ORDER PROHIBITING PUBLICATION OF EVIDENCE RELATING TO THE HEALTH OF MR HARRIS AND FAMILY MEMBERS AND THE AMOUNT OF HIS CONTRIBUTION TO THE EARLIER SETTLEMENT.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2745
[2024] NZHC 2322

BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	CBL CORPORATION LIMITED (IN LIQUIDATION) First Defendant - DISCONTINUED
	SIR JOHN WELLS Second Defendant – DISCONTINUED
	PETER ALAN HARRIS Third Defendant

Continued …

Hearing:	10 June 2024 and joint memorandum dated 12 June 2024
Appearances:	JCL Dixon KC and N M Blomfield for FMA D M Salmon KC and J Cundy for Mr Harris
Judgment:	19 August 2024

JUDGMENT OF GAULT J
(Penalty hearing)

This judgment was delivered by me on 19 August 2024 at 3.30 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Continued …

AND

ANTHONY CHARLES RUSSELL HANNON
Fourth Defendant – DISCONTINUED

GEOFFREY JOHN TURNER as executor of the ESTATE OF ALISTAIR LEIGHTON HUTCHISON
Fifth Defendant – DISCONTINUED

NORMAN GERALD PAUL DONALDSON
Sixth Defendant – DISCONTINUED

IAN KELVIN MARSH
Seventh Defendant – DISCONTINUED

CARDEN JAMES MULHOLLAND
Eighth Defendant

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Introduction

[1] In this proceeding commenced in December 2019 following the collapse of companies within the CBL group of companies (CBL Group), the Financial Markets Authority (FMA) seeks declarations of contravention and a pecuniary penalty against Mr Peter Harris, the Managing Director of CBL Corp Ltd (in liq) (CBLC), for his involvement in contraventions by CBLC relating to false and misleading statements (fair dealing) and continuous disclosure obligations under ss 19, 22, 23 and 270 of the Financial Markets Conduct Act 2013 (FMCA).

[2] By notice of admission of causes of action dated 26 March 2024, Mr Harris admitted seven causes of action relating to his involvement in contraventions by CBLC. One admitted cause of action concerned fair dealing (s 22), and the others concerned continuous disclosure obligations (s 270).

[3] The FMA and Mr Harris agreed to recommend that this Court make declarations of contravention under s 486 of the FMCA, and a pecuniary penalty order under s 489. The parties provided detailed submissions, adopting a similar approach to that applied earlier to CBLC and its independent non-executive directors (INEDs) who made the same admissions,[1] but reflecting Mr Harris' central role straddling the board and management. The FMA and Mr Harris agreed the quantum of the proposed penalty to recommend ($1.4 million) but acknowledged that the amount of any pecuniary penalty to be imposed is a matter for the Court.

[4] This judgment addresses the appropriate declarations of contravention and pecuniary penalty.

Agreed facts

[5] The FMA and Mr Harris provided a detailed agreed statement of facts. The following is a somewhat condensed summary taken from the FMA's submissions, with which Mr Harris agreed (subject to proposing reference to some corresponding or additional paragraphs of the agreed statement of facts, which I have incorporated).

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1 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842.

CBLC

[6] Between 13 October 2015 and 8 February 2018 (the Relevant Period), CBLC was dual-listed with the NZX and ASX. Its primary operating subsidiary was CBL Insurance Ltd (in liq) (CBLI), which predominantly provided reinsurance. As a listed issuer, CBLC was required to comply with the NZX Main Board/Debt Market Listing Rules (NZX Listing Rules).

[7] As part of CBLC's initial public offering (IPO), it issued a product disclosure statement on 7 September 2015 (PDS) that identified that key risks for the CBL Group's business included (inter alia) under-provisioning for claims, failing to maintain the conditions of CBLI's insurance licence, the CBL Group's underwriting process not accurately assessing and pricing the risks underwritten, and regulatory risk including loss of licence.

[8] Also, around the time of the IPO, the CBLC Board of Directors adopted a Continuous Disclosure Policy dated 4 September 2015 (the Continuous Disclosure Policy), which established a committee that was responsible for CBLC's continuous disclosure obligations (Disclosure Committee). The objective of the Continuous Disclosure Policy, recorded in para 1.3, was to see that CBLC "immediately discloses all material information to NZX and ASX in accordance with [the] Policy".

[9] During the Relevant Period, the products offered by the CBL Group included building works-related insurance policies that were compulsory in France, namely:

(a) dommages ouvrage insurance (DO), which is taken out by the building contractor in the name of the homeowner when undertaking renovations and building works, and which provides project-specific cover during the period of construction and in respect of which claims for defective works can be made for a period of 10 years; and

(b) decennial liability insurance (DL), which is a defects liability policy held by a building contractor, with a 12 month policy period under which the insurer recognises claims lodged against the contractor for a period of up to 10 years, for all work carried out by the building

contractor during the policy year and where the party typically pursuing the contractor for recovery of its loss is the DO insurer (because the DO insurer must immediately repair the defective works (under the DO project-specific policy), and on a no-fault basis and then seek to recover its loss against the DL insurance of the contractor which actually caused the defective work),

(together, the French Construction Business).

[10] CBLI reinsured French Construction Business policies written by three ceding insurers: Elite Insurance Company (Elite) in Gibraltar, Alpha Insurance A/S (Alpha) in Denmark and CBL Insurance Europe dac (CBLIE) in Ireland. CBLIE was CBLI's primary ceding insurer from mid-2017.

[11] On 6 January 2017, CBLC acquired a controlling 71.1 per cent shareholding in Securities and Financial Solutions Europe SA (SFS) through its subsidiary, SFS Holdings SA. SFS operated as an insurance broker and managing general agent in Europe. It was registered in Luxembourg.

[12] SFS was one of the largest brokers of French Construction Business policies in France and had binding authority to underwrite policies on behalf of Elite, Alpha and CBLIE.

[13] CBLI was regulated as a licensed insurer by the Reserve Bank of New Zealand (RBNZ). Each of its ceding insurers was subject to oversight by various European prudential regulators, including the Gibraltar Financial Services Commission (GFSC), the Danish Financial Services Authority (DFSA) and the Central Bank of Ireland (CBI).

[14] At all material times, CBLI held a licence under the Insurance (Prudential Supervision) Act 2010 (IPS Act). CBLI was subject to various prudential requirements under the IPS Act, including the need to meet certain minimum regulatory solvency levels. CBLI was also required to appoint an independent actuary, who was responsible for reviewing information prepared by CBLI and providing

regular reporting to RBNZ on CBLI's regulatory solvency and levels of reserves. That reporting under the IPS Act included an annual Financial Condition Report and an annual Liability Valuation Report. CBLI had an opportunity to provide feedback on draft versions of these reports prior to the final version being supplied to RBNZ.

[15] CBLIE was a wholly owned subsidiary of CBLC and was licensed and regulated by the CBI.

[16] During the Relevant Period, the membership of the boards of CBLC and CBLI were the same (the Board). The Board was majority independent, and the Chairman was independent. The meetings of the boards of the two entities were held concurrently and referenced as CBLC.

[17] Mr Harris attended all Board meetings in person or by phone during the Relevant Period.

[18] During the Relevant Period, CBLI (and CBLC) had the following key external professional advisors:

(a) Deloitte (the Auditor);

(b) Paul Rhodes (the Appointed Actuary), with support from PwC New Zealand; and

(c) MinterEllisonRuddWatts and a senior barrister (the Legal Advisors).

Peter Harris

[19] Mr Harris was the Managing Director and Chief Executive Officer of both CBLI and CBLC at all times during the Relevant Period. He was appointed as a director of CBLI and CBLC on 13 December 2006 and 19 November 2013 respectively, and in each case became Managing Director (or Chief Executive Officer) from those dates or thereabouts. He continues to be a director of both companies.

[20] Mr Harris was a member of the Disclosure Committee. Mr Harris was not a member of CBLC's and CBLI's Audit & Financial Risk Committee (ARC), but he attended a number of the meetings of the ARC by invitation during the Relevant Period.

[21] Mr Harris was also a director and Chairman of CBLIE, and was on its Underwriting Risk Committee throughout the Relevant Period. He was appointed on 25 November 2013 and resigned on 14 December 2018.

[22] Mr Harris was integral to the overall direction and management of the CBL Group throughout the Relevant Period. He had an in-depth knowledge and understanding of the business, and credit and surety insurance business in general, and maintained a close working relationship with the management team, including in particular underwriting risk. He also had knowledge and understanding of the CBL Group's financial statements and regulatory solvency position, although he was not directly responsible for preparing the financial statements and solvency reporting. As Managing Director, Mr Harris was accountable to the Board for the CBL Group's performance and protection of its assets. He was also one of the primary contacts for CBLI in its dealings with RBNZ. He attended some meetings with CBI on behalf of CBLIE, and on behalf of CBLI as CBLIE's main reinsurer, during the second half of 2017 and in early 2018. He also worked with CBLC's Compliance Officer in preparing correspondence that was sent to CBI on behalf of CBLIE and CBLI.

[23] Mr Harris' interests[2] received $12.26 million from the proceeds of the share sale in the IPO, and $16.3 million from the share sell down in April 2017.

The other defendants

[24] The INEDs were independent non-executive directors of CBLC and CBLI during the Relevant Period. Sir John Wells was Chairman of the CBLC Board and CBLI Board. All had significant experience in the financial sector, as well as in governance and management. Sir John Wells was a member of the Disclosure

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[2] Mr Harris was a shareholder, or held the ultimate beneficial interest, in the following entities, all of which were shareholders in CBLC: Oceanic Securities Pte Ltd, Eurasia Investment Ltd, Sunshine Nominees Ltd and Stichting Lygon Pension Fund.

Committee during the Relevant Period. From October 2015, Mr Anthony Hannon was chair of the ARC, and Mr Ian Marsh and Mr Paul Donaldson were members of the ARC.

[25] Mr Alistair Hutchison was a director of CBLI and CBLC from 24 December 2008 and 19 November 2013 respectively, until his death on 22 December 2021. At all times during the Relevant Period, Mr Hutchison was Deputy Chair of the Board and worked closely with Mr Harris as a result of their longstanding relationship with CBLI.

[26] Mr Carden Mulholland was the Chief Financial Officer throughout the Relevant Period, and was responsible for overseeing the finance team, which produced the financial reports for the CBL Group on a monthly and annual basis. He also had oversight of RBNZ regulatory solvency returns and the banking and financial arrangements of the CBL Group, and managed reporting to the NZX and investor relations.

Regulatory overview

[27] CBLIE was subject to increased regulatory oversight by CBI from January 2017 onwards.

[28] From 23 June 2017, and following the receipt of the PwC UK skilled person report into Elite,[3] CBLI and CBLIE faced escalating regulatory scrutiny from RBNZ and CBI, including in relation to their reserving for the French Construction Business. Elite and Alpha were also subject to regulatory investigation by GFSC and DFSA respectively in relation to lines of business that were reinsured by CBLI.

[29] As a result, RBNZ and CBI issued formal directions and conditions to CBLI, CBLIE and CBLC, as addressed below.

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[3] A skilled person report is an independent third-party report undertaken by a relevant expert to assess the matters specified in the scope of the engagement as required by the relevant regulator. In this case, the GFSC asked PwC UK to review the adequacy of Elite's governance, cover holder due diligence and monitoring, and reserving.

[30] On 23 June 2017, CBI issued directions to CBLIE that prohibited it from disposing of assets other than in the normal course of its business, and prohibited it from making any payments to its shareholders.

[31] On 25 July 2017, RBNZ issued a direction to CBLI under ss 143 and 144 of the IPS Act restricting its business activities (absent RBNZ's consent), and substantially increasing CBLI's solvency ratio to at least 170 per cent.[4]

[32] On 28 July 2017, CBI imposed conditions on CBLIE that (among other things) required CBLIE to collateralise any obligations due to it from CBLI in a trust account for the exclusive benefit of CBLIE.

[33] On 21 August 2017, RBNZ also appointed McGrathNicol to conduct an independent investigation into the affairs of CBLI, including an independent review of the adequacy of CBLI's reserves for its French Construction Business.

[34] CBLC was prohibited by law under s 150 of the IPS Act from disclosing the existence and terms of the directions issued by RBNZ, including the fact of the McGrathNicol investigation. On 21 August 2017, CBLC and CBLI's solicitors asked RBNZ to confirm whether RBNZ's confidentiality order applied to the appointment of McGrathNicol as investigator. RBNZ responded on the same day stating that the correspondence and notice were confidential and should not be disclosed. On the following day, RBNZ advised CBLC and CBLI's solicitors that RBNZ did not consent to CBLC making a market announcement in respect of the McGrathNicol investigation as it considered that the purposes of the IPS Act were best served by allowing the investigation to proceed in confidence. Mr Harris says he also recalls that around this time he had a telephone discussion with RBNZ about disclosure of RBNZ's direction and the investigation, and that he was told that those matters should not be disclosed. The FMA has not been able to independently verify this discussion

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[4] Robinson J held in *R v Harris* [2023] NZHC 2635 that directions issued by RBNZ to CBLC and CBLI, including the direction referred to at [31], were unlawful and invalid. That decision, which acquitted Mr Harris and Mr Mulholland of criminal charges, is now subject, in part, to an application for leave to appeal [leave to appeal has since been granted in *R v Harris and Mulholland* [2024] NZCA 176]. Mr Harris' position is that, as Robinson J held, the directions were unlawful and invalid. Nevertheless, Mr Harris and the FMA agree that issues about the lawfulness and validity of the RBNZ directions are not relevant to the matters currently before this Court, and that it does not need to make a finding on those issues.

based on contemporaneous documents. Mr Harris believed that the confidentiality order extended to the subject matter giving rise to the directions and investigation, including the adequacy of CBLI's reserves and the CBI directions/conditions. However, apart from the clarification sought by CBLC and CBLI in this paragraph, Mr Harris did not specifically seek clarification from RBNZ on its views as to whether the confidentiality order prevented disclosure of the adequacy of CBLI's reserves and the CBI directions/conditions. Mr Harris now accepts that the confidentiality restrictions did not prohibit CBLC from making the market disclosures that are the subject of admissions in the agreed statement of facts.

Second cause of action: False or misleading representations – August 2017

[35] On 18 August 2017, CBLC made an announcement on the NZX Market Announcement Platform in anticipation of the release of its interim financial statements for the period to 30 June 2017 (2017 Interim Financial Statements), in which it notified the market that:

(a) CBLC expected to miss its first-half internal operating profit expectations by $17.5 million, largely due to a $16.5 million strengthening of CBLI's reserves based on advice from the Appointed Actuary; and

(b) Elite had decided to stop writing new business and go into orderly run-off in July 2017, but this was not expected to adversely affect CBLI as it could write its European business directly through CBLIE.

(the 18 August Announcement).

[36] Following the 18 August Announcement, CBLC's share price on the NZX fell from $3.77 (being the last price at which shares were traded prior to the 18 August Announcement) to $3.25 per share by close of trading on 25 August 2017 (following the 24 August Announcement addressed below), a drop of 13.8 per cent.

[37] On 24 August 2017, CBLC made an announcement on the NZX Market Announcement Platform as part of the release of its 2017 Interim Financial Statements in which it notified the market that, inter alia:

(a) operating profit was impacted by the decision to take a "one-off" $16.5 million increase to its reserves against future claim forecasts (One-off Representation);

(b) of the $16.5 million, $10 million related to a decrease in the discount rate for Euro denominated claims, which could easily be turned around should Euro bond yields increase in the future. The balance related directly to a review of policies looking back for up to 10 years and forward for up to 10 years; and

(c) the strong revenue growth to the 2017 financial year was encouraging,

(the 24 August Announcement).

[38] The 24 August Announcement was misleading at the time it was made. CBLI was likely to need to strengthen its reserves again in the future, so the $16.5 million increase could not properly be described as "one-off".

[39] Mr Harris was involved in drafting the 24 August Announcement prior to its release and was informed about the circumstances that made it misleading. In particular, Mr Harris was aware that a number of parties (including RBNZ) were questioning the adequacy of CBLI's reserving, and that both RBNZ and CBI were investigating and taking action in relation to the CBL Group. Mr Harris also knew from the Appointed Actuary that there could be further strengthening at the full year (that is, 31 December 2017) and agreed on a "measured approach" to the half-year reserve strengthening on the basis that "it would be better for [CBLI] to take a bigger hit in the second half where [it has] higher revenue".

[40] In reviewing the draft 24 August Announcement, Mr Harris recognised the potential for criticism over the use of "one-off" and identified the need to remove it

from the market announcement. Despite this, Mr Harris failed to ensure it was removed from the announcement prior to its release. He was conscious of a risk that the market would be misled by the 24 August Announcement, but nonetheless failed to ensure that the One-off Representation was removed.

Sixth cause of action: Failure to disclose need for CBLI to materially strengthen reserves – November 2017

[41] By 15 November 2017, it was clear that CBLI would need to materially strengthen its reserves (Need to Strengthen Reserves):

(a) On 16 October 2017, the Appointed Actuary provided CBLI management with a document entitled "Update on reserving for French construction business", which concluded that each of five key hypotheses on reserving for the French Construction Business was either incorrect or inconclusive. The document also cautioned "New information suggests further strengthening is required >$33m before risk margin for DL products with less significant impacts for DO products".

(b) On 13 November 2017, CBI advised CBLIE that, given the seriousness of its concerns (which included the level of CBLI's reserves), it was "minded to direct" CBLIE to cease writing all new contracts of insurance and to refrain from renewing any existing contracts of insurance.

(c) On 14 November 2017, the Appointed Actuary advised Mr Harris that it was "pretty clear" that in December 2017 CBLI would go below the minimum solvency ratio of 170 per cent, even with a minor reserve strengthening, and that it was "not realistic" that the impact would be less than $10 million.

(d) On 15 November 2017, CBLI, on Mr Harris' direction, notified RBNZ that based on initial assumptions and advice from the Appointed

Actuary, CBLI "may" need to strengthen reserves for its French Construction Business for the 31 December 2017 year-end.

(e) On 15 November 2017, the Appointed Actuary separately advised RBNZ, in an email copied to Mr Harris, that based on its initial assumptions CBLI would require reserve strengthening on its French Construction Business at 31 December 2017.

[42] As at 15 November 2017, the Need to Strengthen Reserves was material information that was not generally available to the market. As such, CBLC was required by the FMCA and the NZX Listing Rules to disclose the Need to Strengthen Reserves, and failed to do so.

[43] While there was not yet certainty around the precise amount of the increase needed, CBLI had received advice on more than one occasion from the Appointed Actuary that strengthening was likely to be needed at the year end. This was reinforced by regulatory concerns and actions. The lack of disclosure is made worse by the fact that the One-off Representation in August 2017 remained in the market.

[44] Mr Harris knew about the Need to Strengthen Reserves by 15 November 2017. While Mr Harris believed the Need to Strengthen reserves at year end was uncertain, he was conscious of the risk that the Need to Strengthen Reserves was not insufficiently definite to warrant disclosure. Mr Harris accepts he should have taken further steps to ascertain whether the Need to Strengthen Reserves was in fact uncertain.

[45] Mr Harris subsequently received the draft Appointed Actuary's Actuarial Update Report on 23 November 2017 for the upcoming ARC meeting on 28 November 2017, which estimated that CBLI would need to strengthen reserves by an amount in the region of $67 million to $120 million. Despite the magnitude of the estimated reserve strengthening, and in circumstances where Mr Hannon told him in an email on 23 November 2017 that if the report was received by the ARC then "we will have a Disclosure issue", Mr Harris was involved in the decision not to provide the draft report to the ARC or to the rest of the Board, but he was aware that

Mr Hannon, as Chair of the ARC, had it. He appreciated the risk that market disclosure was required, yet failed to ensure investors were informed of this material information. After discussing the matter with Mr Hannon, Mr Harris said in an email to CBL staff members on 23 November 2017 that:

> … the report is a working draft document, with additional work still being done in a number of areas. It is a process that management is working through with the actuaries, - it is not part of the audit at all at the moment. I think it should be taken off the [ARC] agenda.

Eighth cause of action: Failure to immediately disclose need for CBLC to increase reserves by $100 million – January 2018

[46] On 25 January 2018, the Appointed Actuary advised CBLI in a draft actuarial update that he estimated CBLI would require reserve strengthening of $112 million as at 31 December 2017.

[47] On or about 30 January 2018, the Appointed Actuary advised CBLI of the need to increase reserves by an amount of approximately $100 million (the $100 Million Increase in Reserves):

(a) On Tuesday 30 January 2018 at 1:55 pm, the Appointed Actuary advised CBLI that it had concluded the reserving adjustment increase would be $98 million, but these were still draft numbers for further discussion as required; and

(b) On Wednesday 31 January 2018 at 3:29 pm, the Appointed Actuary provided CBLI with a draft insurance liability valuation report for CBLI (31 January Draft Valuation Report), which concluded CBLI would need to increase its provision for outstanding claims by $101.3 million.

[48] Having received the Appointed Actuary's advice, the Board agreed at a meeting on 31 January 2018 at 7:00 pm that "disclosure needed to be made within the next 48 hours" of "details of the reserving impact, the effect on the Financial Results and plans for a capital management structure". Despite all the indications and advice from the Appointed Actuary prior to this regarding the need for significant reserve

strengthening, CBLC (including its Board) was not prepared to make disclosure immediately as required by the NZX Listing Rules and the FMCA.

[49] By 31 January 2018, the $100 Million Increase in Reserves was material information that was not generally available to the market. As such, CBLC was required by the FMCA and the NZX Listing Rules to disclose the $100 Million Increase in Reserves immediately.

[50] By 31 January 2018, Mr Harris knew of the $100 Million Increase in Reserves:

(a) concerns in respect of CBLI's reserving had been raised by RBNZ during a meeting with the Board that Mr Harris attended on 12 December 2017;

(b) Mr Harris attended a meeting with the Appointed Actuary on 25 January 2018 during which the Appointed Actuary estimated that CBLI would require reserve strengthening of $112 million in respect of its French Construction Business as at 31 December 2017; and

(c) Mr Harris emailed the Board on 30 January 2018, following receipt of the Appointed Actuary's advice of the same date, and advised that the Appointed Actuary had landed on a reserving increase of $98 million.

[51] By 31 January 2018, Mr Harris knew that CBLC was required to make a market disclosure regarding the $100 Million Increase in Reserves. He was conscious of a risk that disclosure after 1-2 February 2018 would not satisfy CBLC's continuous disclosure obligations to disclose that information immediately, but failed to ensure earlier disclosure of the information.

[52] Mr Harris failed to act immediately. CBLC was taking accelerated steps to prepare for a capital raise and planned to announce this in conjunction with the $100 Million Increase in Reserves.

[53] CBLC did not notify the market of the $100 Million Increase in Reserves until the market announcement on Monday 5 February 2018.

[54] Between 31 January 2018 and 2 February 2018, the volume of CBLC shares traded on the NZSX was 359,995 (for a total value of $1,151,008.97).

Tenth cause of action: Failure to disclose aged receivables impacts – October 2017

[55] On or about 17 August 2017, CBLC's Chief Financial Officer, Carden Mulholland, advised the Board that CBLI had identified a significant aged debtor balance related to SFS-generated business written through Elite (the Aged Receivables), the quantum of which had been assessed at approximately $35.6 million (Mulholland Memorandum).

[56] Identifying the Aged Receivables was complicated because, among other things:

(a) the receivables in question were owed to CBLI by Elite as reinsurance premiums payable (and not by SFS);

(b) Elite only recognised risk when the premium was received, whereas CBLI recognised premium and risk when the policy was written; and

(c) it was not until CBLC acquired a controlling shareholding in SFS that CBLI obtained additional information, including SFS premium and banking records, which assisted it to better determine what was properly owed, instead of working off reports provided by Elite and SFS.

[57] The Aged Receivables had several possible impacts, including but not limited to, one related to solvency (because, until they were actually collected, the Aged Receivables would continue to attract a 100 per cent asset risk charge and negatively impact or reduce CBLI's regulatory solvency capital by $34.2 million in circumstances where the RBNZ had, on 25 July 2017, directed CBLI to maintain a solvency ratio of 170 per cent or higher), or alternatively one related to profit (because if the Aged Receivables could not be collected then they would need to be written off in the financial statements, with the effect of reducing operating profit by up to $35.6 million) (the Aged Receivables Impacts).

[58] On 17 August 2017, the Board decided not to impair the Aged Receivables in the company's 2017 Interim Financial Statements based on management representations in the Mulholland Memorandum. Instead, a disclosure was included in respect of the reconciliation of the Aged Receivables in Note 6 of the 2017 Interim Financial Statements. However, Note 6 only referred to an acquisition accounting reconciliation being underway, and did not clearly or adequately inform the market with respect to the existence of the Aged Receivables, or the Aged Receivables Impacts.

[59] In September and October 2017, CBLI explored the potential sale of the Aged Receivables to a third party, Castlerock Receivables Management Ltd (Castlerock). CBLI elected to sell the Aged Receivables to Castlerock on the basis that the transaction's effective date would be 31 July 2017, and the Aged Receivables were valued at approximately $35.6 million. CBLI executed a term sheet with Castlerock on 11 October 2017, which provided that:

(a) CBLI would sell the Aged Receivables to Castlerock;

(b) the transaction's effective date would be 31 July 2017;

(c) The Aged Receivables were valued at approximately $35.6 million;

(d) Castlerock would pay CBLI 100 per cent of the value of the Aged Receivables in CBLI's balance sheet (being approximately 50 per cent of the original gross premium) on a deferred settlement basis in five annual instalments commencing on 30 September 2018;

(e) Castlerock and SFS would arrange for the collection of the receivables. The gross value of the Aged Receivables (and therefore the amounts received by CBLI) would be based on the quantum of Aged Receivables that Castlerock and SFS could collect,

(the Castlerock Transaction).

[60] By 10 October 2017, the existence of the Aged Receivables and Aged Receivables Impacts was material information that was not generally available to the market. As such, CBLC was required by the FMCA and the NZX Listing Rules to disclose the existence of the Aged Receivables and Aged Receivables Impacts.

[61] By 10 October 2017, Mr Harris had knowledge of the Aged Receivables and the Aged Receivables Impacts due to attending various meetings where the Aged Receivables and the Aged Receivables Impacts were discussed, and receiving the Mulholland Memorandum on 17 August 2017. He admits the existence of the Aged Receivables and the Aged Receivables Impacts was material information that was not generally available to the market and that it should have been disclosed by 10 October 2017. Despite this, no disclosure of these impacts was made to the market at that time.

Fourteenth cause of action: Failure to immediately disclose the Aged Receivables Write-Off – December 2017

[62] In late 2017 and during January 2018, CBLI engaged in numerous discussions with Deloitte as to the appropriate accounting treatment for the Castlerock Transaction under NZ IAS 39 Financial Instruments: Recognition and Measurement. CBLI also proposed a number of different structures for the Castlerock Transaction to try to address Deloitte's concerns about the accounting treatment, including an upfront payment or a parent company guarantee. However, it was clear that CBLI needed to write off the Aged Receivables as at 22 December 2017 (Aged Receivables Write Off) when Deloitte advised that it did not agree with CBLI's proposed accounting treatment of the Castlerock Transaction.

[63] CBLI's position was that if it sold the Aged Receivables to Castlerock it could replace the Aged Receivables on its balance sheet with a new asset – being the receivable now due from Castlerock – as CBLI was no longer exposed to the collectability of the Aged Receivables. The new asset would have a lower regulatory solvency risk charge as it was not aged.

[64] On 19 December 2017, Deloitte advised CBLI that did it not accept CBLI's proposed accounting treatment of the Castlerock Transaction. Deloitte considered that

CBLI remained exposed to the collectability risk of the Aged Receivables. Deloitte confirmed this advice again on 20 December 2017.

[65] CBLI did not initially accept Deloitte's position and asked it on 20 December 2017 to reconsider its view. Deloitte advised CBLI on 22 December 2017 that it was "still not satisfied that the accounting de-recognition rules are met and therefore CBL still has a dependency on the underlying receivables."

[66] As at 22 December 2017, the Aged Receivables Write-Off was material information that was not generally available to the market. As such, CBLC was required by the FMCA and the NZX Listing Rules to disclose the Aged Receivables Write-Off.

[67] By 22 December 2017, Mr Harris had knowledge of the Aged Receivables Write-Off and was conscious of the risk that the information was sufficiently certain to warrant disclosure. He had been involved in CBLI's discussions with Deloitte around accounting for the Castlerock Transaction with support from CBLI's finance team. He admits the Aged Receivables Write-Off was material information that was not generally available to the market, and that it should have been disclosed by 22 December 2017. Mr Harris accepts he failed to ensure that CBLC disclosed this to the market immediately, and that CBLC did not notify the market of the Aged Receivables Write-Off until 5 February 2018.

Eighteenth cause of action: failure to disclose the Central Bank Conditions – July 2017

[68] During the same period of time in which CBLC failed to make disclosures concerning its reserving levels being inadequate, and failed to make disclosures regarding the Aged Receivables, it also failed to make disclosures regarding the increasing regulatory actions by CBI against CBLIE.

[69] By 23 June 2017, and following its receipt of the PwC UK Report, CBI had formed a view that CBLIE was exposed to increased prudential risk. It was particularly concerned with CBLIE's exposure to CBLI.

[70] On 23 June 2017, CBI issued a direction to CBLIE that:

(a) CBLIE may not dispose of any assets other than in the normal course of its business without the written approval of CBI; and

(b) in particular, CBLIE shall not make any payments or transfer of assets to its shareholders, directors (except for payments related to directors' fees and salaries) or any related undertaking of CBLIE or its shareholders,

(the First Central Bank Direction).

[71] On 28 July 2017, CBI issued conditions to CBLIE requiring, among other things, CBLIE to collateralise any obligations due to it from CBLI in a trust for the benefit of CBLIE on the following terms:

(a) the collateralisation must be in an amount that includes any claim reserves plus any incurred but not reported reserves plus any premium reserve;

(b) the trust must be for the exclusive benefit of CBLIE arising from its contracts of reinsurance; and

(c) the assets within the trust must comprise cash deposits with a third-party credit institution,

(the Central Bank Conditions).

[72] By 28 July 2017, CBLIE was the most significant ceding insurer to CBLI and the second highest "top line" revenue earner for the CBL Group. Accordingly, the imposition of the Central Bank Conditions, which demonstrated significantly increased regulatory risk for CBLIE, was material information. "Regulatory risk" was one of the specific risks identified in the PDS as having a "low" likelihood of arising, but that could potentially have a "low to severe" impact on CBLC.

[73] CBI did not impose statutory confidentiality restrictions on CBLIE in relation to the disclosure of the Central Bank Conditions. The cover email from CBI to CBLIE attaching the Central Bank Conditions was marked confidential, but Mr Harris now accepts that CBLC was not prevented from disclosing the Central Bank Conditions.

[74] As at 30 July 2017, the imposition of the Central Bank Conditions was material information that was not generally available to the market. As such, CBLC was required by the FMCA and the NZX Listing Rules to disclose the imposition of the Central Bank Conditions.

[75] Mr Harris had knowledge of the Central Bank Conditions by 30 July 2017 given:

(a) he advised Mr Mulholland on 4 July 2017 that the CBI investigation was "very distracting and may become a disclosure issue very soon";

(b) he advised CBI on 7 July 2017 that the First Central Bank Direction and the Central Bank Conditions that CBI advised it was minded to direct constituted a "drastic premature measure";

(c) he received the Central Bank Conditions on 29 July 2017 as a member of the CBLIE Board;

(d) he sent a copy of the Central Bank Conditions to the Board on 30 July 2017; and

(e) the minutes of the CBLC Board meeting on 30 July 2017 state "The Board agreed that there should not be a market disclosure at this stage given the lack of certainty and that regulator actions are not based on fact".

[76] Mr Harris admits the imposition of the Central Bank Conditions was material information that was not generally available to the market and that it should have been disclosed by 30 July 2017. He accepts he failed to ensure CBLC disclosed this information to the market immediately.

[77] CBLC did not make any disclosure to the market concerning the regulatory investigation by CBI (including the existence of directions and conditions) until the 7 February announcement.

Twenty-second cause of action: Failure to disclose the Third Central Bank Direction – January 2018

[78] Between the imposition of the Central Bank Conditions on 8 November 2017 and the Third Central Bank Direction on 12 January 2018, CBI's concerns regarding CBLIE's regulatory compliance had increased.

[79] On 8 November 2017, CBI revoked the First Central Bank Direction and issued a new direction to CBLIE that:

(a) CBLIE may not dispose of any assets (excluding claim payments to third parties, office expense, and staff salaries) without the written approval of CBI; and

(b) in particular, CBLIE shall not make any payments or transfer of assets to its shareholders, directors (except for payments related to directors' fees and salaries) or any related undertaking of CBLIE or its shareholders,

(the Second Central Bank Direction).

[80] On 13 November 2017, CBI advised CBLIE that it was minded to direct CBLIE to cease writing all new contracts of insurance and to refrain from renewing any existing contracts of insurance.

[81] On 15 December 2017, CBI advised CBLIE that it had found serious issues in relation to the CBLIE governance framework potentially exposing CBLIE to an increased risk of under-pricing and under-reserving, which CBI said could ultimately lead to company failure (the Governance Inspection Findings).

[82] On 12 January 2018, CBI directed CBLIE to apply a capital add-on to meet potential claims on a quarterly basis until such time that the issues identified in the Governance Inspection Findings were addressed (the Third Central Bank Direction) and required CBLIE to provide a Skilled Persons' Report.

[83] CBI did not impose statutory confidentiality restrictions on CBLIE in relation to the disclosure of the Third Central Bank Direction. The Third Central Bank Direction contained the word "confidential" in the header of the document, but Mr Harris now accepts that CBLC was not prohibited from disclosing the Third Central Bank Direction.

[84] As at 30 January 2018, the imposition of the Third Central Bank Direction was material information that was not generally available to the market. As such, CBLC was required by the FMCA and the NZX Listing Rules to disclose the imposition of the Third Central Bank Direction.

[85] By 13 January 2018, Mr Harris knew about the Third Central Bank Direction, having received it, together with the rest of the CBLIE Board, on 13 January 2018. However, he failed to ensure the Third Central Bank Direction was disclosed to the market. He admits the imposition of the Third Central Bank Direction was material information that was not generally available to the market and that it should have been disclosed by 30 January 2018. Mr Harris accepts he failed to ensure that CBLC disclosed this to the market immediately.

[86] CBLC did not make any disclosure to the market concerning the regulatory investigation by CBI (including the existence of directions and conditions) until 7 February 2018.

CBLC's collapse

[87] On 2 February 2018, CBLC's ordinary shares on the NZX Main Board were placed into a trading halt.

[88] On 5 February 2018, CBLC made an announcement on the NZX Market Announcement Platform in relation to results expectations for the financial year ended 31 December 2017, in which it notified the market that:

(a) future claims reserve strengthening of around $100 million was expected to the reserves of CBLI in respect of its long-tail French Construction Business;

(b) it expected another one-off write off of receivables of approximately $44 million from SFS reconciliations;

(c) those adjustments were expected to result in the CBL Group reporting a consolidated after-tax loss of $75 million to $85 million for the financial year ended 31 December 2017; and

(d) RBNZ had commissioned an independent report by a skilled expert in relation to reserving issues.

[89] On 7 February 2018, CBLC made a further announcement on the NZX Market Announcement Platform in relation to RBNZ and CBI regulatory action in which it notified the market that:

(a) RBNZ was reviewing CBLI and had issued directions, including a 170 per cent minimum regulatory solvency requirement;

(b) the directions issued by RBNZ had been subject to strict confidentiality orders which (it was asserted) prohibited CBLC from making any announcement to the market; and

(c) CBI had also issued directions and conditions in relation to CBLIE.

[90] On 23 February 2018, RBNZ applied for CBLI to be put into liquidation and for Kare Johnstone and Andrew Grenfell of McGrathNicol to be appointed as interim liquidators. McGrathNicol was already engaged by RBNZ to investigate CBLI and the adequacy of CBLI's reserves for its French Construction Business, having been

appointed by RBNZ on 21 August 2017. That same day, the High Court heard and granted RBNZ's application for the appointment of interim liquidators. This was heard on a without notice basis. Later that same day, the Board appointed Brendan Gibson and Neale Jackson (then) of KordaMentha as voluntary administrators of CBLC.

[91] On 12 March 2018, the High Court of Ireland appointed an administrator to CBLIE on the application of CBI.

[92] On 12 November 2018, liquidators were appointed to CBLI.

[93] On 13 May 2019, liquidators were appointed to CBLC.

Declarations of contravention

[94] Under s 486(1) of the FMCA, the Court may make a declaration of contravention if it is satisfied that a person has contravened a civil liability provision or has been involved in a contravention of a civil liability provision.

[95] Sections 22 and 270 are both civil liability provisions, as defined in s 485.[5]

[96] Section 488 requires a declaration of contravention to state:

(a) the civil liability provision to which the contravention or involvement in the contravention relates; and

(b) the person who engaged in the contravention or was involved in the contravention; and

(c) the conduct that constituted the contravention or the involvement in the contravention and, if a transaction constituted the contravention, the transaction; and

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5 Financial Markets Conduct Act 2013, ss 38(1), 385(1) and (3)(c) and 485(a) and (d).

(d) the issuer, offeror, or service provider to which the conduct relates (if relevant).

[97] For a person to be involved in a contravention of the FMCA, there must be a contravention. Here, that means that for Mr Harris to be liable, there must be a (primary) contravention by CBLC.

Notice of admissions

[98] Mr Harris' notice of admission of causes of action dated 26 March 2024 records that:

(a) Mr Harris admits the second, sixth, eighth, tenth, fourteenth, eighteenth, and twenty-second causes of action, as pleaded in the relevant paragraphs of the second amended statement of claim dated 30 June 2023; and

(b) Mr Harris admits the FMA is entitled to declarations (in the order of the causes of action) that:

(i) as at 24 August 2017 Mr Harris was involved in a contravention of s 22 of the FMCA in relation to the One-off Representation;

(ii) as at 15 November 2017 Mr Harris was involved in a contravention of s 270 in relation to the failure to disclose the Need to Strengthen Reserves;

(iii) as at 31 January 2018 Mr Harris was involved in a contravention of s 270 in relation to the failure to disclose the $100 Million Increase in Reserves;

(iv) as at 10 October 2017 Mr Harris was involved in a contravention of s 270 in relation to failure to disclose the existence of the Aged Receivables and the Aged Receivables Impacts;

(v) as at 22 December 2017 Mr Harris was involved in a contravention of s 270 in relation to the failure to disclose the Aged Receivables Write-Off;

(vi) as at 30 July 2017 Mr Harris was involved in a contravention of s 270 in relation to the failure to disclose the imposition of the Central Bank Conditions; and

(vii) as at 30 January 2018 Mr Harris was involved in a contravention of s 270 in relation to the failure to disclose the Third Central Bank Direction.

Discussion

[99] In an ordinary civil proceeding involving private rights, an admission of causes of action enables the other party to seal judgment on those causes of action.[6] However, the position is somewhat different in this case involving declarations of contravention under the FMCA. As well as the requirement in s 486(1) for the Court to be satisfied that Mr Harris has been involved in a contravention of a civil liability provision, there is Australian authority in this context that a Court does not make declarations on matters relating to public rights, or rights analogous thereto, by consent or on admissions, but only if it is satisfied by evidence.[7] Here, in addition to the notice of admission of causes of action, there is the agreed statement of facts. I must be satisfied on the basis of the agreed statement of facts that Mr Harris has been involved in CBLC's contraventions of ss 22 and 270 of the FMCA as admitted, such that the declarations sought are appropriate.

[100] Dealing first with the contraventions by CBLC, s 22 provides:

> **22 False or misleading representations**
>
> A person must not, in trade, in connection with any dealing in financial products, the supply or possible supply of financial services, or the promotion

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6 High Court Rules 2016, r 15.16(3). Contrast judgment on admission of facts where the Court *may* give any judgment on an application as it thinks just: r 15.15.

7 *Australian Securities & Investments Commission v Rich* [2004] NSWSC 836, (2004) 50 ACSR 500 at [10]-[15].

by any means of the supply or use of financial services, make a false or misleading representation—

(a) that the products or services are of a particular kind, standard, quality, grade, quantity, composition, or value, or have had a particular history; or

(b) that the products or services are offered, issued, transferred, or supplied by a particular person, by a person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or

(c) that a particular person has agreed to acquire the products or services; or

(d) that the products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or

(e) that a person has any sponsorship, approval, endorsement, or affiliation; or

(f) with respect to the price of the products or services; or

(g) concerning the need for the products or services; or

(h) concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or

(i) concerning the place of origin of the products or services.

[101] Therefore, the relevant contravention of s 22 requires that the One-off Representation contained a false or misleading statement of present fact when it referred to reserve strengthening as "one off", and that the statement was of a kind specified in (a) to (i).

[102] Given the admissions and the agreed statement of facts, I am satisfied that CBLC's contravention in relation to the One-off Representation is made out.

[103] Section 270 provides:

270 Listed issuers must disclose in accordance with listing rules if continuous disclosure listing rules apply

(1) A listed issuer must notify information in accordance with the continuous disclosure provisions of the listing rules for the licensed market if—

(a) the listed issuer is a party to a listing agreement with the licensed market operator; and

(b) the listed issuer has information that those continuous disclosure provisions require it to notify; and

(c) the information is material information that is not generally available to the market.

(2) Subsection (1) does not affect or limit the situations in which action can be taken (other than under this Act) for a failure to comply with provisions of the listing rules for a licensed market.

[104] Material information is relevantly defined in s 231(1):

231 Meaning of material information

(1) In this Part, **material information**, in relation to a listed issuer, is information that—

(a) a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial products of the listed issuer; and

(b) relates to particular financial products, a particular listed issuer, or particular listed issuers, rather than to financial products generally or listed issuers generally.

[105] CBLC was listed on the NZX and was required to comply with NZX Listing Rules. The NZX Listing Rules required CBLC, once it became aware of material information concerning it, to immediately release that material information to NZX, provided that the safe harbour exceptions did not apply.[8]

[106] Therefore, the relevant contraventions of s 270 require that:

(a) CBLC was aware of the alleged information;

(b) the information was not generally available to the market;

(c) a reasonable person would expect the information, if it were generally available to the market, to have a material effect on the price of CBLC shares;

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8 "Material information" was defined in the Listing Rules in essentially the same way as in the FMCA.

(d) the information relates to CBLC shares rather than to financial products generally or listed issuers generally; and

(e) none of the safe harbour exceptions to disclosure applied to the information.

[107] Given the admissions and the agreed statement of facts, I am satisfied that CBLC's contraventions of s 270 are made out in respect of the Need to Strengthen Reserves, the $100 Million Increase in Reserves, the Aged Receivables and the Aged Receivables Impacts, the Aged Receivables Write-Off, the Central Bank Conditions, and the Third Central Bank Direction.

[108] For Mr Harris' involvement in each contravention, the FMA relied on s 533(1)(c), that Mr Harris "has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention". This requires:[9]

(a) knowledge of the essential matters which go to make up the contravention;

(b) intentional participation in the contravention.

[109] It does not require that Mr Harris deliberately contravened the FMCA.

[110] Given the admission of causes of action and the agreed statement of facts, I am satisfied that Mr Harris was involved in each of these seven contraventions, and that there should be declarations of contravention accordingly. I note that insofar as the FMA and Mr Harris in their submissions regarding the quantum of penalty (addressed below) characterise Mr Harris' conduct as careless in relation to the Aged Receivables Impacts and the Third Central Bank Direction, and as inadvertent in relation to the Central Bank Conditions, this does not seem to fit with the knowledge and intentional participation requirements for accessory liability under s 533(1)(c) of the FMCA. In any event, the Court's acceptance of the admission of causes of action must be based

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[9] See *Financial Markets Authority v Zhong* [2023] NZHC 766 at [42], citing *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 at [260]; and *Specialised Livestock Imports Ltd v Borrie* CA72/01, 20 September 2002 at [155]–[157].

on the agreed statement of facts, rather than submissions which, for example, suggest Mr Harris' misunderstanding of confidentiality restrictions and uncertainty in relation to reserving and aged receivables. Such characterisations and other submissions must be read consistently with the agreed statement of facts. Otherwise, the Court would be going behind the agreed facts to doubt that Mr Harris appreciated the risk that disclosure was required. As indicated, given the admission of causes of action and the agreed statement of facts, I am satisfied that Mr Harris was involved in each of these contraventions.

[111] Accordingly, the declarations sought are appropriate.

Pecuniary penalty

[112] I repeat the Court's approach to pecuniary penalties adopted when considering and imposing penalties against CBLC and the INEDS.[10]

[113] Section 489(2)(c) of the FMCA provides that the Court may order a person to pay to the Crown a pecuniary penalty that the Court considers appropriate if it is satisfied that the person has contravened, or has been involved in a contravention of, a civil liability provision.

[114] Section 492 provides:

> **492 Considerations for court in determining pecuniary penalty**
>
> In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—
>
> (a) the purposes stated in sections 3 and 4 and any other purpose stated in this Act that applies to the civil liability provision; and
>
> (b) the nature and extent of the contravention or involvement in the contravention; and
>
> (c) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in contravention or who was involved in the contravention, because of the contravention or involvement in the contravention; and

[10] *Financial Markets Authority v CBL Cor Ltd (in liq)* [2023] NZHC 3842 at [81]-[83] and [85]-[87].

(d) whether or not a person has paid an amount of compensation, reparation, or restitution, or taken other steps to avoid or mitigate any actual or potential adverse effects of the contravention; and

(e) the circumstances in which the contravention, or involvement in the contravention, took place; and

(f) whether or not the person in contravention, or who was involved in the contravention, has previously been found by the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct; and

(g) in the case of section 534 (directors treated as having contravened), the circumstances connected with the director's appointment (for example, whether the director is a non-executive or an independent director); and

(h) the relationship of the parties to the transaction constituting the contravention.

[115] Although deterrence is not expressly set out as a factor, deterrence is a relevant consideration when determining a pecuniary penalty.[11] Deterrence – both specific to the individual defendants and general to other boards and senior officers of listed entities – is especially important given the main purposes of the FMCA, which are to:[12]

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

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

Agreed penalty

[116] As indicated, the FMA and Mr Harris agreed the quantum of the proposed penalty to recommend ($1.4 million) but acknowledged that the amount of any pecuniary penalty to be imposed is a matter for the Court.

[117] The task for the Court in cases where a recommended penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure, but to consider whether the proposed penalty is within the proper

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11 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [44]-[45] and [55]; *Financial Markets Authority v CBL Cor Ltd (in liq)* [2023] NZHC 3842 at [83]. See also *Financial Markets Authority v Warminger* [2017] NZHC 1471, (2017) 11 NZCLC 98-054 at [35]-[36], under the preceding s 42Y of the Securities Markets Act 1988.

12 Financial Markets Conduct Act, s 3.

range. This is because there is a significant public benefit when reporting entities acknowledge wrongdoing, thereby avoiding time-consuming, costly investigation and/or litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range.[13]

[118] The Court must be satisfied that the proposed agreed pecuniary penalty satisfies the objectives of the FMCA and reflects the particular circumstances of the case before it. When assessing whether the final figure proposed is within the proper range, the Court need not accept each step of the methodology proposed – it is the final amount that matters.[14]

Approach to fixing pecuniary penalty

[119] The three-stage approach to fixing pecuniary penalties is well-settled and applies to the FMCA. The Court:[15]

(a) determines the maximum penalty;

(b) sets a starting point for the conduct, in light of the relevant factors in s 492 bearing on the contravener's culpability, and by reference to the applicable maximum penalty; and

(c) adjusts the starting point by applying an uplift or a discount on the basis of considerations personal to the defendant.

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13 *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21]; *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [30]-[32]; *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610 at [47]; *Financial Markets Authority v Tiger Brokers (NZ) Ltd* [2023] NZHC 1625 at [36]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [85]. See also *Financial Markets Authority v Hill* [2024] NZHC 1353 at [28].

14 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [32], citing *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414, (2013) 13 TCLR 618 at [27]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [86]. See also *Financial Markets Authority v Hill* [2024] NZHC 1353 at [29].

15 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [37]; *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610 at [49]; *Financial Markets Authority v Zhong* [2022] NZHC 480 at [58] *Financial Markets Authority v Zhong* [2023] NZHC 2196 at [21]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [87]. See also *Financial Markets Authority v Hill* [2024] NZHC 1353 at [30].

Maximum penalty

[120] Section 490(1) provides that the maximum pecuniary penalty for a contravention or involvement in a contravention of any civil liability provision referred to in s 490(2) (which includes ss 22 and 270) is the greatest of:

(a) the consideration for the transaction that constituted the contravention (if any); and

(b) if it can be readily ascertained, three times the amount of the gain made or the loss avoided by the person who contravened the provision; and

(c) $1 million in the case of a contravention, or involvement in a contravention, by an individual or $5 million in any other case.

[121] As with the INEDs, the FMA and Mr Harris agreed that the maximum penalties in the present case are those under s 490(1)(c), being $1 million in respect of involvement in each contravention.

[122] It is also common ground that there are seven distinct sets of conduct involving different material information occurring at different times and that s 506, which provides that no person is liable to more than one penalty for the same conduct, does not apply.[16]

[123] Accordingly, the maximum penalty for Mr Harris's conduct is $7 million.

Starting point

[124] The FMA and Mr Harris agreed to recommend to the Court a starting point of $1.87 million. This is higher than the starting points recommended for the INEDs of $1.43 – 1.57 million accepted in my previous judgment in this proceeding,[17] and higher than in other cases, but counsel submit it still falls well within the principles

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16 *Financial Markets Authority v Kiwibank Ltd* [2023] NZHC 2856 at [25]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [90].

17 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [92](b)-(e).

indicated by the authorities having regard to the seriousness of the misconduct and Mr Harris' role as Managing Director.

[125] It is unnecessary to repeat the FMA's helpful summary of previous fair dealing and market manipulation cases set out in my earlier judgment.[18] The penalties imposed on the INEDs for their involvement in fair dealing and continuous disclosure contraventions have particular relevance here given those penalties relate to the same or similar conduct, and the desirability of consistency.

[126] Where there are multiple breaches, as here, Courts have generally proceeded on the basis that a global starting point/penalty figure should be set to address the conduct as a whole. Doing so avoids totality adjustments.[19]

[127] Counsel addressed the s 492 factors applicable to Mr Harris, as well as specific and general deterrence. I turn to those factors. Given the same or similar conduct, I repeat applicable observations from my earlier judgment.

[128] In terms of s 492(a) and the relevant purposes of the FMCA,[20] the present case is the epitome of what the fair dealing provisions and continuous disclosure regime are designed to prevent. Such breaches undermine market integrity and transparency. They are unfair to investors, and jeopardise confidence in the integrity and transparency of New Zealand's financial markets. Any penalty must bear in mind such harmful effects. The contraventions denied investors access to accurate and timely information, and are inconsistent with the promotion of transparent financial markets. Investors were provided with misleading information in August 2017 and no further information was made available to them about the multiple material issues impacting CBLC's business until 5 February 2018, after the trading halt. The conduct was completely inconsistent with promoting the confident and informed participation of business, investors and consumers in New Zealand's financial markets.

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18 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [108].
19 See, for example, *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549 at [152].
20 Sections 3, 4 and 229.

[129] In terms of the nature and extent of the involvement in the contraventions,[21] I emphasise again that timely disclosure of material information is essential to maintaining the integrity of the market.[22] Here, the lack of accurate disclosure involved two key financial metrics: CBLI's reserving and Aged Receivables. Reserve strengthening was identified as a key risk by the directors, including Mr Harris, in the PDS. It had a major impact on CBLI's and CBLC's ability to operate. The collectability of Aged Receivables had profit and (regulatory) solvency impacts. Non-disclosure of these matters was compounded by the failure to disclose regulatory action by CBI.

[130] The lack of disclosure was also prolonged, with the various contraventions extending over six months, and exacerbated by the false impression put into the market in the One-off Representation. During this period, the very problems were being investigated by regulators. The various failures meant that investors were wholly unaware of the escalating problems at CBLC. The impact on the market was very serious – more so than in the previous FMCA cases involving market manipulation or misrepresentations to customers.

[131] Mr Harris was the Managing Director of CBLC. He was a member of the Disclosure Committee, and an attendee at a number of ARC meetings. He was also a director and Chairman of CBLIE and was on its Underwriting Committee. He was integral to the overall direction and management of the CBL Group throughout the Relevant Period. As discussed above, he had an in-depth knowledge and understanding of the business, and credit and surety insurance business in general, and maintained a close working relationship with the management team. He also had knowledge and understanding of the CBL Group's underwriting risk, financial statements, and regulatory solvency position. I accept that he had no prior experience as a director of a public company.

[132] As noted above, Mr Harris was accountable to the Board for the CBL Group's performance and protection of its assets as its Managing Director. He was also one of

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21 Section 492(b).

22 NZX Guidance Note - Continuous Disclosure, April 2017, at 4 (which applied at the time of the contraventions).

the primary contacts for CBLI in its dealings with RBNZ. He attended some meetings with CBI on behalf of CBLIE, and on behalf of CBLI as CBLIE's main reinsurer, during the second half of 2017 and in early 2018. He also worked with CBLC's Compliance Officer in preparing correspondence that was sent to CBI on behalf of CBLIE and CBLI.

[133] The submissions record that the FMA and Mr Harris have agreed that his conduct was:

(a) reckless in relation to the One-off Representation, and the disclosure required in respect of the Need to Strengthen Reserves, the Need to Increase Reserves by $100 Million, and the Aged Receivables Write-off;

(b) careless in respect of the Aged Receivables Impacts and the Third Central Bank Direction; and

(c) inadvertent in respect of the Central Bank Conditions.

[134] Accordingly, Mr Harris accepts heightened culpability in relation to the One-off Representation, and disclosure on reserving and aged receivables. In turn, the FMA submits that it recognises that Mr Harris' conduct was not deliberate; however, reckless and careless conduct in relation to disclosure issues, especially by a Managing Director entrusted with the governance of a listed company, requires both specific and general deterrence.

[135] As noted above, this characterisation of some of the conduct as careless and inadvertent does not seem to fit with the knowledge and intentional involvement requirements for accessory liability under s 533(1)(c) of the FMCA. In any event, the Court's assessment of the culpability of the conduct for pecuniary penalty purposes is based on the agreed statement of facts. Such characterisations must be read consistently with the agreed statement of facts. So too must the submissions for Mr Harris that sought to emphasise (without detracting from the recommended penalty) matters such as his understanding of confidentiality restrictions and

uncertainty in relation to reserving and aged receivables. Otherwise, the Court would be going behind the agreed facts. Therefore, the relevance of these characterisations is essentially limited to comparing the culpability of Mr Harris' conduct with that of the INEDs given the desirability of consistency. In particular, as indicated, Mr Harris accepts a greater level of culpability in respect of the One-off Representation (the second cause of action). Following his involvement in that contravention, he was resistant to accurate and timely disclosure to the market, as required under the FMCA and NZX Listing Rules, especially concerning reserve strengthening and aged receivables. More generally, as Managing Director, Mr Harris was integral to the overall direction and management of the CBL Group, and had a detailed knowledge and understanding of the matters that are the subject of the contraventions.

[136] Mr Harris has also agreed that for the purposes of assessing the starting point, each individual contravention was of moderate seriousness, save for the Need to Strengthen Reserves (the sixth cause of action) which was serious. These assessments were accepted by the Court in considering and making penalty orders against CBLC and the INEDs.[23]

[137] The various failures to make disclosure about reserving, aged receivables and the CBI sanctions, taken individually or collectively, meant that investors were wholly unaware of the escalating problems at CBLC. Disclosure regarding these issues was only made on 5 and 7 February 2018, after CBLC's shares were placed under a trading halt on 2 February 2018. The shares did not trade again.

[138] Turning to the nature and extent of loss,[24] it was agreed that loss need not be quantified. There is insufficient information before me to do so. Self-evidently, the non-disclosures related to material information, that is, information a reasonable person would expect to have a material impact on the share price. CBLC shares traded in large numbers during the relevant period. But I do not draw an inference as to quantum. As counsel accepted, the breaches at least caused investors a loss of opportunity. However, Mr Harris did not obtain a realised gain.

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23 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [99]-[100].
24 Section 492(c).

[139] As to payment of compensation,[25] it is accepted that in the settlement of the shareholder and liquidator proceedings, which were resolved in 2023 without any admissions of liability, Mr Harris contributed [redacted] personally to the settlement sum. As the FMA accepted, this reduces Mr Harris' culpability and is to be taken into account by way of personal mitigation below.

[140] The circumstances in which the involvement in the contraventions took place (s 492(e)) were that CBLC and the wider CBL group were facing increasing financial concerns and regulatory intervention from the second half of 2017. Mr Harris was not only Managing Director but also a member of the Disclosure Committee tasked with determining information required to be disclosed to the market.

[141] Mr Harris has not previously been found liable under the FMCA or any other enactment for similar conduct,[26] albeit his credit for this is tempered somewhat by the number of contraventions here over a prolonged period. I take his lack of previous contraventions into account by way of personal mitigation below.

[142] The factors in s 492(g) and (h) are not applicable in this case.

[143] I have already acknowledged the need for specific and general deterrence. As Mr Dixon KC submitted for the FMA, the penalty imposed against Mr Harris (as Managing Director and a member of the Disclosure Committee) needs to reflect the importance of listed companies making prompt and accurate disclosures to the market, as well as Mr Harris' specific involvement in the contraventions. As such, it is important that the penalty in this case achieves both specific and general deterrence. The starting point needs to be high enough so that a penalty is not seen as merely a cost of doing business.

[144] Taking into account the above factors and previous cases, I am satisfied that the recommended starting point for Mr Harris of $1.87 million is within the appropriate range.

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25 Section 492(d).
26 Section 492(f).

Personal aggravating and mitigating factors

[145] There are no personal aggravating features applicable to Mr Harris that would require an uplift to the starting point.

[146] The FMA and Mr Harris have agreed that a 25 per cent discount is merited for personal mitigating factors. Counsel submit this reflects:

(a) the timing of the admissions – after the FMA served its briefs of evidence and shortly prior to trial;

(b) the settlement that Mr Harris reached with investors, which included the amount personally contributed by him;

(c) the saving in court time from Mr Harris no longer being part of the trial;

(d) Mr Harris' remorse, to the extent that is set out in the agreed statement of facts and his affidavit;

(e) other personal factors (including Mr Harris' health issues); and

(f) the Enforceable Undertaking offered by Mr Harris, and accepted by the FMA, pursuant to s 46 of the Financial Markets Authority Act 2011 in the following terms:[27]

> Mr Harris will not take management or directorship positions with any listed issuer or licenced insurer, and will not participate in any regulated offer in New Zealand, until the final resolution of the IPO Proceeding (including any appeals) (as per the definitions of "listed issuer", "licensed insurer" and "regulated offer" in s 6(1) of the Financial Markets Conduct Act 2013).

[147] This 25 per cent discount compares with the 30 per cent discount approved by the Court for CBLC and the INEDs. The difference reflects that Mr Harris' admissions were made later than the INEDs, closer to trial.

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[27] For completeness, Mr Harris accepts the FMA is entitled to argue at any penalty hearing in the IPO proceeding (CIV-2019-404-2739) that the declarations of contravention in this proceeding (the CD proceeding) are relevant to the imposition of a banning order in the IPO proceeding.

[148] In *Financial Markets Authority v Zhong*,[28] Venning J applied discounts of 25 per cent and 35 per cent to Mr Meng and Mr Qian respectively for admissions, no previous contraventions and the impact of the proceeding – the difference reflecting Mr Qian's earlier admissions. In *Financial Markets Authority v ANZ Bank New Zealand Ltd* and *Financial Markets Authority v AIA New Zealand Ltd*,[29] discounts of 30 per cent were applied for factors including self-reporting, cooperation and early admissions (remediation of customers was addressed in relation to the starting point). In *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* and *Financial Markets Authority v Vero Insurance New Zealand Ltd*,[30] the discount was 35 per cent. Self-reporting is not relevant here. Nor were the admissions made at an early stage – they were made around three months before trial was due to start, and after evidence was served. I take into account Mr Harris' settlement contribution, but it is not comparable to the remediation in those other cases. The proposed discount is above the 20 per cent discount applied in *Financial Markets Authority v Warminger*,[31] on the basis of Mr Warminger's lack of previous contraventions, the impact on his career and his health.

[149] I am satisfied that a 25 per cent discount for Mr Harris is within the proper range. As Mr Dixon submitted, a 15 per cent discount is within range for Mr Harris' admissions given their timing and the saving of trial time. It is between the 20 per cent given to CBLC and the INEDs who settled shortly before the FMA served its briefs of evidence,[32] and the 10 per cent discount applied for Mr Meng in *Zhong*, where admissions were made one week before the start of the trial.[33]

[150] A 10 per cent discount, which Mr Salmon KC submitted was conservative, is within range for Mr Harris' other personal mitigating factors – particularly his contribution to the settlement sum, lack of previous contraventions, enforceable

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28 *Financial Markets Authority v Zhong* [2022] NZHC 480 at [87]-[90] and [103]-[105].
29 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [87]; and *Financial Markets Authority v AIA New Zealand Ltd* [2022] NZHC 2444 at [111]-[112].
30 *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610; and *Financial Markets Authority v Vero Insurance New Zealand Ltd* [2023] NZHC 2837.
31 *Financial Markets Authority v Warminger* [2017] NZHC 1471, (2017) 11 NZCLC 98-054 at [58]-[62].
32 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [113]-[114].
33 *Financial Markets Authority v Zhong* [2022] NZHC 480 at [88].

undertaking and remorse. I also take into account Mr Harris' health issues, albeit these arose after the contraventions and are not suggested to affect the severity of the pecuniary penalty.

[151] A 25 per cent discount would reduce the starting point of $1.87 million to just over $1.4 million.[34] The recommended penalty of $1.4 million is well within the proper range.

Confidentiality

[152] At the hearing, I made an interim order prohibiting publication of evidence relating to the health of Mr Harris and family members and the amount of his contribution to the earlier settlement. The Court has the power to make permanent confidentiality orders in cases where there are specific adverse consequences sufficient to justify an exception to the fundamental principle of open justice.[35] Given the personal health issues and the confidentiality obligations applying to the earlier settlement, it is appropriate to continue the narrow non-publication order.

Result

[153] I make declarations of contravention as follows:

(a) In relation to the second cause of action, a declaration that as at 24 August 2017 Peter Harris was involved in CBLC's contravention of a s 38 Part 2 fair dealing provision, specifically s 22 of the Financial Markets Conduct Act 2013, in that he caused CBLC, a listed issuer, to make the One-Off Representation.

(b) In relation to the sixth cause of action, a declaration that as at 15 November 2017 Peter Harris was involved in CBLC's contravention of a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct Act 2013, by failing to cause CBLC, a listed issuer, to disclose the Need to Strengthen Reserves.

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34 $1,402,500.

35 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

(c) In relation to the eighth cause of action, a declaration that as at 31 January 2018 Peter Harris was involved in CBLC's contravention of a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct Act 2013, by failing to cause CBLC, a listed issuer, to disclose the $100 Million Increase in Reserves.

(d) In relation to the tenth cause of action, a declaration that as at 10 October 2017 Peter Harris was involved in CBLC's contravention of a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct Act 2013, by failing to cause CBLC, a listed issuer, to disclose the existence of the Aged Receivables and the Aged Receivables Impacts.

(e) In relation to the fourteenth cause of action, a declaration that as at 22 December 2017 Peter Harris was involved in CBLC's contravention of a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct Act 2013, by failing to cause CBLC, a listed issuer, to disclose the Aged Receivables Write-Off.

(f) In relation to the eighteenth cause of action, a declaration that as at 30 July 2017 Peter Harris was involved in CBLC's contravention of a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct Act 2013, by failing to cause CBLC, a listed issuer, to disclose the imposition of the Central Bank Conditions.

(g) In relation to the twenty-second cause of action, a declaration that as at 30 January 2018 Peter Harris was involved in CBLC's contravention of a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct Act 2013, by failing to cause CBLC, a listed issuer, to disclose the Third Central Bank Direction.

[154] I order Mr Harris to pay a pecuniary penalty of $1.4 million.

[155] I make an order under s 493 of the FMCA that the penalty be applied first to the FMA's actual costs in bringing this proceeding. Otherwise, there is no order as to costs.

[156] I continue the order prohibiting publication of evidence relating to the health of Mr Harris and family members and the amount of his contribution to the earlier settlement.

Gault J

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