IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2739
[2024] NZHC 3597

BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	CBL CORPORATION LIMITED (IN LIQUIDATION) First Defendant
	Continued …

Hearing: 14 May 2024

Appearances: JCL Dixon KC, W R Potter and JEM Greer for Financial Markets Authority
J R Billington KC and D R Morley for G J Turner, executor of the Estate of A L Hutchison

Judgment: 29 November 2024

JUDGMENT OF GAULT J
(Estate of A L Hutchison strike out application)

This judgment was delivered by me on 29 November 2024 at 4:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Continued …

AND

PETER ALAN HARRIS
Second Defendant

GEOFFREY JOHN TURNER as executor of the ESTATE OF ALISTAIR LEIGHTON HUTCHISON
Third Defendant

CARDEN JAMES MULHOLLAND
Fourth Defendant

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Introduction

[1] In this proceeding, the Financial Markets Authority (FMA) alleges breaches of the Financial Markets Conduct Act 2013 (FMCA) through omissions and/or false or misleading statements in offer documents issued by the first defendant, CBL Corporation Ltd (now in liquidation) (CBLC), in connection with its 2015 Initial Public Offering (IPO and IPO proceeding). These allegations concern, in particular, the failure to disclose related party information and the impact of interrelated transactions in 2014 (the Samoa transaction, explained below).

[2] The third defendant, Mr Turner as executor of the Estate of Mr Hutchison (Estate), applies for orders striking out, or alternatively staying, each cause of action against the Estate in the FMA's second amended statement of claim, for reasons connected with the death of Mr Hutchison after the proceeding commenced. In essence, the Estate says it cannot get a fair trial following Mr Hutchison's death, and the FMA's ongoing claim for declarations should not proceed given lack of jurisdiction and utility.

[3] The IPO proceeding was to be heard together with the FMA's continuous disclosure (CD) proceeding although the FMA had discontinued the CD proceeding against the Estate. The trial of the two proceedings was scheduled to commence on 25 June 2024.[1] The need to determine the strike out application urgently was reduced when Mr Billington KC, for the Estate, advised at the hearing that the Estate would not take an active role in the trial of the proceeding in any event. It subsequently transpired that the IPO proceeding had to be adjourned until 2026 for unrelated reasons.[2] Accordingly, the priority was to hear the trial of the CD proceeding before addressing this application.

Factual background

[4] CBLC is the parent company of the CBL Group, which operated as an international credit surety and financial risk insurer headquartered in Auckland.

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1 A separate application by two other defendants to adjourn the trial of the IPO proceeding on fair trial grounds was pending at the time of the hearing of this application.

2 *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 1473.

[5] In 1996, interests connected with Mr Hutchison and the second defendant, Mr Harris, purchased Contractors Bonding Ltd, which subsequently changed its name to CBL Insurance Ltd (CBLI). CBLI was the CBL Group's primary operating subsidiary once CBLC was incorporated in June 2012, and became the parent company of the CBL Group in November 2013.[3] Mr Hutchison was a non-executive director of CBLI from December 2008 and of CBLC from November 2013. He was the deputy chair of CBLC and through his interests, its largest ultimate shareholder.

[6] Following the coming into force of the Insurance (Prudential Supervision) Act 2010 (IPSA), in February 2012, the Reserve Bank of New Zealand (RBNZ) granted CBLI a provisional insurance licence. From that date, CBLI was required to comply with the Solvency Standard for Non-life Insurance Business issued by RBNZ in October 2011 (Solvency Standard).[4] This included maintaining a solvency margin. In September 2013, RBNZ granted CBLI a full insurance licence under s 19 of IPSA. Pursuant to s 21 of IPSA, RBNZ imposed a condition on CBLI's licence that it maintain a solvency margin in accordance with the Solvency Standard.

[7] The Samoa transaction occurred in October 2014. On 15 October 2014, CBLI deposited EUR12.5m with National Bank of Samoa (NBoS). On the same day, NBoS lent EUR12.5m to Federal Pacific Group (Singapore) PTE Ltd (FPGS). Also on the same day, FPGS lent EUR12.5m to Alpha Holdings A/S (Alpha), a Danish cedant insurer reinsured by CBLI. NBoS paid the EUR12.5m directly to Alpha after it had received CBLI's deposit. The terms upon which CBLI deposited the EUR12.5m with NBoS were set out in an Instrument to Receive Term Deposit dated 15 October 2014. At the same time, CBLI executed a Form of Undertaking in favour of NBoS in relation to its EUR12.5m loan to FPGS (also referred to as a Surety Bond). Mr Hutchison personally guaranteed FPGS' loan to NBoS. Mr Hutchison was a director of, and substantial shareholder (directly or indirectly) in, both NBoS and FPGS. He had a central role in the Samoa transaction.

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3 CBLI was a wholly owned subsidiary of CBLC owned through LBC Holdings New Zealand Ltd.

4 This was revoked and replaced by the Solvency Standard for Non-life Insurance Business 2014.

[8] On or about 7 September 2015, CBLC lodged a product disclosure statement (PDS) with the Registrar of Financial Service Providers in connection with CBLC's IPO.

[9] On or about 13 October 2015, following the IPO, CBLC listed on the NZX and ASX. The IPO raised NZD125 million.

[10] On 15 November 2017, CBLC's board advised RBNZ that CBLI was likely to breach its solvency condition as at 31 December 2017 and required further reserve strengthening. In or around November 2017, CBLI's appointed actuary recommended a further reserve strengthening as at 31 December 2017 of NZD147 million.

[11] On or about 2 February 2018, NZX placed a trading halt on trading of CBLC's shares. On or about 8 February 2018, NZX suspended quotation of CBLC's shares on the basis that it was concerned that CBLC was in breach of its continuous disclosure obligations.

[12] On or about 23 February 2018, the Court made an order appointing interim liquidators of CBLI on the application of RBNZ, and placed CBLC (and nine of its subsidiaries) into voluntary administration.

[13] On or about 12 November 2018, the Court made an order placing CBLI into liquidation.

[14] On or about 13 May 2019, the Court made an order placing CBLC into liquidation.

[15] Legal proceedings followed, brought by representative shareholders, the FMA (the IPO and CD proceedings, both filed on 16 December 2019), and the liquidators of CBLI and CBLC. So did the Serious Fraud Office (SFO) prosecution in the criminal proceeding, which included one charge against Mr Hutchison.

[16] Mr Hutchison died on 21 December 2021.

[17] On 8 February 2022, the Deputy Solicitor-General directed that the SFO charge against Mr Hutchison be stayed under s 176(1) of the Criminal Procedure Act 2011. Justice Fitzgerald made note of the stay the same day.

[18] On 16 May 2022, Mr Turner was appointed the sole executor of Mr Hutchison's estate.

[19] On 21 July 2022, I directed that the two FMA proceedings and the liability issues in the two shareholder proceedings all be heard together.[5] The shareholder and liquidator proceedings were subsequently resolved.

[20] On 31 October 2022, Mr Turner was substituted as the third defendant in this IPO proceeding, and as the fifth defendant in the CD proceeding (by consent).

[21] On 22 November 2022, the FMA filed amended statements of claim in both FMA proceedings. Among the amendments was that the FMA no longer sought pecuniary penalties against the Estate.

The IPO proceeding

[22] The Samoa transaction features substantially in the IPO proceeding. The FMA alleges that CBLC, Mr Harris, Mr Hutchison (now the Estate) and Mr Mulholland breached ss 57 and 82 of the FMCA through omissions and/or false or misleading statements in offer documents issued by CBLC in connection with its 2015 IPO. Those allegations concern, in particular, the failure to disclose related party information and the impact of the Samoa transaction.

[23] The first cause of action is against CBLC for breach of s 57(1)(a)(i) of the FMCA – failure to disclose in the PDS material information that Mr Hutchison had a material interest in the Samoa transaction. The second cause of action is against Mr Harris, Mr Hutchison and Mr Mulholland (the individuals) concerning the same alleged breach. The third cause of action against CBLC alleges breach of s 82(1)(a)(ii), relating to the same related party non-disclosure. The fourth cause of

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5 *Livingstone v CBL Corporation Ltd (in liq)* [2022] NZHC 1734.

action alleges the same breach against the individuals. The fifth cause of action against CBLC is for breach of s 82(1)(a)(i), alleging false or misleading statements relating to CBLC's solvency ratio disclosures, and the purpose statement in the PDS. The solvency ratio was allegedly false or misleading because of the Samoa transaction, and the purpose statement was allegedly incorrect because the use of the IPO proceeds was based on the solvency ratio being correct. The sixth cause of action alleges the same breach against the individuals.

[24] Against CBLC, the FMA seeks declarations of contravention and pecuniary penalties. Against Mr Harris and Mr Mulholland, the FMA seeks declarations of contravention, pecuniary penalties and banning orders. Against Mr Hutchison's estate, the FMA seeks only declarations of contravention. By this application, the Estate seeks to avoid any such declaration.

FMCA liability

[25] For the Estate to be liable under the FMCA, there must be a (primary) contravention by CBLC. The alleged primary contraventions by CBLC are failing to disclose in the PDS Mr Hutchison's material interests in the Samoa transaction (first cause of action), omitting that information (third cause of action), and making false or misleading statements relating to the solvency ratio and purpose statement (fifth cause of action).

[26] These alleged primary contraventions may be characterised as involving strict liability, but are subject to statutory defences.

[27] In relation to the causes of action under s 57 of the FMCA, there is a defence in s 499(1) if CBLC proves that:

> (a) the contravention was due to reasonable reliance on information supplied by another person;[6] or

[6] Another person does not include a director, an employee, or an agent of CBLC: s 499(2).

(b) both of the following apply:

(i) the contravention was due to the act or default of another person,[7] or to an accident or to some other cause beyond CBLC's control; and

(ii) CBLC took reasonable precautions and exercised due diligence to avoid the contravention.

[28] Involvement in the contravention, at least in terms of s 533(1)(c) (which requires that the accessory, "has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention"), requires by analogy with accessory liability in the criminal law:[8]

(a) knowledge of the essential matters which go to make up the contravention;[9] and

(b) intentional participation in the contravention.

[29] In addition, there is a statutory defence in s 503 for a person involved in a contravention if they prove that their involvement in the contravention was due to reasonable reliance on information supplied by another person (not being the director, employee or agent of the person involved), or they took all reasonable steps to ensure that the contravener complied with the relevant provision.

[30] The position is different with alleged contraventions of s 82. In relation to the primary contravention, the s 499 defence is limited to that set out at [27](a) above.[10] Section 500 also provides a defence for a contravention of s 82 if CBLC proves that it

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7 Another person does not include a director, an employee, or an agent of CBLC: s 499(2).

8 See *Financial Markets Authority v Zhong* [2023] NZHC 766, [2023] NZCCLR 28 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]. See also the earlier case of *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 (HC); and recently *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2024] HCA 27, (2024) 98 ALJR 1021.

9 This does not extend so far as knowledge that the FMCA required disclosure of the transactions – if it did, the FMA's case against Mr Hutchison would be even harder to prove in his absence.

10 Section 499(3).

made all inquiries (if any) that were reasonable in the circumstances, and after doing so, believed on reasonable grounds that the relevant statement was not false or misleading or that there was no omission (as applicable).

[31] In relation to accessory liability, s 534(3) provides that every director of the offeror/issuer at the time of the contravention must be treated as also having contravened the provision. However, s 501 provides a defence if the Estate proves that Mr Hutchison took all reasonable steps to ensure that CBLC complied with s 82. This defence also does not limit any defence that the director may have under ss 499 or 500 (as a person who is treated as contravening s 82).[11]

Grounds in support of strike out or stay

[32] The application is made under r 15.1 of the High Court Rules 2016 or the Court's inherent jurisdiction, on the grounds that:

(a) each cause of action against the Estate is an abuse of process, as a fair trial is not possible given Mr Hutchison's death, the nature of the claim, and the legislative framework;

(b) the claims against the Estate are purely personal and analogous to defamation proceedings to which an exception in s 3 of the Law Reform Act 1936 applies;

(c) the claims against the Estate are quasi-criminal, and are pointless and frivolous given Mr Hutchison's death;

(d) the FMA does not seek pecuniary penalties against the Estate, and there is no public interest or utility in proceedings for declarations of contravention; and

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11 Section 501(3).

(e) the claim for declarations of contravention is contrary to their statutory purpose and the Court's discretion to grant solely declaratory relief where there is no utility.

[33] In written submissions, the Estate raised a further ground that continuing the proceeding is contrary to tikanga, as discussed by the Supreme Court in *Ellis v R*.[12] However, at the hearing, Mr Billington said this ground was not pursued. He accepted that protection of Mr Hutchison's reputation is sufficiently addressed in the other grounds.

Applicable strike out and stay principles

[34] Rule 15.1 of the High Court Rules provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[35] As the Court of Appeal said in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*:[13]

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12 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

13 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89] (footnotes omitted).

> … In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes…

[36] The Court of Appeal addressed abuse of process in *Reid v New Zealand Trotting Conference*:[14]

> Misuse of the judicial process tends to produce unfairness and to undermine confidence in the administration of justice. In a number of cases in recent years this Court has had occasion to consider the inherent jurisdiction of the High Court, and on appeal this Court, to take such steps as are considered necessary in a particular case to protect the processes of the Court from abuse. (See particularly *Moevao v Department of Labour* [1980] 1 NZLR 464 and *Taylor v Attorney-General* [1975] 2 NZLR 675.) In exercising that jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. The public interest in the due administration of justice necessarily extends to ensuring that the Courts' processes are fairly used and that they do not lend themselves to oppression and injustice. The justification for the extreme step of staying a prosecution or striking out a statement of claim is that the Court is obliged to do so in order to prevent the abuse of its processes. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 Lord Diplock began his judgment, which was concurred in by the other members of the House, with these words:
>
> > "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

[37] It is common ground that the "otherwise an abuse of process" category in r 15.1(1)(d) includes circumstances where a fair trial is not possible. While this case does not involve want of prosecution or other prejudicial delay by the plaintiff, the FMA accepts the need for a fair trial. As Heath J said in *Anderson v Hawke*:[15]

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[14] *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 9. See also *Savril Contractors Ltd v Bank of New Zealand* [2005] 2 NZLR 475 (CA); *Schaeffer v Murren* [2018] NZCA 420 at [15]; and *Dotcom v District Court at North Shore* [2018] NZCA 442, [2018] NZAR 1859 at [16].

[15] *Anderson v Hawke* [2016] NZHC 1541. See also *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602 at [31].

> [19] While s 25(a) [of the New Zealand Bill of Rights Act 1990 (NZBORA)] is part of a provision that sets minimum standards of criminal procedure, there is no doubt that fair trial concerns can be raised in civil proceedings in the context of a claim of abuse of process,[16] even where a limitation period has not expired.[17] Section 27 of the Bill of Rights, by its guarantee of judicial processes that accord with the principles of natural justice, supports that proposition…

[38] In the criminal context, the approach to stays was summarised by William Young J for the majority of the Supreme Court in *CT v R* as follows:[18]

> (a) Delay between offending and prosecution does not erase criminal liability and the adoption of limitation periods is for Parliament and not the courts. There is no scope for a presumption that after a particular time memories are too unreliable for the purposes of a criminal trial.
>
> (b) The adequacy or otherwise of the explanation for delay may be relevant to credibility but perceived inadequacy of such explanation of itself is not a ground for a stay, at least in the case of serious crime.
>
> (c) A judge should grant a stay if persuaded that, despite the operation of the burden and standard of proof and the steps which a trial judge must take to mitigate the risk of prejudice, there cannot be a fair trial.
>
> (d) The exercise does not turn on whether the Judge is satisfied on the balance of probabilities as to any particular item of alleged prejudice (for instance, that but for the delay there would have been identifiable evidence which would have assisted the defendant). Rather what is required is a judicial evaluation based on assessments of the circumstances as they are at the time of trial and of the likely prejudicial effects of the delay.
>
> (e) Material to such assessments will be the availability (or more commonly, the unavailability) of defence witnesses, relevant documents and independent evidence of whereabouts and activity, the general impact of time on memory, any deterioration in the defendant's physical or mental health (with consequent impact on ability to mount a defence), indeterminacy as to the specifics of the alleged offending (particularly where an isolated act of offending is in issue) and the apparent strength or weakness of the Crown case.
>
> (f) While a defendant facing serious charges will usually have to be able to point to tangible delay-related prejudice, a combination of a very lengthy delay and a weak Crown case may justify a stay.

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16 For example, see *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 (CA) applying *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 9 (per Richardson J) and *Hunter v Chief Constable of West Midlands* [1982] AC 526 (HL) at 536 (per Lord Diplock).

17 *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 (CA), at paras [88] and [111].

18 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [32].

(g) Judges must approach stay applications on the basis that an evaluative assessment is required of the facts of the case at hand without any presupposition as to what the result should be.

[39] I accept that fair trial principles should be afforded particularly significant importance when the civil proceeding is a regulatory proceeding by the State against a citizen.

[40] Even so, the jurisdiction to strike out for abuse of process (as with other strike out grounds) should be exercised sparingly.[19] As I said in the strike out decision in the CD proceeding,[20] where the conduct in issue gives rise to an alleged denial of a fair trial, the Court of Appeal's observations in *Schaeffer v Murren* are apt (albeit the conduct in that case involved alleged threats):[21]

> [16] …Such conduct may properly found an application for permanent stay or strike-out of a proceeding. But the burden on the applicant for such orders will be a heavy one. That is because the effect of granting such an application is to preclude altogether the determination of the asserted rights of a party to proceedings before the courts. A court will do so only where it is demonstrated that there was no other available means that would permit a fair trial to take place. In most cases this will be a proper matter for the trial judge to address. It will be a rare case indeed where a pre-trial application for stay based on abusive conduct by one party will be granted. That is because in most cases the effect of the abusive conduct, and whether fair trial is possible despite it, will only be able to be assessed at the trial, rather than ex ante, after: (1) determination of the actuality of the alleged abusive conduct; (2) consideration of appropriate trial directions to neutralise or mitigate the proven conduct; and (3) the efficacy of those directions has been assessed in operation at trial.

[41] The discretionary power under r 15.1(3) of the High Court Rules to stay instead of striking out must be informed by the considerations in r 15.1(1).[22] The Court also retains an inherent jurisdiction to stay which is unaffected by r 15.1.[23] In either case, compelling circumstances weighing in favour of a stay are required.[24]

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19 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31]; *Dotcom v District Court at North Shore* [2018] NZCA 442, [2018] NZAR 1859 at [16]; and recently, *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [74]-[85].

20 *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2235 at [47].

21 *Schaeffer v Murren* [2018] NZCA 420 (footnotes omitted).

22 *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681 at [34].

23 High Court Rules, r 15.1(4); and *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681 at [33], citing *Forestry Corporation of New Zealand v Attorney-General* (1999) 16 PRNZ 262 (HC) at 269.

24 *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681 at [39].

Issues

[42] There are three main issues to be determined:

(a) whether a fair trial is possible for the Estate;

(b) whether the Court has jurisdiction to grant a declaration against the Estate; and

(c) whether there is any arguable utility or practical benefit in granting a declaration against the Estate.

[43] Before addressing these issues, I deal with the Estate's reference to s 3 of the Law Reform Act and the characterisation of the proceeding as "quasi-criminal".

Law Reform Act 1936, s 3

[44] Section 3 of the Law Reform Act provides:

> **3 Effect of death on certain causes of action**
>
> (1) Subject to the provisions of this Part, on the death of any person after the passing of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate:
> provided that this subsection shall not apply to causes of action for defamation or for inducing one spouse to leave or remain apart from the other.
> …

[45] This is reflected in pt 4, subpt 8 of the High Court Rules. Rule 4.49(1) provides that a proceeding does not come to an end on the death or bankruptcy of a party if a cause of action survives or continues. Rules 4.50-4.53 set out the procedure to be followed.

[46] Mr Billington submitted that while s 3 of the Law Reform Act ostensibly enables this proceeding to continue against a deceased estate, the rationale for excluding defamation is the same as in this case – both actions are "purely personal". In defamation cases, only the plaintiff can give reliable evidence as to his or her feelings or distress, and no one but the defendant can give reliable evidence to rebut

an allegation of ill will. Mr Billington submitted the same applies here; only Mr Hutchison could give reliable evidence as to his conduct, knowledge and belief.

[47] This submission relies on the 1934 recommendations of the Law Revision Committee to the Lord Chancellor. These recommendations resulted in English legislation which substantially influenced the drafting of New Zealand's Law Reform Act. The relevant recommendations were reproduced in the judgment of Cooke P in *Re Chase*.[25] While recommending reform to enable claims after death because of the toll of motor vehicle accidents, the Committee also stated:

> 14. In actions which are regarded as purely personal, such as defamation, or seduction, where the presence of the plaintiff or of the defendant may be of the greatest importance, we do not suggest any change.
>
> 15. We may sum up our recommendations, which are subject to the above limitations, as follows:
>
> "(a) *Death of defendant after action commenced but before judgment* — An action for a breach of contract or for a tort or for a breach of statutory duty commenced during the lifetime of the defendant may, notwithstanding his death, be continued against his personal representative…

[48] Acknowledging that the relevant causes of action against the Estate and/or relevant statutory defences require proof of Mr Hutchison's knowledge, and that his absence is relevant to the fair trial assessment, I do not accept that a further exception can be implied into s 3 for causes of action involving breaches of the FMCA, or for so-called "purely personal" causes of action. Those words in the Law Revision Committee's report, or a wider class of exempt causes of action, were not incorporated into s 3.

[49] The Estate also relied on the Court of Appeal's explanation of the rationale for the defamation exception in *Hagaman v Little*; namely, that only the plaintiff can give reliable evidence as to his or her feelings or distress, and no one but the defendant can give reliable evidence to rebut an allegation of ill will.[26] But that decision does not suggest s 3 should permit other exceptions. This proceeding is quite different from the two causes of action excepted from s 3. Personal knowledge is relevant to many causes of action. Nor was it suggested that the right to natural justice affirmed in s 27

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25 *Re Chase* [1989] 1 NZLR 325 (CA) at 330.
26 *Hagaman v Little* [2017] NZCA 447, [2018] 2 NZLR 140 at [9].

of NZBORA cuts across s 3 of the Law Reform Act. Section 27 cannot be interpreted to mean that no civil proceeding can continue after a defendant's death. As the FMA submitted, if natural justice is limited through Mr Hutchison not being available to give evidence, s 3 is a reasonable limit.[27] Whether the rationale for the exceptions in s 3 also applies in claims under the FMCA is best assessed in the context of considering the possibility of a fair trial and the utility of seeking declarations.

Nature of proceeding

[50] As mentioned, principles from the criminal law can apply to applications to strike out or stay civil proceedings on fair trial grounds. That is particularly so in the case of pecuniary penalty claims, which have been described as "quasi-criminal" (at least for some purposes).[28] However, this characterisation has also been rejected.[29] The Law Commission has stated that statutory pecuniary penalty regimes blur the traditional distinction between the criminal and civil law.[30] Such regimes have public purposes including denunciation and deterrence. The proceedings are brought by the State. However, the Law Commission nevertheless recommended that pecuniary penalties should continue be imposed on the civil standard of proof under civil rules of court procedure and evidence.[31] The "quasi-criminal" reference should not be taken too far. As the FMA submitted, this is a civil proceeding under a *sui generis* statutory regime. Subject to the Court's oversight, pecuniary penalty claims are amenable to commercial resolution by way of admissions and agreed recommended penalties.[32] An executor can also make responsible admissions.

[51] In any event, in this proceeding the FMA is not seeking a pecuniary penalty against the Estate, and it is unnecessary to decide whether pecuniary penalty claims can survive the death of the defendant. Accepting that the regulatory context includes

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27 New Zealand Bill of Rights Act 1990, s 5.

28 For example, *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA) at 96-97; *Commerce Commission v Roche Products (New Zealand) Ltd* [2003] 2 NZLR 519 (HC) at [43], [57] and [61]; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* [2007] 2 NZLR 805 (HC) at [89]; and *R v Talbot* [2019] NZHC 773 at [1].

29 *Commerce Commission v Air New Zealand Ltd* HC Auckland CIV 2008-404-8352, 21 October 2009 at [97].

30 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014).

31 At Appendix A cls G4 and G9.

32 See for example in the CD proceeding *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2322 at [117]-[118].

public purposes such as denunciation and deterrence, this proceeding for declarations of contravention is not to be treated as quasi-criminal and struck out or stayed simply because a pecuniary penalty was previously sought against Mr Hutchison, and there was also previously a separate criminal proceeding against him.

[52] I accept it will be relevant to my assessment of whether a fair trial is possible that the protections available in a civil proceeding are not the same as those in a criminal proceeding where, as William Young J said in *CT v R*, the burden and standard of proof provide substantial protection for a defendant, as does the obligation of a trial judge to take all appropriate measures to mitigate the risk of prejudice.[33]

Abuse of process – is a fair trial possible?

[53] I turn to evaluate whether a fair trial is possible or whether I should conclude now that there cannot be a fair trial.

[54] I accept that the application needs to be seen in its proper context; whether Mr Hutchison's absence precludes a fair trial for the Estate must be assessed by reference to the relevant claims and factual circumstances. These are regulatory claims by the FMA against CBLC as primary contravener and individuals alleged to have been involved in the contraventions – with Mr Hutchison replaced by the Estate. As indicated, the FMA must establish a primary contravention by CBLC (the first, third and fifth causes of action) as a prerequisite to establishing individual liability (the second, fourth and sixth causes of action) according to the differing claims and defences summarised above.

[55] I also accept that counsel for the liquidators of CBLC has advised the Court that the liquidators are not proposing to file any evidence in this proceeding. However, that does not mean that the FMA's case against CBLC will proceed unopposed. It will be open to any other defendant to oppose the primary contravention claims which are a prerequisite to individual liability. The CD trial proceeded in this way despite CBLC having made admissions, as indicated in my strike out decision.[34]

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33 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [27].
34 *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2235 at [41].

[56] In relation to each claim relating to Mr Hutchison, I accept that his conduct, knowledge and belief are central. In relation to the second cause of action, Mr Hutchison's involvement in CBLC's alleged breach of s 57, the FMA must establish his knowledge of the essential matters which go to make up the contravention and his intentional participation in the contravention. The FMA pleads these essential matters are that:[35]

(a) he had a material interest in the Samoa transaction;

(b) the Samoa transaction was material to CBLI, CBLC, and/or himself; and

(c) the PDS failed to disclose his interest.

[57] The FMA needs to prove Mr Hutchison knew each of these matters. The FMA says the documentary evidence establishes unequivocally that Mr Hutchison knew these matters, such that it would not plausibly have been open to him to give evidence that he did not. The FMA accepts, however, that this is ultimately a matter for the FMA to prove, and the actual knowledge generally required to establish accessorial liability is a high threshold.

[58] In relation to the fourth and sixth causes of action, Mr Hutchison's liability in respect of alleged breaches of s 82, if CBLC's contravention is proved I accept there is a deemed contravention by directors under s 534(3) – subject to the statutory defences referred to above Thus, in the case of the alleged s 82 contraventions, I accept there is a reverse onus in the event of a primary contravention. However, this applies to any director alleged to be involved in a breach of s 82. Whether a fair trial is possible must be assessed by reference to the issues genuinely in dispute in the proceeding.

[59] I do not accept the FMA's submission that in the period before Mr Hutchison's death in December 2021, he had sufficient time to prepare for this proceeding – at least in the sense of preparing evidence for trial. Without ignoring that the proceeding was

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35 Interests are dealt with in the Financial Markets Conduct Regulations 2014, sch 3 cl 23(3).

commenced in December 2019, that the Samoa transaction was a critical feature of this and other proceedings, including the criminal proceeding, and that Mr Turner was Mr Hutchison's solicitor prior to his death, it is evident from Mr Hutchison's May 2021 application for name suppression in the criminal proceeding that he was in very poor health well before he died. He died before extensive discovery was complete, before a trial date was set, before the briefing of evidence process commenced and before the FMA served the briefs of its witnesses. He was also subject to many other allegations in the various proceedings during this period.

[60] Even so, Mr Hutchison's pleaded admissions in this proceeding in May 2020 (19 months before he died) are relevant to determining what is genuinely in issue, whether his executor can now offer an effective defence, and whether a fair trial is possible. Mr Hutchison admitted knowledge of the terms of the Samoa transaction, and his directorships and shareholdings. However, he denied the balance of the second cause of action – including that he had a material interest in the Samoa transaction, that the Samoa transaction was material to CBLI, CBLC, and/or himself, and that the PDS did not disclose any interests he may have had (albeit admitting knowledge of its content).[36] It is also relevant that there is no suggestion the Estate cannot access Mr Hutchison's records, such as the emails and other documents in which he was involved. The issue is essentially whether the absence of evidence from Mr Hutchison himself precludes a fair trial of the issues in dispute.

[61] The Estate can prepare its defence based on the pleadings, documents, Mr Hutchison's FMA interview transcripts,[37] whatever further information or instructions he provided before he died, and cross-examination of FMA and other defence witnesses. Mr Hutchison was interviewed twice by the FMA. Although he was not asked about his understanding of "material interest" or the materiality of his interests in the Samoa transaction, he accepted he was aware of the Samoa transaction. The FMA will have to establish his knowledge of the essential matters making up the contravention and his intentional participation without being able to cross-examine him. He also said that he relied heavily on others and believed that relevant

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[36] I acknowledge that the Estate has filed an amended defence stating that it cannot plead to some of these and other matters, which it will be necessary to address at any trial.

[37] The FMA accepts these transcripts will be admissible under s 18 of the Evidence Act 2006. There may also be interim liquidators' interview transcripts.

information was disclosed. It is open to the Estate to argue that defences are made out by CBLC in relation to each cause of action. It is also open to the Estate to argue that Mr Hutchison's reliance on information or advice supplied by others was reasonable, and/or that he took all reasonable steps to ensure that CBLC complied with the relevant statutory provisions, albeit he did not suggest when interviewed that he took any specific advice on his interests in the Samoa transaction and their omission from the PDS. If Mr Hutchison had taken advice or other steps, those steps should be able to be discerned from the documents recording the Due Diligence Committee process.

[62] In any event, as the FMA submitted, whether the executor's defence has been so prejudiced that continuing the claims would be an abuse of process cannot be determined without assessing the extent to which Mr Hutchison's death has actually reduced the likelihood of successfully establishing a statutory defence. The cases under the somewhat analogous s 58(4) of the (now repealed) Securities Act 1978 set a high bar to establish objectively reasonable grounds for belief.[38] However, a strike out application is not the occasion to assess the merits of a defence that might be available.

[63] The trial judge assessing the evidence would apply the relevant onus and standard of proof to the elements of the alleged primary contraventions, Mr Hutchison's knowledge and participation in the alleged s 57 contravention, and the statutory defences, and would take into account Mr Hutchison's unavailability as a witness and avoid drawing any inappropriate inferences.

[64] As in *Anderson v Hawke*,[39] I acknowledge the problems that the Estate faces, but I consider a fair trial remains possible given the nature of the claims, the significance of the extensive documentary record, the evidence available from other participants in the relevant transactions, and the fact that the trial judge would take a cautious approach to inferences as to Mr Hutchison's conduct and knowledge. The need for a fair trial should be addressed by the trial judge. I am not satisfied at

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38 *R v Petricevic* [2012] NZHC 665, [2012] NZCCLR 7, where the evidence was discussed at [366]; *R v Graham* [2012] NZHC 265, [2012] NZCCLR 6, where the evidence was discussed at [138] (upheld on appeal: *Jeffries v R* [2013] NZCA 188); and *R v Moses* HC Auckland CRI 2009-004-1388, 8 July 2011, where the evidence was discussed at [406](a). See also *Ministry of Economic Development v Feeney* DC Auckland CRI-2008-004-029199, 2 August 2010 at [77] ff.

39 *Anderson v Hawke* [2016] NZHC 1541 at [46].

this stage that there cannot be a fair trial such that it is necessary to take the extreme step of striking out or staying the proceeding.

Jurisdiction to grant a declaration?

[65] The FMA's statement of claim seeks declarations against the Estate pursuant to s 486(1) of the FMCA or, alternatively, in the Court's inherent jurisdiction.

[66] Under s 486(1), 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.[40]

[67] Section 487 states the purpose and effect of a declaration of contravention:

> **487 Purpose and effect of declarations of contravention**
>
> (1) The purpose of a declaration of contravention is to enable an applicant for a compensatory order or other civil liability order under section 497 to rely on the declaration of contravention in the proceedings for that order, and not be required to prove the contravention or involvement in the contravention.
>
> (2) Accordingly, a declaration of contravention is conclusive evidence of the matters that must be stated in it under section 488.

[68] Mr Billington submitted that there is no prospect of any such applicants relying on the FMA's declarations (if the case is proven), as the two shareholder class actions, between them representing virtually all eligible shareholders, have been settled on conditions prohibiting any represented shareholders from bringing further claims relating to the CBL Group of companies, and the limitation period for bringing any such claim has also expired. He submitted the gravamen of his argument was that the statutory purpose for a declaration under s 487 of the FMCA is spent, and there is no jurisdiction to make declarations against Mr Hutchison. He also submitted that, as there is a specific provision in the FMCA dictating the circumstances under which the Court can make declarations, it would be contrary to the purposes of the FMCA for the Court to exercise a separate jurisdiction.

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[40] Sections 57 and 82 of the Financial Markets Conduct Act 2013 are both civil liability provisions, as defined in s 485(b): ss 101(3)(c) and (g).

[69] The FMA accepted that the evidential consequence of s 487 is unlikely to be of practical utility due to the settlement of the shareholder proceedings, but submitted that does not mean that declarations under s 486 are unavailable.

[70] Acknowledging the statutory purpose of declarations of contraventions in s 487, I accept that most shareholders unrelated to CBLC have already settled (only 3.5 per cent have not, according to Mr Turner's affidavit), and that other private parties would now appear to be statute-barred. However, I do not consider that likelihood precludes the Court's jurisdiction under the FMCA. The Court's jurisdiction to make a declaration of contravention under s 486 should not depend on the FMA establishing that other private parties will still bring claims. This is more a question of utility, considered below. The follow-on evidential purpose of a declaration of contravention articulated in s 487 may not be the only purpose of a declaration. As the FMA submitted, it would not promote the main purposes of the FMCA[41] to read the power to make declarations of contravention as being limited to when they will serve the narrow evidential function identified in s 487.

[71] Nor does the FMCA purport to oust the Court's separate or inherent jurisdiction to grant declaratory relief which does not have the follow-on effect of a declaration of contravention under the FMCA. As s 2 of the Declaratory Judgments Act 1908 states:

> **2 Declaratory judgments**
>
> No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

[72] This case has some similarity with *Telecom Corporation of New Zealand Ltd v Commerce Commission* (*Telecom*),[42] where the Court of Appeal dismissed an appeal against the High Court's judgment that Telecom's pricing breached s 36 of the Commerce Act 1986 from 18 March 2001 until late 2004, allowed the Commission's cross-appeal in relation to Telecom's pricing in the prior period from 1 February 1999 to 18 March 2001, and held that declaratory relief was available for the earlier period. In relation to declaratory relief, the High Court had held that there was no jurisdiction

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41 Section 3.

42 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 278 [*Telecom*].

to grant a declaration in relation to Telecom's conduct prior to 18 March 2001, the so-called "limitation date", since pecuniary penalties were only available subject to a three-year limitation period,[43] but the Court of Appeal concluded that limitation did not preclude the Court from granting a declaration and that it was an appropriate case to do so.

[73] As to jurisdiction, Chambers J (with whom the other judges agreed) said that the law had moved on since *Gouriet v Union of Post Office Workers*, in which Lord Diplock said the Court's jurisdiction to grant declarations concerning private conduct is limited to declarations over enforceable rights, i.e. legal rights in respect of which the Court has jurisdiction to grant a remedy other than a declaration,[44] referring to the classic text *The Declaratory Judgment*[45] and the Supreme Court's decision in *Mandic v Cornwall Park Trust Board (Inc)*.[46] Chambers J said that the jurisdiction to grant declarations did not come from the Commerce Act, and was not subject to any statutory limitation period.[47] He said the courts in general "lean firmly against construing a statute in a manner which ousts their own [declaratory] jurisdiction" and did not accept that the Commerce Act implicitly ousted the Court's jurisdiction to grant a declaration.[48] He did not accept that relief was limited to that available under the Commerce Act, saying that the starting point was that the High Court has jurisdiction to grant declaratory relief even though that remedy is mentioned nowhere in that Act. A construction of the Commerce Act as purporting to permit declaratory relief only if tied to an application for an order of specific Commerce Act relief would be contrary to s 2 of the Declaratory Judgments Act.[49]

[74] I accept that the FMCA differs from the Commerce Act in that it specifically provides for declarations of contravention, but I do not consider this implicitly ousts

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43 Commerce Act 1986, s 80(5).

44 *Telecom* at [295]-[296], referring to *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 501.

45 Lord Woolf and Jeremy Woolf, The Declaratory Judgment (4th ed, Sweet & Maxwell, London, 2011), especially at [3-26]-[3-27]; see also [3-19].

46 *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135; [2012] 2 NZLR 194 at [5]-[9] per Elias CJ and at [82] per Blanchard, Tipping, McGrath and William Young JJ. See also *Peters v Davison* [1999] 2 NZLR 164 (CA) at 188; and *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [63]-[64].

47 *Telecom* at [299].

48 At [301], citing Lord Woolf and Jeremy Woolf, The Declaratory Judgment (4th ed, Sweet & Maxwell, London, 2011) at [3-65].

49 At [303].

the Court's separate jurisdiction to grant a declaration. The real issue is whether there is any utility or practical benefit in the Court granting a declaration. I turn to this next.

No utility or practical benefit in the Court making declarations?

[75] Mr Billington submitted it has consistently been held that the Court will not make declaratory orders that have no utility. The Court's time is precious, and it is not the function of the courts to provide abstract opinions.[50] He relied particularly on *Re Chase*.[51] In that case, the Court of Appeal dismissed an appeal against the High Court's decision that the administrator of Mr Chase's estate had no reasonable cause of action in relation to the police shooting of Mr Chase. In relation to the question of a declaration, Cooke P considered there was jurisdiction, but emphasised it was a discretionary jurisdiction to be exercised only in exceptional cases.[52] Given the previous inquiry and inquest, the circumstances of the case did not warrant what would amount to a further inquiry into the circumstances of Mr Chase's death.[53] As Somers J said, the case was not one in which the discretion to make a declaration could be properly exercised.[54]

[76] On the other hand, in *Telecom* the Court of Appeal did not accept that the declaration sought should be denied on the basis it was hypothetical or of no practical significance.[55] In the circumstances of that case outlined above, the Court concluded that the Commerce Commission was entitled to a declaration covering the pre-2001 conduct as well as the post-2000 conduct.[56]

[77] It is common ground that in this context the test on a strike out or stay application is whether the FMA's claim for a declaration is reasonably arguable. If so, the case should proceed. Whether the Court ultimately would or should grant the declaratory relief sought in the circumstances is an issue for the trial judge's discretion, having heard the available evidence of Mr Hutchison's involvement in the events in issue.

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50 *Te Whakakitenga o Waikato Inc v Martin* [2016] NZCA 548, [2017] NZAR 173 at [39].
51 *Re Chase* [1989] 1 NZLR 325 (CA).
52 At 334. See also Henry J at 343.
53 At 334. See also Somers J at 338 and Henry J at 343.
54 At 338.
55 *Telecom* at [321].
56 At [337].

[78] Mr Billington submitted there would be no utility or practical benefit in the Court making declarations in this case (if the FMA could prove its case despite the fair trial issues). All that could be achieved by declarations is that the public would be made aware that the Court accepted the FMA proved its case against a deceased person, with little, if any, deterrent effect. He submitted that denunciation and deterrence would not be achieved through declarations, but through the pecuniary penalties imposed on CBLC, Mr Harris, and/or Mr Mulholland (if the case is proved).

[79] I do not consider the issue is appropriate for strike out or stay. Unlike the CD proceeding, which was discontinued against Mr Hutchison after his death, the FMA considers there is public utility in continuing discrete parts of this IPO proceeding against the Estate given Mr Hutchison's central involvement in the Samoa transaction. I consider the FMA's claim for a declaration is reasonably arguable. Even if the unopposed Commerce Commission cases relied on by the FMA are distinguishable,[57] this case has more similarity to *Telecom* than it has to *Re Chase*. The claim relating to Mr Hutchison is not moot or frivolous, and there may be practical benefit in a declaration. Declaratory relief is discretionary, and I consider the discretion should be exercised by the trial judge in all the circumstances known at trial.[58] Whether denunciation, general deterrence or public education are sufficiently achieved through proving the claims against other defendants can only be assessed at trial.

[80] In any event, it will be necessary in this IPO proceeding to make findings about the Samoa transaction, including Mr Hutchison's role, irrespective of whether the claim against his Estate continues. Further, this is not a case where practical prejudice weighs in favour of the Estate since Mr Billington indicated that the Estate will not take an active role in the trial whatever the result of this application.

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57 *Commerce Commission v PGG Wrightson Ltd* [2017] NZHC 2584; and *Commerce Commission v International Racehorse Transport NZ* [2020] NZHC 1716. See also *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28.

58 As Woolf and Woolf say, "[t]he discretion as to whether or not to grant relief is that of the trial judge…": Lord Woolf and Jeremy Woolf, The Declaratory Judgment (4th ed, Sweet & Maxwell, London, 2011) at [4-04].

Confidentiality

[81] I accept that confidentiality orders as sought are appropriate in respect of the excerpts from the affidavits of Mr Porus and Mr Bascand, which are subject to non-publication/ confidentiality orders made in the shareholder proceedings,[59] and clauses from the Settlement Agreement, referred to in paras [47], [48], [53] and [54] of the affidavit of Mr Turner dated 3 November 2023.

Result

[82] The Estate's application is dismissed.

[83] I make confidentiality orders in respect of the excerpts from the affidavits of Mr Porus and Mr Bascand, which are subject to non-publication/ confidentiality orders made in the shareholder proceedings, and clauses from the Settlement Agreement, referred to in paras [47], [48], [53] and [54] of the affidavit of Mr Turner dated 3 November 2023.

Costs

[84] My preliminary view is that the FMA is entitled to 2B costs and reasonable disbursements. If costs cannot be agreed, counsel may file memoranda not exceeding three pages and I will determine costs on the papers.

Gault J

[59] *Livingstone v CBL Corporation Ltd (in liq)* [2023] NZHC 2712 at [99](k); and *Livingstone v CBL Corporation Ltd (in liq)* HC Auckland CIV-2019-404-2727, 19 September 2024 at [2] (Minute).

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