under that subpart. These principles include whether exercise of the power is "necessary or desirable" in order to promote the main and additional purposes specified in ss 3 and

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8 *R v White* [1988] 1 NZLR 264 (CA); and *R v Leitch* [1998] 1 NZLR 420 (CA).

9 For example, see s 59 which provides for "material information" which is defined as information that, among other things, a reasonable person would expect to, or would be likely to, influence persons who commonly invest in financial products in deciding whether to acquire the financial product on offer.

10 See *New Zealand Transport Agency v Walters Holdings (*2008) Ltd [2020] NZHC 1715, [2020] 3 NZLR 537 at [66]; *Serious Fraud Office v Harris* [2021] NZHC 1693 at [142] (citing with approval Mathew Downs (ed) Adams on Criminal Law (online looseleaf, Thomson Reuters) at [CA 242.03] and [CA240.16]; *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [45]; *R v Sullivan* [2014] NZHC 2501 at [441].

4 of the Act. Section 393(b) also provides that in exercising the power, the FMA should "not unnecessarily restrict the licensing of persons".

[42] Section 393 of the Act does not apply to decisions to cancel a licence because the evaluation of s 396 factors pursuant to s 414(3)(b) does not involve the exercise of a power under subpart 2. The FMA is not considering whether to grant a new licence under subpt 2, but whether to cancel an existing licence under subpt 3 of pt 6.

[43] Nevertheless, the principles set out in s 393 create a lens through which the FMA must consider whether the requirements in s 396 are being met. More generally, the exercise of the FMA's powers under ss 414 and 415 of the Act will be informed by the main and additional purposes of the Act.

[44] Finally, the FMA's decision under the third limb of the test is limited to the choices set out in s 414(2) (censure; action plan; or direction). Whether one of those powers would be "more appropriate" in the circumstances will be informed by the conclusions reached on the first two limbs of the test and the purposes of the Act.

Approach to the evidence

[45] The FMA challenges the admissibility of Mr Greenslade's affidavit sworn in support of Rockfort's appeal. For its part, Rockfort challenges aspects of the report filed by the FMA for the purposes of the hearing. Both challenges are considered below.

Mr Greenslade's affidavit

[46] Mr Greenslade is Strategi's Executive Director. Strategi assisted with Rockfort's response to the FMA's Notice of Intention to Cancel and prepared the accompanying Action Plan. Strategi has also been engaged by Rockfort on prior occasions to review policies and assist Rockfort to meet its compliance objectives.

[47] The FMA objects to Mr Greenslade's evidence on the basis that it is neither impartial nor independent and is therefore in breach of s 26 of the Evidence Act 2006 (which requires experts to conduct themselves in accordance with applicable rules of

court) and the Code of Conduct for experts set out in sch 4 of the High Court Rules 2016 (Code).

[48] Clause 1 of the Code requires an expert witness to "assist the court impartially on relevant matters within the expert's area of expertise". Failure to comply with the duty of impartiality will constitute a breach of r 9.43 of the High Court Rules. Evidence will only be admitted in those circumstances with the permission of the Judge.[11]

[49] The FMA also says that the lack of impartiality renders Mr Greenslade's evidence unreliable and therefore not substantially helpful within the meaning of s 25 of the Evidence Act. Accordingly, the FMA says the evidence is inadmissible under s 25 too.

[50] The lack of impartiality is said to stem from Strategi's prior involvement with Rockfort which dates to 2018 and its current involvement with Rockfort which is set to continue for the foreseeable future. Strategi has been engaged by Rockfort to provide an outsourced compliance service for a monthly fee, which, the FMA submits, means that Strategi has a strong financial interest in Rockfort's appeal being allowed.

[51] In *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*, the Court of Appeal upheld the trial Judge's decision to rule that the expert evidence adduced on behalf of the appellant was inadmissible.[12] The Court of Appeal noted that the evidence was impartial. That was because the claim advanced on behalf of *Prattley* was prepared before trial in the capacity of an advocate and pursued at trial in the guise of an expert.[13] The expert also had a "powerful financial interest" in his evidence being accepted as he was the principal director of the company engaged by the appellant on a no-win no-fee basis.[14]

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11 Evidence Act, s 26(2).
12 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750.
13 At [104].
14 At [13] and [104].

[52] There is no doubt in this case that Mr Greenslade has the requisite expertise and experience to qualify as an expert within the meaning of s 4 of the Evidence Act. Mr Greenslade has over 20 years' experience advising on licensee compliance requirements, has several qualifications, and is a member of relevant professional organisations.

[53] Mr Greenslade's affidavit comprises a mix of fact and expert opinion. He describes the preparation of the Action Plan and explains how, in his opinion, the Action Plan meets the FMA's concerns in relation to each contravention of the licence and how it will prevent future contraventions. That evidence is clearly relevant to the issues to be determined in the appeal and, in that sense, it holds probative weight.

[54] It is a concern that Mr Greenslade did not initially agree to abide by the Code for expert witnesses and made no reference to it in his first affidavit. Nevertheless, Mr Greenslade swore an updating affidavit in the proceeding explaining that the failure to refer to the Code was simply an oversight and he subsequently agreed to abide by it.

[55] That addresses the issue insofar as compliance with the Code is concerned, but it does not address the issue of impartiality. I consider there to be an element of partiality in Mr Greenslade's evidence in the sense that Strategi's competence is linked to the assessment of Rockfort's ability to comply. Strategi also has a financial interest in ensuring Rockfort retains its licence.

[56] The extent of the impartiality in Mr Greenslade's evidence is not the same as in *Prattley*. There were other issues with the expert evidence in that case which rendered it unreliable and not substantially helpful. Those other factors are not present in this case and there is no reason to disregard Mr Greenslade's affidavit in its entirety. Rather, I consider the lack of partiality in Mr Greenslade's affidavit is a matter going to the weight to be attributed to his opinions. I have approached his evidence on that basis.

FMA report

[57] The FMA has issued a report under r 20.15 of the High Court Rules. That rule provides for reports which address the following matters:

> (a) any considerations, other than findings of fact, not set out in the decision but to which the decision-maker had regard in making the decision appealed against:
>
> (b) any information about the effect that the decision might have on the general administration of the enactment under which the decision was made:
>
> (c) any other matters relevant to the decision or to the general administration of the enactment under which the decision was made that should be drawn to the attention of the court.

[58] It addresses subjects such as the nature of a derivative, associated risks, the number of licensed derivatives issuers in New Zealand, how action plans mitigate risk and the effects the decision may have on the administration of the Act.

[59] Rockfort contends that the report is overly general and discusses matters that are not directly relevant to the appeal. I agree that the matters canvassed in the FMA's report are general in nature, but they are nevertheless relevant. For example, a description of the risks associated with trading derivatives provides important context to the regulatory regime.

[60] There is no prejudice to the appellant in the filing of this report. Rule 20.15(3) preserves the right of every party to an appeal to be heard and tender evidence on any matter referred to in the report. Rockfort made submissions on those aspects of the appeal it considered irrelevant and referred to the evidence of Mr Greenslade in responding to questions of risk. That is sufficient to address Rockfort's concerns and nothing more is required.

Is the appeal against the exercise of a discretion or a general appeal?

[61] The appeal is brought under s 531 of the Act which provides:

> **531 Appeals against market services licence decisions**
>
> A person may appeal to the court against a decision of the FMA under Part 6 to—
>
> (a) decline to issue a licence to the person or to authorise the person to provide a service under the licence; or
>
> (b) impose conditions on the person's licence or proposed licence or to vary, revoke, add to, or substitute any conditions on the person's licence; or
>
> (c) decline an application to vary the conditions of the person's licence; or
>
> (d) exercise a power in respect of the person under section 414 or 418 (which relates to the FMA's powers in the case of contraventions, etc).

[62] Section 531 is found in subpt 9 of pt 8 of the Act. Rockfort contends that the appeal is a general appeal meaning that the Court should approach it as a rehearing. Conversely, the FMA says that cancellation of a licence requires both evaluative and discretionary assessments. It submits that the first two limbs are threshold enquiries and involve evaluative conclusions. However, the third limb involves the exercise of a discretion. Accordingly, the FMA says that the standard of appeal will vary depending on which aspect of the decision is challenged.

[63] This is the first appeal of its kind under s 531, so there is no guidance on the appropriate standard of appeal. However, some assistance may be gained from the Court of Appeal's decision in *FMA v Vivier*.[15] That case concerned a decision by the FMA to deregister the respondent under the Financial Services Providers (Registration and Dispute Resolutions Act) 2008 (Registration Act). The statutory provisions at issue in that case required the FMA to consider whether it was "necessary or desirable" for a financial service provider to be deregistered. The FMA was required to give written notice of its intention to direct deregistration including the reasons why it intended to give the direction. The financial service provider was given an opportunity

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[15] *Financial Markets Authority v Vivier and Company Ltd* [2016] NZCA 197, [2016] 3 NZLR 70.

to make submissions in response to the notice, with the FMA making a final decision thereafter. Reasons for the final decision also had to be provided. There was a statutory right of appeal to the High Court.

[64] As counsel for the FMA points out, there are differences between the legislative regime at issue in *Vivier* and this case. Nevertheless, I consider the similarities between the two schemes are sufficient to make the Court of Appeal's decision applicable to decisions under ss 414 and 415 of the Act. I say that for four reasons.

[65] First, the relevant provisions in both legislative schemes are concerned with deregistration or cancellation. Both schemes require the FMA to undertake an evaluation of the criteria set out in the Act before deciding whether to issue a direction to deregister or to cancel a licence. Under the Registration Act, the FMA must consider whether a direction to deregister is "necessary or desirable" considering s 18A of the Registration Act.

[66] Counsel for the FMA submits that the criteria in s 18A guides the exercise of the FMA's deregistration decision, whereas there is no guidance on whether one of the other forms of enforcement set out in s 414(2) might be more appropriate. Therefore, the FMA says that the decision to cancel under s 414(2) is the exercise of a true discretion.

[67] While the FMA's discretion under s 415(2) is not expressly guided by statutory criteria, it is nevertheless constrained by the alternatives listed in that subsection. That is, the "appropriateness" decision is limited to consideration of cancellation and the three listed alternatives. In that sense at least the "necessary or desirable" enquiry under the Registration Act involves the exercise of a broader discretion than under s 415(2) of the Act.

[68] More importantly, the discretion to be exercised under s 415(2) is by reference to the "circumstances" of the case. That means the discretion will be exercised by reference to the statutory criteria set out in s 414(3). In other words, it will be the FMA's evaluation of the s 414(3) criteria which will inform its decision on whether it would be more appropriate to take one or other of the s 414(2) steps. That is very

similar to the considerations under s 18A which inform the FMA's decision about whether deregistration is "necessary or desirable".

[69] Second, s 416 of the Act requires the FMA to state reasons for giving the notice of cancellation under s 414(3). This is in addition to the reasons set out in the Notice of Intention as required by s 415(a). The FMA must also include reasons for any direction regarding deregistration under the Registration Act. This, coupled with the right of appeal, was key to the Court of Appeal's decision in *Vivier* that "what is required is a reasoned decision capable of being contested, on appeal, on its merits".[16] That reasoning applies with equal force in this case.

[70] Third, while s 531 of the Act is not expressed in the same broad terms found in s 42(3)(b) of the Registration Act (which the Court of Appeal found was a "classic indicator" of a general appeal), Parliament's intention may nevertheless be discerned from a comparison of s 531 to the other sections prescribing appeal rights.[17] Unlike those other sections, s 531 is not limited to appeals on a question of law. Indeed, there are no express constraints on appeal rights in s 531 at all.

[71] Interpreting s 531 as affording a general right of appeal is consistent with r 20.18 of the High Court Rules, which provides that an appeal is to proceed by way of rehearing, and the Court may make any decision it thinks should have been made.

[72] Fourth, it is preferable that the same standard of appeal apply to decisions by the FMA which have similar consequences for the market participant. They are final decisions which impact on the ability of a participant to trade. It is appropriate that those who have been deregistered, and those who have had their licence cancelled by the FMA, have the same rights of appeal from those respective decisions.

[73] For these reasons, I consider the appeal proceeds as a standard appeal and the principles applicable in *Austin Nichols & Co Ltd v Stichting Lodestar* apply.[18] Accordingly, the appeal Court must come to its own view on the merits. The weight it gives to the decision of the FMA is a matter of judgment and the appellant bears the

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16 At [43].
17 At [43].
18 *Austin Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

onus of showing the original decision was wrong. Given the FMA's particular advantage in terms of technical expertise, this appeal Court may hesitate to conclude that its findings of fact are wrong.[19]

Did the FMA wrongly decide there had been material contraventions of the market services licensee obligations?

[74] A market services licensee obligation is defined in s 6 of the Act. It includes obligations imposed under a condition of licence and under the Act.

[75] The FMA's decision identified eight material contraventions. Of these eight, only four are appealed. As the admitted contraventions are relevant to the decision to cancel, they are briefly considered first, followed by the four contested contraventions the subject of this appeal.

Admitted contraventions

[76] The material contraventions which Rockfort has admitted are as follows:

(a) SC 1 (Prohibition on dealing with unregulated financial service providers). Rockfort failed to take reasonable steps to ensure introducing brokers had the required authorisations, licences or registrations.

(b) SC 3 (records). Rockfort failed to have adequate records of the suitability assessments carried out pursuant to SC 12.

(c) Section 479(1) of the Act (person must comply with order made by the FMA). Rockfort failed to comply with a direction issued under s 468 of the Act relating to statements published on Rockfort's website.

(d) Regulation 191(1)(c) of the Financial Markets Conduct Regulations 2014 (reporting condition). Rockfort failed to notify the FMA of

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19 *Innovative Securities Ltd v Financial Markets Authority* [2017] NZHC 1187, [2017] NCCLR 25 at [77].

changes to the positions of Head of Dealing, Head of Compliance, and General Counsel.

[77] These admitted contraventions establish the threshold for cancellation, but the totality of the contraventions is relevant to the FMA's decision. For that reason, the contested contraventions are considered below.

Standard Condition 5

[78] SC 5 relates to compliance. It requires licence holders to have at all times adequate and effective systems, policies, processes, and controls that are likely to ensure licence holders will meet their market services licensee obligations in an effective manner.

[79] The explanatory note to SC 5 makes it clear that changes may be needed over time due to changes in the scope of the licensee's business or in the market as a whole. Licensees are also directed to consider whether their policies and processes are sufficient to meet the minimum standards set out in the FMA's Licensing Application Guide.

[80] The FMA says that Rockfort breached SC 5 by failing to have processes and policies in place in relation to SC 12, SC 1, and the minimum standards of advertising and disclosure set out in pt 2 of the Act.

[81] The first two contraventions may be addressed very briefly:

(a) SC 12 relates to the suitability of products for clients. The FMA relies on the contravention of SC 12 on a standalone basis. Accordingly, the associated contravention of SC 5 relating to policies and processes is addressed under that head.

(b) Rockfort admits contravention of SC 1. That condition requires licensees to take reasonable steps to ensure that any broker or introducing broker has the required authorisations, licences, or registrations for the jurisdictions in which it operates. While Rockfort

> required introducing brokers to warrant they were licensed or registered in their jurisdiction, it took no other steps to verify this information. It also failed to ensure the introducing broker agreements defined jurisdictional limits.

[82] The key contravention to consider under this head is the contravention relating to advertising policies and procedures to ensure compliance with the fair dealing conditions under pt 2 of the Act. That part of the Act contains provisions which, relevantly, prohibit misleading or deceptive conduct, making of false or misleading representations, and the making of unsubstantiated representations.

[83] The FMA refers to engagements with Rockfort in 2019, 2020, and 2021 relating to Rockfort's advertising to substantiate its decision that Rockfort does not have adequate and effective policies and processes to ensure compliance with pt 2 of the Act.

[84] Those engagements include a letter which the FMA wrote to Rockfort on 21 August 2019 regarding statements on its website which the FMA considered false and misleading. The website statements suggested that Rockfort was only one of a handful of companies listed on the FMA register in New Zealand, and that Rockfort "not only meets but exceeds the requirements of the FMA" and undertakes frequent audits to maintain its licence. Despite confirming to the FMA that it had removed these statements, the FMA identified that the infringing statements remained on the website on 25 September 2019.

[85] By way of explanation, Rockfort said that the infringing statements had appeared in two places rather than one as first thought. It again confirmed to the FMA that it had removed the statements in question. Nevertheless, on 6 December 2019, the FMA wrote to Rockfort in relation to one of the statements in question which remained on the website. In response, Rockfort explained that there appeared to be an issue with its website and confirmed (again) that it had been removed.

[86] Between August and October 2020, the FMA engaged with Rockfort again in relation to certain statements which the FMA considered were likely to mislead

prospective clients contrary to pt 2 of the Act. The FMA identified six such representations by Rockfort on its website and social media and requested that Rockfort remove them. Rockfort complied with only some of the FMA requests. Consequently, the FMA provided Rockfort with a Notice of Intention to issue a Direction Order under s 468 of the Act.

[87] On 25 January 2021, Rockfort responded to the Notice of Intention to issue a Direction Order. It informed the FMA that it did not necessarily agree that the statements identified by the FMA were misleading or contained unsubstantiated representations. Nevertheless, it stated that whether or not a Direction Order was issued, it intended to undertake a full audit and review of its advertising policy, arrange external training on advertising compliance, and review its external advertising agency appointment.

[88] Notwithstanding these intended actions, the FMA issued a Direction Order on 3 March 2021. That order required Rockfort to remove the offending material and to take steps in the future to ensure the marketing material complied with the Act. These steps included ensuring that statements (express or implied) were not made to the effect that Rockfort was licensed or regulated to provide financial services or products not covered under its licence.

[89] In response to the Direction Order, Rockfort acknowledged historic concerns but submitted that it had implemented a new Advertising and Marketing Approval Procedure on 1 April 2021 which met the FMA's concerns. Under the new procedure, the marketing executive prepares all advertising and marketing material and refers it to the Head of Compliance to review. The Head of Compliance either approves or asks for modifications which are completed before the material is published.

[90] Despite this new procedure being in place since 1 April 2021, the FMA discovered that Rockfort had continued to include statements in its marketing materials which suggested that Rockfort was licensed or regulated to provide forex and share-broking activities when those were not covered by its licence. This represented a contravention of the Direction Order. These statements were still on the website at the time the Notice of Intention was issued in August 2022.

[91] In its submissions in response to the Notice of Intention, Rockfort indicated that it had requested that Strategi review its Advertising and Marketing Approval Procedure for advertising material. Strategi recommended that a comprehensive record of all compliance checks of advertising be kept.

[92] Those intended steps are relevant to the likelihood of future compliance and the alternatives to cancellation. However, they do not form part of the enquiry into whether there was a material contravention of SC 5.

[93] I agree with the FMA's conclusion that Rockfort's repeated failures in this area indicate that it does not have adequate and effective policies, processes, and controls in place to ensure compliance with the obligations under pt 2 of the Act.

[94] The regulation of misleading and deceptive statements made by licensees is an important part of ensuring investors and potential clients make decisions based on full and accurate information. This supports the purposes of the Act of informed participation of investors in financial markets, and the provision of timely and accurate information to assist persons to make decisions.[20] The failure to have in place processes and controls to ensure compliance with these provisions is a material contravention of this condition. The repeated nature of the failures only adds to that conclusion.

[95] The FMA did not err in concluding that there was a material contravention of SC 5.

Standard Condition 12

[96] SC 12 provides:

> Before entering into a derivative with a retail investor you must ask the retail investor to provide information about the individual's knowledge, experience and level of understanding of the relevant type of derivative (unless you already have such information) so as to enable you to assess whether the derivative is suitable for the individual.

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[20] Financial Markets Conduct Act 2013, ss 3 and 4(a).

> When assessing suitability you must take all reasonable steps to determine whether the retail investor has the ability to understand the particular type of derivative and the risks involved.
>
> If, based on the information you have concerning the retail investor, you consider that the investor does not have the ability to understand the particular type of derivative and the risks involved, you must not enter into that derivative with the investor.
>
> If the retail investor elects not to provide the information to enable you to assess suitability, or if the investor provides insufficient information, you must warn them that you are required to request information from the investor in order to assess whether the derivative is suitable for the individual. The warning must note that without such information there is a strong risk you will not be able to assess whether they have the necessary ability to understand the derivative and the risks involved. This warning must also be in writing and prominently displayed.
>
> Consequently, you must strongly advise the investor to provide you with any requested information that you believe is necessary to enable you to assess suitability.
>
> If a retail investor asks you to go ahead with entering into a derivative in circumstances where you do not have sufficient information to assess whether the derivative is suitable for the individual, despite you having given the above warning, you may choose whether or not to go ahead with the transaction having regard to all the circumstances.

[97] The explanatory note to SC 12 states that the purpose of the condition is to reduce the possibility of derivatives being sold to people who do not have the ability to understand the derivative or the risks involved. The explanatory note also provides that the approach to the suitability assessment may be proportionate to the complexity of the derivative. It lists the type of information which a licensee may consider when assessing an investor's ability to understand the particular type of derivative and its associated risks.

[98] Rockfort required prospective investors to complete an online application form. That form posed seven questions. Three of these questions concerned the client's experience of trading over the past three years, and four related to the client's knowledge and understanding of derivative trading and related risks.

[99] Investors could select one of four options: never, rarely, occasionally or regularly in answer to the experience questions. As for the knowledge questions, investors could answer either "yes" or "no". If an investor answered a question "never" or "no", they were presented with the following risk warning:

> Your responses provided means we are unable to determine that you are suitable to trade Rockfort Markets products. Trading in Rockfort Markets derivative products may not be suitable for everyone as derivative products are considered high risk. Please ensure that you understand the risks involved before trading. A Product Disclosure Statement can be obtained here and should be considered before trading with us.

[100] Investors were then required to confirm that they understood Rockfort's products and the risks involved with trading those products before the application was submitted for processing. The processing of the application involved a Client Account Manager assessing a client's response to the suitability question, and then making a decision about whether to onboard an investor. That decision was subsequently reviewed and signed off by the Head of Compliance.

[101] Between 24 July 2018 and 2 July 2021, Rockfort onboarded 40 New Zealand based retail clients who had selected "never" and "no" to all seven questions. There was no evidence of Rockfort obtaining further information or clarification from these 40 clients before onboarding. Twenty-two of the 40 clients sustained substantial losses.

[102] The FMA says that SC 12 requires a licensee to obtain information on a client's knowledge, experience, and level of understanding, and use that information in its assessment of whether the client has the requisite ability to understand the derivative and the risks associated with it. The FMA says that a query as to whether a client understands the derivative and the risks involved in circumstances where the client has given answers to questions which indicate the derivative is unsuitable is insufficient to discharge the obligation in SC 12.

[103] Rockfort challenges the FMA's interpretation of SC 12. It says that SC 12 requires an assessment of a retail client's *ability* to understand the derivatives and risks, rather than an assessment of the client's *actual* knowledge and experience with derivatives. Rockfort relies on those parts of the explanatory note to SC 12 which refer to an assessment of a prospective client's ability to understand. It also relies on the equivalent provision found in the United Kingdom's Financial Conduct

Authority's Conduct of Business Sourcebook and the interpretation of that provision in *Quinn v IG Index Limited*.[21]

[104] Starting with the question of interpretation, I consider the clear focus of SC 12 is on an assessment of suitability of the type of derivative offered to the investor. Suitability depends on the ability of the investor to understand the type of derivative and the risks involved. The assessment of the investor's ability to understand, and thus the suitability of the product, will be informed by the prospective investor's knowledge, experience and level of understanding. If, based on that information, the licensee considers that an investor does not have the ability to understand, then the licensee must not enter into that derivative with the investor.

[105] The position is different if the investor does not provide any information or sufficient information to allow a suitability assessment to be made. In those circumstances a warning must be given. The content of that warning is set out in SC 12 and includes a reference to the importance of the information sought and the "strong risk" that a suitability assessment cannot be made without that information. If the investor asks the licensee to go ahead in those circumstances, then the licensee has a choice whether to do so.

[106] SC 12 places a positive onus on the licensee to seek information regarding knowledge, experience, and the level of understanding to allow the ability of an investor to understand, and therefore the suitability of the product, to be determined. It is not enough to pose questions which do not elicit sufficient information to allow the suitability assessment to be made. If that were the threshold, then even if the prospective client answered all the questions posed by a licensee, there would be insufficient information to make a suitability assessment. That is not consistent with the purpose of SC 12.

[107] Applying that interpretation of SC 12 to the facts of this case, I consider there was a contravention of SC 12 in relation to the 40 investors onboarded by Rockfort. All 40 of those investors answered "no" or "never" to all seven questions, indicating a lack of experience and knowledge of the nature of the derivative offered. That

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[21] *Quinn v IG Index Ltd* [2018] EWHC 2478 (Ch).

strongly suggested that the investor did not have the ability to understand the derivative product, rendering it unsuitable for the investor. In those circumstances, SC 12 prohibited the licensee from entering the derivative with the investor. The fact that a warning was then given, and a follow-up question was posed to the investor, did not discharge the responsibilities under SC 12 regarding the suitability assessment.

[108] To the extent there is any disagreement about whether the answers to the questions suggest an inability to understand, then, at the very least, the answers given by these investors were insufficient to enable the suitability assessment to be made. Further information needed to be sought on the investor's knowledge and experience. Rockfort did not do that. A question which asks the investor to confirm their understanding of the derivative and the associated risks is insufficient for that purpose.

[109] Rockfort's reliance on case law concerning the equivalent rule in the United Kingdom does not assist it in this case. While there are similarities between the two rules, there are also differences which mean there should be caution in drawing comparisons. More fundamentally, the assessment of contravention of SC 12 is a fact specific determination, and the circumstances of Rockfort's contravention are different to those considered in *Quinn v IG Index Ltd*. That case does not bear weight on the determination of a contravention of SC 12 in this case.

[110] Rockfort says the ambiguity in SC 12 (and the explanatory note) nevertheless means that any contravention cannot be material. I do not agree. While the explanatory note to SC 12 could be expressed more clearly, I do not consider SC 12 to be ambiguous. The onus is squarely on the licensee to ensure sufficient information is sought to enable an assessment of suitability (including the investor's ability to understand) to be undertaken. That obligation is heightened in relation to the high-risk nature of derivatives in this case. The requirement is a manifestation of the main purpose in s 3(a) of the Act which is to promote the confident and informed participation of investors in financial markets. The failure to undertake the suitability assessment, and the failure to properly assess suitability, undermines this main purpose.

[111] The fact that Rockfort was on notice since 2019 in relation the requirements of SC 12 adds weight to the materiality of the contravention. All but two of the 40 clients referred to above were onboarded after 2019. Rockfort was required to develop, document and implement a specific framework for assessing the suitability of products for clients prior to onboarding. During the 2021 review, it confirmed that it had failed to take any such steps. I agree with the FMA that Rockfort materially contravened the requirements of SC 12.

[112] There was also a contravention of SC 5 in relation to SC 12. Rockfort failed to have adequate policies and processes to ensure compliance with SC 12. This was highlighted during the 2021 review in which Rockfort was unable to produce suitability records for all of its investors, and the lack of a policy by which the criteria to assess suitability could be monitored. The direct contraventions of SC 12 also represented a failure to ensure there were adequate and effective systems, policies, processes, and controls in place to ensure that market services obligations were met in an effective manner. That is, the repeated failures were also a material contravention of SC 5.

[113] The FMA was correct to conclude there was a material contravention of SC 12 and SC 5 in this respect.

Specific Condition 1

[114] Under Specific Condition 1, Rockfort must maintain the same or better standard of capability, governance, and compliance as was the case when the FMA assessed Rockfort's initial licensee application.

[115] At the time Rockfort was issued a licence it had three directors who the FMA considered had the collective experience and skills to govern the business and oversee compliance with Rockfort's market services licensee obligations. In its initial application, Rockfort had also indicated that it would have a dedicated Compliance Officer.

[116] The FMA says there were the following contraventions of this condition:

(a) Rockfort had only one director instead of three directors for a period of seven months.

(b) There were shortcomings in the board's competency during the seven-month period when there was only one director due to gaps in the knowledge of the single director.

(c) Rockfort moved from having a dedicated Compliance Officer at the time of its application to a combined Compliance Officer/General Counsel role.

[117] Rockfort's position is that it has maintained the same standard of governance despite the change in arrangements. The combination of the compliance role with the general counsel role did not detract from the compliance responsibilities associated with the role or affect its ability to be compliant.

[118] That position cannot be maintained in the face of the various compliance issues identified during the seven-month period that Rockfort only had one director (April 2021–November 2021). It was these compliance issues which ultimately led to Rockfort's licence being cancelled. Significantly, these compliance issues were identified by the FMA through monitoring and reviews, rather than through self-identification and self-report.

[119] I also agree with the FMA that, as a matter of logic, the merger of the roles of General Counsel and Chief Compliance Officer diminished the resources dedicated to compliance. While the impact of that might have been moderated to some degree by the appointment of a Client Services Executive, that appointment was not made until December 2021, some nine months after Rockfort's board was reduced to a single director.

[120] In summary, it is clear that for a period of at least seven months there was a drop in the standard of capability, governance and compliance. The magnitude of the drop reflects the materiality of the contravention of Specific Condition 1. The change was from three directors to one director, and there was also a reduction in the capability

dedicated to compliance. The contravention had a real effect with significant compliance issues being identified during this period which ultimately led to the cancellation of the licence.

[121] The FMA was correct to find a material contravention of Specific Condition 1.

Section 82

[122] Derivative issuers are required to provide a Product Disclosure Statement prior to offering derivatives or distributing an application form for an offer of derivatives. The Product Disclosure Statement must include details of any hedging counterparty, including, in some circumstances, a link or URL to an internet site maintained by or on behalf of the hedging counterparty.[22]

[123] Under s 82(1)(a)(ii) of the Act, a financial product must not be offered, or continued to be offered, if there is an omission of information from the Product Disclosure Statement that is "materially adverse from the point of view of an investor".

[124] Rockfort's Product Disclosure Statements recorded that Rockfort may engage in authorised hedging activities, but they did not contain the mandatory information relating to hedging counterparties. Rockfort accepts there were omissions but nevertheless disputes that they are "materially adverse from the point of view of an investor".

[125] There is no New Zealand case law on the meaning of "materially adverse from the point of view of an investor" under s 82 of the Act. Accordingly, meaning is to be ascertained from the text, and in light of purpose and context.[23]

[126] Section 82 falls within subpt 2 of pt 3 of the Act which deals with the procedure for making regulated offers. Section 49 falls within that same part and subpart. It provides that a purpose of the Product Disclosure Statement is to provide certain information "that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial products".

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22 Financial Market Conduct Regulations 2014, sch 6, cl 19(3)(b) and (c).
23 Legislation Act 2019, s 10.

[127] The meaning of "materially adverse from the point of view of an investor" also needs to be considered in light of the promotion of informed and transparent financial market purposes of the Act, and the provision of "accurate" information to assist.[24] The principles relevant to "materiality" in the context of a material contravention (at [38]–[40]) of this judgment will also be relevant here.

[128] Case law on the equivalent provision in Australia may also offer some guidance. Section 728 of the Corporations Act 2001 (Cth) is in similar terms to s 82 and provides for civil liability if an omission in a disclosure document is materially adverse from the point of view of an investor. Section 724 of that Act affords an investor a choice if they become aware that a disclosure document contains an omission that is materially adverse from the point of view of the investor.

[129] Section 724 was considered by the New South Wales Supreme Court in *Roadships Logistics Ltd v Tree*.[25] The Court confirmed that the test was an objective one and that it involved something that would turn the would-be investor away rather than making that investor more willing to invest.[26]

[130] The Australian approach provides a helpful yardstick by which to measure contraventions of s 82. However, care must be taken not to construe the phrase too narrowly or to place an unnecessary gloss on the statutory text. Whether something is materially adverse from the point of view of the investor is ultimately a fact-driven assessment which will vary from case to case.

[131] Rockfort says that the failure to include the hedging counterparties was not of such a nature that it would sway a potential investor's decision to invest one way or another. That is because the identity of the hedging counterparty would not have affected a potential investor's decision whether to invest. As such, Rockfort says its omission was not materially adverse and s 82 of the Act has not been contravened.

[132] I do not agree. One of the risks inherent in derivatives is the "counterparty risk". The risk is that the counterparty will default on its obligations leading to

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24 Financial Markets Conduct Act, ss 3 and 4.
25 *Roadships Logistics Ltd v Tree* [2007] NSWSC 1084.
26 *Cackett v Keswick* [1902] 2 Ch 456.

significant loss for an investor. Understanding the creditworthiness of the counterparty is therefore important information for a derivatives investor. It allows an investor to make an informed assessment about the risks underlying a derivative before proceeding with the trade.

[133] The mandatory requirement to include details of hedging counterparties in the Product Disclosure Statement as prescribed in the regulations adds weight to the importance of this information. The Product Disclosure Statement is the means by which risks involved in financial products may be identified for an investor. The risks associated with hedging counterparties is recognised by the requirement to disclose details of the counterparties used. It is a recognition that identification of hedging counterparties is a fact which might reasonably deter or tend to deter investors from entering into the contract, and it has the potential of turning a prudent but non-expert investor away.

[134] It follows that, on this issue too, the FMA did not err in concluding that there was a breach of s 82 of the Act.

Did the FMA wrongly decide that Rockfort no longer met the requirements referred to in s 396(c) and (d) of the Act?

[135] As already noted, cancellation of a licence is only available where the FMA is satisfied that a licensee no longer meets the requirements referred to in s 396(a) to (g) of the Act.

[136] The FMA concluded that Rockfort:

(a) was no longer capable of effectively performing its service as a licensee (s 396(c), performance requirement); and

(b) there was reason to believe that Rockfort was likely to contravene its market services licensee obligations (s 396(d), contravention requirement).

[137] As noted at [43], the assessment under s 396 will be informed by the principles set out in s 393 of the Act. Those principles include whether the exercise of the power is necessary or desirable in order to promote the purposes of the Act specified in ss 3 and 4.

[138] The FMA has published guidance on the various requirements for a licence in its Licensing Guide. That guidance also informs the assessment of whether Rockfort meets the requirements in s 396.

Section 396(c) — performance requirement

[139] The FMA considered that Rockfort was not capable of performing a derivatives issuer service because various minimum standards set out in its Licensing Guide were not being met. Following receipt of the submissions and Action Plan, the FMA remained of the view that Rockfort could not meet the following minimum standards:

(a) Advertising and disclosure.

(b) Maintenance of records.

(c) Governance, capability and material issues and complaints.

[140] These minimum standards relate to the material contraventions already considered in this judgment. The conclusions reached in relation to those contraventions are relevant to the evaluation which follows.

Advertising and disclosure

[141] Rockfort submits that the Action plan and Strategi's ongoing engagement meets the minimum standard concerning advertising and disclosure.

[142] The Action Plan provides for Strategi to review and expand upon the Advertising and Marketing Approval Procedure and ensure directors and senior managers are trained in that process. Rockfort also intends to implement, in consultation with Strategi, a more comprehensive record of all advertising compliance

checks. Rockfort has ceased advertising and the onboarding of New Zealand clients until Strategi confirms the associated policies are satisfactory.

[143] These are steps which are intended to take place in the future. Yet Rockfort's pattern of contraventions relating to advertising and disclosure give no confidence that the future will be any different from the past. The repeated contraventions in the face of FMA reviews and directions suggest that Rockfort does not have the capability to implement the Action Plan and meet the minimum standards relating to advertising and disclosure.

Maintaining records

[144] Licensees are required to keep records of key decisions and activities for at least seven years so that the FMA can confirm compliance. They are also required to keep files for each client with all relevant documents. These include client agreements and disclosure documents.

[145] Rockfort accepts that it breached its obligation to maintain compliant records. However, it relies on the evidence of Mr Greenslade to say that Strategi's future review of Rockfort's record keeping policies, systems and procedures provides the necessary reassurance as to future compliance with this minimum standard. Strategi is also doing some sample testing on a monthly basis to ensure compliance, and processes have been added to the Compliance Assurance Plan to ensure internal accountability.

[146] For the reasons already canvassed, I am not convinced that the FMA's reservations about Rockfort's future compliance are in error. The review of record-keeping policies and procedures has not yet occurred. The FMA also says that the proposed sample testing appears to be no different to that which was already undertaken by the former Head of Compliance and General Counsel. This adds little reassurance that Rockfort has the necessary capabilities to ensure the minimum standard will be met.

[147] The FMA was correct to find that Rockfort's record keeping clearly falls short of that required under the Licensing Guide.

Governance, capability, material issues and complaints

[148] The third minimum standard under this head concerns governance, capability, and material issues and complaints. The concerns regarding this minimum standard relate back to the material contravention in relation to maintaining standards of governance.

[149] Mr Greenslade sets out the steps to be taken under the Action Plan to ensure minimum standards are met. These include returning to the original structure with a dedicated Compliance Officer. Strategi will also undertake monthly compliance assurance checks, review current policies, and advise the board and General Manager. Mr Greenslade deposes to the difficulties in recruiting appropriate individuals into governance roles while there is uncertainty associated with the status of Rockfort's licence. Accordingly, Mr Greenslade says that Strategi's role is an interim measure pending the outcome of this appeal.

[150] While I accept that current circumstances will make recruitment more difficult, that does not provide an adequate response to the FMA's concerns. The concerns about governance arose prior to this appeal. There is nothing to suggest that new governance arrangements will be able to be put in place to address those concerns. Given the contraventions in governance and compliance in the past, the FMA's assessment that Rockfort was not capable of meeting the governance standards cannot be faulted.

Section 396(d) — contravention requirement

[151] The FMA says it is satisfied that Rockfort is likely to contravene its market services licensee obligations in the future, meaning the requirement in s 396(d) could not be met.

[152] Rockfort relies on the evidence of Mr Greenslade and the Action Plan as ensuring there will be no future contraventions of Rockfort's market services licensee obligations. The FMA remains unconvinced, as do I. That is due to the following four reasons.

[153] First, while the Action Plan sets out strategies and steps to meet the FMA's concerns it still remains somewhat aspirational. It includes steps which will be implemented in the future. There is no timeframe for full implementation of the Action Plan which gives rise to concerns about compliance failures in the meantime.

[154] Second, future compliance rests on the ongoing involvement of Strategi. In addition to a review of all policies and employee training, Strategi will also be involved in conducting monthly compliance checks and support services. That involvement is somewhat open-ended, and it is not clear what will happen when Strategi is no longer providing that support.

[155] Moreover, Strategi was previously engaged by Rockfort to assist with compliance issues. In 2018, it provided a report on Rockfort's risk and compliance framework. It was also engaged by Rockfort in 2019 to review Rockfort Compliance Assurance Plan and to ensure further advertising issues did not arise. In 2021, Strategi was engaged by Rockfort to complete an anti-money laundering audit on a bi-annual basis.

[156] Strategi's competence is not challenged. However, the fact that the compliance issues identified by the FMA still occurred even after Strategi's involvement reflects adversely on Rockfort's ability to implement Strategi's advice and to avoid compliance issues in the future.

[157] Third, Rockfort's history of non-compliance gives no confidence that it will not commit further contraventions in the future. That non-compliance has continued despite assurances that contraventions would be remedied through, for example, the development of new policies and frameworks and the submission of an action plan. Failures in compliance persisted even after the FMA censured Rockfort and issued a Direction Order. As the FMA submits, the failure to consistently adhere to market services licensee obligations, despite escalating interventions, gives no assurance that Rockfort will comply in the future.

[158] Fourth, the non-compliance in relation to governance and capability also gives reason to believe that there will be contraventions in the future. The current

arrangements remain deficient pending the recruitment of a new Head of Compliance officer. While I accept that recruitment is difficult while uncertainty around licence continues, the flipside of that is that there is no reassurance that Rockfort's new governance and capability arrangements will guard against future contraventions. This adds to the risk of material contraventions in the future.

[159] Considered in totality, these factors substantiate the FMA's concerns that there is reason to believe that Rockfort is likely to contravene its market services licensee obligations, and that it no longer meets the requirements in s 396(d).

Did the FMA wrongly decide that it should cancel Rockfort's licence under s 414 of the Act?

[160] Before cancelling a licence, the FMA is required to consider whether, in the circumstances, it would be more appropriate to exercise a power under s 414(2). Those powers include censuring Rockfort; requiring Rockfort to submit an action plan; or giving a direction to Rockfort.

[161] Rockfort submits that the FMA should have required Rockfort to submit an action plan rather than cancel its licence. That approach, it submits, is consistent with the requirements in s 393 and the general purposes of the Act. It also claims that the FMA was under a duty to consult prior to cancelling its licence and the failure to do so was a breach of natural justice.

[162] Dealing with the application of s 393 first, that section does not apply to decisions under ss 414 and 415 of the Act. Section 393 only applies when the FMA is exercising a power under subpt 2 of pt 6 of the Act. Sections 414 and 415 are not found in that part of the Act. That means there is no obligation to consider whether cancellation would be either "necessary or desirable",[27] nor whether it would "unnecessarily restrict the licencing of certain persons".[28]

[163] That said, the purposes of the Act are relevant to the exercise of the discretion to cancel. I consider cancellation of Rockfort's licence will promote the confident and

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27 Section 393(a).
28 Section 393(b).

informed participation of businesses, investors, and consumers in the financial market.[29] It will also promote and facilitate the development of fair, efficient, and transparent financial markets.[30] Those objectives will not be met where licensees are allowed to continue to offer derivatives where they have not, do not, and will likely not meet regulatory standards.

[164] As for the duty to consult, Rockfort submits that s 415 essentially codifies principles of natural justice when exercising a power under s 414. Those principles include a duty to consult which Rockfort says may be derived from the requirement to give reasons and the opportunity for a licensee to make submissions. Rockfort says that the FMA breached this duty by failing to engage with Rockfort in relation to the Action Plan and by failing to accord it proper weight.

[165] Rockfort relies on *Validus v FMA* to support its position.[31] In that case Jagose J held that natural justice rights were not breached in relation to a decision to issue a stop order under s 475 of the Act.[32] The Judge's reasoning drew on a distinction between regulation on the one hand, and empowerment of participation in the market on the other. Stop orders fell into the first category with the inference that natural justice principles were applicable to the second of these categories. Rockfort says that the duty to consult arises in this case because cancellation falls into the second category and involves the empowerment (or disempowerment) of participation in the market.

[166] That distinction does not compel an interpretation of ss 414 and 415 which requires FMA to consult before cancelling a licence. Natural justice rights find their expression in the opportunity to make submissions in response to the Notice of Intention, and the right of appeal to this Court. There is no basis to read in a duty to consult. Indeed, as the FMA submits, inferring such a power could paralyse the FMA as it would be required to engage with a non-compliant market participant every time something new was raised. That cannot have been intended by Parliament.

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29 Section 3(a).
30 Section 3(b).
31 *Validus FZCO v Financial Markets Authority* [2023] NZHC 1701.
32 At [17] and [24].

[167] Even if there was a duty to consult, it is not clear how consultation would alter the end result.[33] Rockfort has now had an opportunity to put forward all evidence in support of the Action Plan, including Mr Greenslade's affidavit. For the reasons already canvassed in this judgment, that evidence does not provide the requisite assurance that Rockfort has the necessary capabilities to implement the Action Plan. Further engagement regarding the Action Plan would not lead to a different conclusion.

[168] Finally, I do not consider the FMA's decision to cancel the licence, rather than require the submission of an Action Plan with associated conditions, was in error. Rockfort's history of non-compliance stretches back to 2019 and persisted despite censure, a Direction Order, and Strategi's involvement. For the reasons already outlined in this judgment, the FMA could not have any faith that material contraventions would not occur in the future. The Action Plan and associated conditions provide hollow comfort in these circumstances.

[169] While I accept that cancellation will impact on Rockfort's reputation, it will not bring all operations to a halt as derivatives trading forms only a part of Rockfort's business. Nor will it prevent Rockfort from applying for a licence in the future. While I accept that re-application has a compliance cost, I do not consider that consideration outweighs all other considerations which clearly favour cancellation.

[170] For these reasons, the FMA was correct to conclude that a lesser regulatory power was not more appropriate than cancellation.

Result

[171] The appeal is dismissed.

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[33] Breach of natural justice regarding disclosure of a complaint was raised in *Financial Markets Authority v Vivier* [2016] 3 NZLR 70, [2016] NZCA 197. At [78] the Court of Appeal said that "complaints about process cannot alter the essential conclusions as to the appropriateness of deregistration of Vivier". In *Innovative Securities Limited v Financial Markets Authority* [2017] NZHC 1187, [2017] NZCCLR 25, Moore J said that even if there had been a breach of natural justice in that case it was cured by the presentation of evidence and submissions on appeal. The observations in both cases are applicable to this case.

[172] The FMA is the successful party in the appeal. The parties are encouraged to agree costs, failing which a memorandum in support of an award may be filed 15 working days after delivery of this judgment with a memorandum in response filed five working days thereafter.

[173] Finally, the order made by Powell J on 21 April 2023 prohibits publication of any information relating to the filing of the appeal or the appeal itself. That order will expire at 5.00 pm on the tenth working day after delivery of this judgment unless extended prior to that date.

Postscript

[174] The non-publication orders have since expired.

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Edwards J