IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2745
[2023] NZHC 3842

BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	CBL CORPORATION LIMITED (IN LIQUIDATION) First Defendant
	SIR JOHN WELLS Second Defendant

Continued …

Hearing:	4 December 2023
Appearances:	JCL Dixon KC and N M Blomfield for Financial Markets Authority J K Goodall KC and A P Colgan for CBL Corporation Ltd (in liq) M Corlett KC and K C Francis for J Wells, A C Russell, NGP Donaldson and I K Marsh
Judgment:	21 December 2023

JUDGMENT OF GAULT J

This judgment was delivered by me on 21 December 2023 at 11:00 am pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

……

Continued …

AND

PETER ALLAN HARRIS
Third Defendant

ANTHONY CHARLES RUSSELL HANNON
Fourth Defendant

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

NORMAN GERALD PAUL DONALDSON
Sixth Defendant

IAN KELVIN MARSH
Seventh Defendant

CARDEN JAMES MULLHOLLAND
Eighth Defendant

TABLE OF CONTENTS

[1] In this proceeding commenced in December 2019 following the collapse of CBL group companies, the Financial Markets Authority (FMA) seeks declarations of contravention and pecuniary penalties against CBL Corporation Limited (In Liquidation) (CBLC), its six directors and its chief financial officer, for breaches 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 Notices of Admissions dated 12 June 2023, the first defendant, CBLC, and the second, fourth, sixth and seventh defendants, the independent non-executive directors (INEDs), have each admitted making misleading statements and failing to make the disclosures required in relation to seven causes of action brought by the FMA in this proceeding, and so having contravened or having been involved in contraventions of ss 22 and 270 of the FMCA.

[3] The FMA, CBLC and the INEDs agreed to recommend that this Court make declarations of contravention under s 486 of the FMCA and pecuniary penalty orders under s 489. The parties provided helpful submissions. They agreed the quantum of appropriate penalties 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 penalties.

Agreed facts

[5] The FMA, CBLC and the INEDs filed a detailed agreed statement of facts. The following is a summary from the FMA's submissions, with which CBLC and the INEDs agreed.

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 Limited (In Liquidation) (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 of companies' (CBL Group) 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 paragraph 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 cover 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, and where the party typically pursuing the contractor for recovery of its loss is the DO insurer,

(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 CBLIE in Ireland. CBLIE was CBLI's primary ceding insurer from mid-2017. CBLIE is a wholly owned subsidiary of CBLC.

[11] On 6 January 2017, CBLC acquired a controlling 71.1% shareholding in Securities and Financial Solutions Europe SA (SFS) through [CBLC's] 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 (IPSA). CBLI was subject to various prudential requirements, 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.

[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 meetings of the Boards of the two entities were held concurrently and referenced as CBLC.

[17] 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 counsel (the Legal Advisors).

The INEDs

[18] Sir John Wells, Anthony Hannon, Paul Donaldson and Ian Marsh (together, 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 Committee during the Relevant Period. From October 2015, Mr Hannon was chair of the Audit and Financial Risk Committee (ARC), and Mr Marsh and Mr Donaldson were members of the ARC.

Regulatory intervention

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

[20] GFSC commissioned a report by PwC UK dated 5 July 2017 on Elite (PwC UK Report), which seriously questioned the adequacy of Elite's reserves, and which in turn caused RBNZ and CBLI's ceding insurers' regulators to doubt CBLI's reserving position (as Elite ceded around 80-90% of its French Construction Business to CBLI as reinsurer). That same month, Elite decided to stop writing new business and go into solvent run-off.

[21] From 23 June 2017, and following the receipt of the PwC UK Report, CBLI and CBLIE faced escalating regulatory scrutiny from RBNZ and CBI, including into 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.

[22] As a result, RBNZ and CBI issued formal directions and conditions to CBLI, CBLIE and CBLC.[1]

[23] 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.

[24] On 25 July 2017, RBNZ issued a direction to CBLI under ss 143 and 144 of IPSA restricting its business activities (absent RBNZ's consent) and substantially increasing CBLI's capital requirements by requiring it to maintain a solvency ratio of at least 170%.

[25] 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.

[26] 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.

First and second causes of action: False or misleading representations – August 2017

[27] 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:

---

[1] While this is agreed as between the FMA, CBLC and the INEDs, Robinson J has subsequently held in *R v Harris and Mulholland* [2023] NZHC 2635 that directions issued by RBNZ to CBLC and CBLI were not valid. That decision is now subject, in part, to an application for leave to appeal. Nevertheless, the validity of the RBNZ directions is not relevant to the matters currently before the Court.

(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 runoff in July 2017, but this was not expected to adversely affect CBLI as it could write its European business directly through CBLIE.

[28] 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:

(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).

[29] The 24 August Announcement was misleading at the time it was made as CBLI was likely to need to strengthen its reserves again.

[30] The INEDs knew of the 24 August Announcement prior to its release and were informed about circumstances that made it misleading. In particular, the INEDs were 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. Despite having received that information, the INEDs

accepted the view of management and the Appointed Actuary that RBNZ's concerns regarding CBLI's reserving were unfounded.

Fifth and sixth causes of action: Failure to disclose need to strengthen reserves – November 2017

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

(a) 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.

(b) On 15 November 2017, CBLI 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.

(c) On 15 November 2017, the Appointed Actuary separately advised RBNZ that based on its initial assumptions CBLI would require reserve strengthening on its French Construction Business at 31 December 2017.

[32] 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.

[33] CBLC did not notify the market of the Need to Strengthen Reserves. 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" misrepresentation in August 2017 remained in the market.

[34] The INEDs knew about the Need to Strengthen Reserves by 15 November 2017. While the INEDs believed the need to increase reserves at year end was uncertain, they (save for Mr Marsh) were conscious of the risk that the need to increase reserves was not "insufficiently definite to warrant disclosure". The INEDs admit the Need to Strengthen Reserves was material information that was not generally available to the market and that it should have been disclosed by 15 November 2017. They accept that they should have taken further steps to ascertain whether the need to increase reserves was in fact uncertain.

Seventh and eighth causes of action: Failure to immediately disclose need for CBLC to increase reserves by $100 million – January 2018

[35] 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 1.55pm, the Appointed Actuary advised CBLI that it had concluded the reserving adjustment increase would be $98 million; and

(b) On Wednesday 31 January 2018 at 3.29pm, 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.

[36] Having received the Appointed Actuary's advice, the Board agreed at a meeting on 31 January 2018 at 7.00pm 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".

[37] 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.

[38] By 31 January 2018, the INEDs 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 the INEDs all attended on 12 December 2017; and

(b) Mr Harris emailed the Board on 30 January 2018 that the Appointed Actuary had landed on a reserving increase of $98 million.

[39] By 31 January 2018, the INEDs knew that CBLC was required to make a market disclosure regarding the $100 Million Increase in Reserves. They were conscious of a risk that disclosure after 1-2 February 2018 would not satisfy their continuous disclosure obligations, but failed nonetheless to act immediately to provide disclosure as required by the NZX Listing Rules and the FMCA. The INEDs admit the $100 Million Increase in Reserves was material information that was not generally available to the market and that it should have been disclosed by 31 January 2018.

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

Ninth and tenth causes of action: Failure to disclose aged receivables impacts – October 2017

[41] On or about 17 August 2017, CBLC's Chief Financial Officer Mr 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).

[42] The Aged Receivables had a number of possible impacts, including but not limited to, one related to solvency (because the Aged Receivables would continue to attract a 100% asset risk charge and negatively impact CBLI's regulatory solvency capital by $34.2 million) or alternatively one related to profit (because if the Aged Receivables could not be collected then they would need to be written off with the

effect of reducing operating profit by up to $35.6 million) (the Aged Receivables Impacts).

[43] 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. Note 6 did not clearly adequately inform the market with respect to the existence of the Aged Receivables, or the Aged Receivables Impacts.

[44] CBLI entered into a term sheet with Castlerock Receivables Management Limited (Castlerock) on 10 October 2017. Under the executed term sheet it was agreed, among other terms, that CBLI would sell the Aged Receivables to Castlerock (Castlerock Transaction). The Castlerock Transaction was conditional on confirmation from Deloitte in relation to the accounting treatment of the transaction and, in particular, that the de-recognition rules were satisfied. However, before receiving such confirmation CBLI incorporated its view of the regulatory solvency effect of the Castlerock Transaction in its regulatory solvency position as at 31 July 2017 and 31 August 2017, which was provided to RBNZ on 11 October 2017.

[45] By the time CBLI signed the term sheet, it had a high degree of certainty over the magnitude of the Aged Receivables such that they were being sold to a third party.

[46] As at 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 Receivable Impacts.

[47] By 10 October 2017, the INEDs had knowledge of the Aged Receivables and Aged Receivables Impacts due to attending various meetings where the Aged Receivables and the Aged Receivables Impacts were discussed and receiving the Mulholland Memorandum. They admit the existence of the Aged Receivables and 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.

Thirteenth and fourteenth causes of action: Failure to immediately disclose the Aged Receivables Write-Off – December 2017

[48] In late 2017 and January 2018, CBLI engaged in numerous discussions with Deloitte as to the appropriate accounting treatment for the Castlerock Transaction. 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.

[49] 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.

[50] 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.

[51] CBLI did not 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".

[52] 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.

[53] By 22 December 2017, the INEDs had knowledge of the Aged Receivables Write-Off and were conscious of the risk that the information was sufficiently certain

to warrant disclosure and could be disclosed notwithstanding RBNZ's confidentiality orders. They admit 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. The INEDs accept they 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.

Seventeenth and eighteenth causes of action: failure to disclose the Central Bank Conditions – July 2017

[54] 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.

[55] 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.

[56] 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 the Central Bank; 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).

[57] 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).

[58] By 28 July 2017, CBLIE was the most significant ceding insurer to CBLI and the second highest revenue earner for the CBL Group. Accordingly, the Central Bank Conditions, which demonstrated significantly increased regulatory risk was material information that was not generally available to the market.

[59] 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.

[60] The INEDs had knowledge of the Central Bank Conditions by 30 July 2017 when they were sent a copy of the direction by Mr Harris and attended a Board meeting where it was discussed. They admit 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. They accept they failed to ensure that CBLC disclosed this to the market immediately.

[61] 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.

Twenty-first and twenty-second causes of action: Failure to disclose the Third Central Bank Direction – January 2018

[62] 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.

[63] 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).

[64] 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.

[65] 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 could ultimately lead to company failure (the Governance Inspection Findings).

[66] 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.

[67] 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.

[68] By 13 January 2018, Mr Donaldson knew about the Third Central Bank Direction as a director of CBLIE. By 30 January 2018, the other INEDs knew about the Third Central Bank Direction. They admit 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. They accept they failed to ensure that CBLC disclosed this to the market immediately.

[69] 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

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

[71] 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.

[72] 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% 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.

[73] On 23 February 2018, the High Court granted RBNZ's without notice application to have interim liquidators appointed to CBLI. Later that same day the Board of directors appointed voluntary administrators to CBLC.

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

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

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

Declarations of contravention

[77] It is common ground that under s 486 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. Sections 22 and 270 of the FMCA are both civil liability provisions, as defined in s 485.[2]

---

2 Financial Markets Conduct Act 2013, ss 38, 385 and 485.

[78] A declaration of contravention must state:[3]

(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

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

Notices of Admissions

[79] In the Notices of Admission of Causes of Action dated 12 June 2023:

(a) CBLC admits the first, fifth, seventh, ninth, thirteenth, seventeenth, and twenty-first causes of action, as pleaded in the relevant paragraphs of the Amended Statement of Claim dated 22 November 2022; and

(b) the INEDs admit the second, sixth, eighth, tenth, fourteenth, eighteenth, and twenty-second causes of action, as pleaded in the relevant paragraphs of the Amended Statement of Claim dated 22 November 2022.

(c) CBLC and the INEDs admit the FMA is entitled to declarations that:

(i) as at 24 August 2017 CBLC contravened, and each of the INEDs was involved in a contravention of, s 22 in relation to the One-Off Representations;

---

3 Section 488.

(ii) as at 15 November 2017 CBLC contravened, and each of the INEDs 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 CBLC contravened, and each of the INEDs 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 CBLC contravened, and each of the INEDs 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 CBLC contravened, and each of the INEDs 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 CBLC contravened, and each of the INEDs 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 CBLC contravened, and each of the INEDs was involved in a contravention of, s 270 in relation to the failure to disclose the Third Central Bank Direction.

[80] Given the Notices of Admissions, I am satisfied that CBLC contravened, and each of the INEDs was involved in the contraventions of, the civil liability provisions referred to in the Notices. The declarations sought are appropriate.

Pecuniary penalties

[81] 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.

[82] 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
>
> (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.

[83] Although deterrence is not expressly set out as a factor, deterrence is a relevant consideration when determining a pecuniary penalty.[4] 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:[5]

(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 penalties

[84] As indicated, the FMA, CBLC and the INEDs agreed the quantum of appropriate penalties to recommend but acknowledge that the amount of any pecuniary penalty to be imposed is a matter for the Court.

[85] 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 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.[6]

[86] 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

---

4 *Financial Markets Authority v ANZ Bank Limited* [2021] NZHC 399, [2021] 16 TCLR 28 at [44]-[45] and [55]. See also *Financial Markets Authority v Warminger* [2017] NZHC 1471, (2017) 11 NZCLC 98-054 at [35] and [36], under the preceding s 42Y of the Securities Markets Act 1988.

5 Financial Markets Conduct Act 2013, s 3.

6 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18]. See also *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]; and *Financial Markets Authority v Tiger Brokers (NZ) Ltd* [2023] NZHC 1625 at [36].

range, the Court need not accept each step of the methodology proposed – it is the final amount that matters.[7]

Approach to fixing pecuniary penalties

[87] The three-stage approach to fixing pecuniary penalties is well settled and applies to the FMCA. The Court:[8]

(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.

Maximum penalties

[88] Section 490(1) provides that the maximum pecuniary penalty for a contravention or involvement in a contravention 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.

---

7 *Financial Markets Authority v ANZ Bank Limited* [2021] NZHC 399, [2021] 16 TCLR 28 at [32], citing *Commerce Commission v Air New Zealand* [2013] NZHC 1414 at [27].

8 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [37]; and *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]; and *Financial Markets Authority v Zhong* [2023] NZHC 2196 at [21].

[89] It is common ground that the maximum penalties in the present case are those under s 490(1)(c), being $5 million for CBLC and $1 million for each of the INEDs in respect of each contravention.

[90] 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.[9]

[91] Accordingly, the maximum penalties for the seven contraventions are:

(a) CBLC: $35 million.

(b) Each of the INEDs: $7 million.

Starting points

[92] The FMA, CBLC and the INEDs agreed to recommend to the Court the following starting points:

(a) CBLC: $8.25 million;

(b) Sir John Wells: $1.43 million;

(c) Mr Anthony Hannon: $1.57 million;

(d) Mr Paul Donaldson: $1.43 million; and

(e) Mr Ian Marsh: $1.43 million.

[93] CBLC's starting point is based on the most serious conduct that is attributed to an INED for each breach. Its starting point is more than five times the starting point of any of the INEDs.

---

9 See also *Financial Markets Authority v Kiwibank Limited* [2023] NZHC 2856 at [25].

[94] The starting point for Mr Hannon is higher than that for the other INEDs. It was submitted that this is to reflect his different level of knowledge. In respect of the Need to Strengthen Reserves, and as part of his role as Chair of CBLC's Audit and Risk Committee, which was responsible for the financial reporting process, risk management and internal controls, Mr Hannon was provided with a draft Appointed Actuary's Actuarial Update Report for the upcoming ARC meeting on 28 November 2017. That draft report indicated CBLI would need to strengthen reserves in the region of $67 million to $120 million. Mr Hannon sent an email to Mr Harris on 23 November 2017 in relation to the Appointed Actuary's Actuarial Update Report. Mr Hannon stated "If [the report] was received by the AFRC, then we will have a Disclosure issue". Mr Hannon appreciated the risk that market disclosure was required. However, no disclosure was made.

[95] In terms of the s 492 factors, I begin with the relevant purposes of the FMCA. As Mr Dixon KC submitted for the FMA, 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 after the trading halt on 5 February 2018. The conduct was completely inconsistent with promoting the confident and informed participation of business, investors and consumers in New Zealand's financial markets.

[96] In terms of the nature and extent of the contraventions or involvement in the contraventions, the lack of accurate disclosure related to the key risk of CBLI's level of reserve strengthening and ultimately had a major impact on CBLI's and CBLC's ability to operate. 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 referred to below.

[97] While the subject-matter raised questions about when information became sufficiently certain to warrant disclosure, CBLC and the INEDs accept their conduct was:

(a) reckless (meaning conscious of a risk) in relation to the disclosure required in respect of the Need to Strengthen Reserves (except for Mr Marsh, for whom it was careless due to the health issues he was facing at the time), the Need to Increase Reserves by $100 Million, and the Aged Receivables Writeoff;

(b) careless in respect of the One-off Representation, the Aged Receivables Impacts and the Third Central Bank Direction; and

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

[98] Accordingly, CBLC and the INEDs accepted heightened culpability in relation to disclosure on reserving and aged receivables. In turn, the FMA recognises the defendants' conduct was not deliberate. It submits, however, that reckless and careless conduct in relation to disclosure issues, especially by senior and experienced individuals entrusted with the governance of a listed company, requires both specific and general deterrence.

[99] The parties 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 (causes of action 5 and 6) which was serious.

[100] I agree with those assessments.

[101] As to the nature and extent of loss, 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 Mr Dixon put it, the breaches at least caused investors a loss of opportunity. But the defendants did not obtain a realised gain.

[102] As to payment of compensation, it is accepted that in the settlement of the shareholder and liquidator proceedings, CBLC and its directors (not only the INEDs) have paid $72.5 million, approximately 53% of which has been paid to shareholders who participated in the shareholder representative proceedings. The INEDs have contributed personally as follows:

(a) Sir John Wells: [REDACTED];

(b) Anthony Hannon: [REDACTED];

(c) Paul Donaldson: [REDACTED];

(d) Ian Marsh: [REDACTED].

[103] I accept this reduces the level of culpability and is to be taken into account by way of personal mitigation (but avoiding double counting).

[104] The circumstances in which the contraventions, or involvement in the contraventions, took place include CBLC's position as the listed issuer and the INEDs positions as directors and on (and in some cases chairing) relevant committees during a time when CBLC faced increasing regulatory intervention. Disclosure of this regulatory intervention was resisted albeit in part on the basis of an honest but mistaken view of the scope of the RBNZ confidentiality restraint. As Mr Dixon submitted, there were sufficient red flags that the Board should have taken steps to look harder. It paid too much heed to management, amounting to poor governance. In short, it did not do enough quickly enough.

[105] None of the relevant defendants has previously been found liable under the FMCA.

[106] This is not a case where a transaction constitutes the contravention.

[107] I have already acknowledged the need for specific and general deterrence.

[108] I agree with counsel that the previous cases under the FMCA (and the Securities Markets Act before it) involve different factual scenarios and are therefore of limited assistance. Nevertheless, the FMA's helpful summary of them is instructive:

> *FMCA Part 2: breach of s 22*
>
> *ANZ* was the first Part 2 case in New Zealand and concerned the issuing of duplicate credit card repayment insurance (CCRI) policies to some customers, which provided no additional benefits or cover, and failing to cancel CCRI policies for ineligible customers, resulting in just under $200,000 of overcharges.[10] The Court confirmed a starting-point of $400,000 (being in the ranges advanced by the parties) and a final penalty of $280,000 based on a discount of 30% agreed between the parties for cooperation and early admissions.
>
> *AIA* concerned three kinds of misrepresentations under s 22 made to the insurer's customers: that certain benefits had been added to their policies (when they had not); that their policies terminated on certain dates (when the stated dates were incorrect); and as to the effect that customers' cover and premiums had been adjusted for inflation (when the amounts stated had been miscalculated).[11] The Court set a starting point of $1,000,000 (being in the ranges advanced by both parties) and confirmed a final penalty of $700,000 agreed between the parties based on a discount of 30% for self-reporting, cooperation and early admissions.
>
> *Cigna* concerned false or misleading representations in relation to applying flat indexation rates to customer insurance policies which were stated to be variable-rate and fixed-rate resulting in customers paying $13,522,689.22 in additional premiums.[12] The Court confirmed an agreed starting-point of $5,500,000 and applied a 35% discount for prompt self-reporting, full cooperation with the FMA's investigation and no previous contraventions, resulting in a final penalty of $3,575,000.
>
> *Vero* involved a failure by Vero to apply multi-policy discounts to approximately 42,000 customers who were entitled to them between April 2014 and May 2022, with the Court concluding that no adequate explanation had been given for the failure to detect this error earlier.[13] Vero had effectively overcharged $9.9 million in premiums, and subsequently reimbursed $13.97 million in overcharges to affected policyholders. The breach of s 22 saw a starting point of $6 million, with a discount of 35% leading to a final penalty of $3.9 million.

---

10 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28.

11 *Financial Markets Authority v AIA New Zealand Ltd* [2022] NZHC 2444.

12 *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610.

13 *Financial Markets Authority v Vero Insurance New Zealand Ltd* [2023] NZHC 2837.

Kiwibank [14] concerned breaches of the fair dealing provisions in the FMCA as a result of false or misleading statements by Kiwibank in its terms and conditions that customers would not pay transaction fees on their accounts if they also had a home loan from Kiwibank. However, Kiwibank failed to waive those fees for 35,000 customers between 2005 and 2020, resulting in overcharges of more than $1.1 million. Remediation steps were taken by Kiwibank, and the Court imposed a final penalty of $812,500.

Market manipulation (Securities Markets Act and FMCA Part 5)

Henry [15] was the first market manipulation case in New Zealand and concerned unsophisticated market manipulation by an individual. Mr Henry had admitted six breaches of market manipulation by executing wash trades by trading shares with himself. The Court accepted a starting point of $200,000 for the overall offending (which was an amount agreed by the parties). The Court then allowed a total deduction for Mr Henry's previous conduct and his acknowledgement of wrongdoing, with a final penalty of $130,000. However, both Venning J and Robinson J have cautioned against relying too much on Henry, which their Honours saw as having limited precedential value.[16]

Warminger [17] concerned sophisticated and deliberate market manipulation by an experienced fund manager. The Court assessed a total maximum penalty of $3,845,900 and adopted a starting point of $500,000 for two contraventions. Mr Warminger received a deduction for personal mitigating factors, including his poor health, resulting in a final penalty of $400,000.

Zhong [18] concerned market manipulation by a group of insiders in a company listed on a secondary market, the NXT. Mr Zhong was the chair and CEO of Oceania Natural Limited (ONL) and instigated and coordinated the misconduct of others, acting with actual knowledge and deliberate intent. He received a starting point of $1,400,000 and obtained a 5% reduction for personal mitigation, resulting in a final penalty of $1,330,000. Ms Ding was a senior manager at ONL and Mr Taking all these matters into account, Zhong's wife; she was also found to have acted with actual knowledge and received a $800,000 starting point, reduced to $760,000. Mr Meng was a director and received a $240,000 starting point, with a 25% reduction, and Mr Qian $200,000, with a 35% reduction, resulting in final penalties of $180,000 and $130,000. Both Mr Meng and Mr Qian received their penalties on the basis of constructive knowledge and their more limited involvement. Significantly, the Court assessed the maximum penalties for Mr Zhong and Ms Ding at $48,640,000 and $48,080,000, but recognised starting points at a much lower scale were appropriate on the basis that both defendants not only did not realise a financial gain but, because the NXT was an illiquid market, were unlikely to.

---

14 *Financial Markets Authority v Kiwibank Ltd* [2023] NZHC 2856.

15 *Financial Markets Authority v Henry* [2014] NZHC 1853.

16 *Financial Markets Authority v Zhong* [2022] NZHC 480 at [77]; *Financial Markets Authority v Zhong* [2023] NZHC 2196 at [69].

17 *Financial Markets Authority v Warminger* [2017] NZHC 1471, (2017) 11 NZCLC 98-054.

18 *Financial Markets Authority v Zhong* [2022] NZHC 480; *Financial Markets Authority v Zhong* [2023] NZHC 2196.

[109] Although the agreed starting points are higher than in these other cases, it was submitted they reflect the seriousness of the misconduct and the roles of the defendants as follows:

(a) The matters to which the contraventions relate (being the inadequacy of CBLI's reserving, a large aged receivables balance, and regulatory intervention in respect of a key subsidiary) concerned key financial and operational matters impacting the CBL Group, and the failure to provide adequate and timely disclosure of this information was adverse to the interests of a wide number of investors. While it is not appropriate to attribute the collapse of the company to the failures in disclosure, the inadequate disclosure could well have adversely influenced the investment decisions of numerous investors and so had the potential to, and likely did, cause significant harm to them. This factor alone distinguishes this case from previous ones and warrants higher starting points. It is much more serious than *ANZ*, *AIA*, *Cigna*, *Vero* or *Kiwibank*; and in those cases, customers suffering loss were remediated in full. It is much more wide-ranging than the impact in *Warminger* or *Zhong*.[19]

(b) The nature of the contraventions, and the extended period to which they relate, are detrimental for investor confidence and market integrity in New Zealand: more so than the actions of individuals such as Mr Warminger or Mr Zhong. It has also resulted in the investment of considerable time and financial resource by regulators.

(c) The INEDs were established and experienced directors of a listed company, unlike Mr Warminger; investors were entitled to rely on them to protect their interests and to look to them to ensure that proper disclosure was made. Mr Zhong was chair and director of ONL, and so in a similar position of governance, but his misconduct was of a very different nature and impacted a markedly smaller pool of investors.

---

[19] In *Warminger*, other traders were forced to trade at higher prices by the defendant's conduct but there was no quantification of specific loss caused.

(d) The starting points for the INEDs sit in a similar range to that for Mr Zhong, who was found to have acted deliberately in six market manipulation contraventions and three disclosure breaches. While the INEDs did not act deliberately, their misconduct is of a very different nature to that of Mr Zhong. The potential for harm was much lower in Mr Zhong's case, with ONL being a far smaller company than CBLC and only trading on the NXT market. CBLC was obviously significantly larger, there were multiple contraventions over a period of time, and a number of opportunities to correct the position (which were not taken).

[110] Counsel acknowledged that it may have been possible to consider a higher penalty for Sir John Wells, given his role as Chair of the CBLC Board. However, as the directors all had the same disclosure obligation in this case, the parties agreed it is appropriate to treat him consistently with the other directors.

[111] Similarly, it may have been possible to consider a lower penalty for Mr Marsh, given his ill-health and thus non-participation at the Board meeting on 27 November 2017. However, given the continuing obligations as a director, the number of transgressions, and the period over which they occurred, the parties agreed it is appropriate to treat him consistently with the other directors (and Mr Marsh accepts his penalty should not be lower than the other INEDs as a consequence of his ill-health).

[112] Taking all the above factors and the previous cases into account, I am satisfied that the recommended starting points for CBLC and each of the INEDs is well within the appropriate range.

Personal aggravating and mitigating factors

[113] The FMA, CBLC and the INEDs agreed that a 30% discount is merited by way of mitigation for each defendant, reflecting:

(a) the timing of the admissions, being after discovery and shortly before the FMA served its briefs of evidence;

(b) the settlement that the defendants reached with investors, which included the amounts personally contributed by the INEDs;

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

(d) the INEDs' remorse, to the extent that is set out in the agreed statement of facts and their affidavits; and

(e) other personal factors relevant to each defendant, including Mr Marsh's health concerns.

[114] In particular, the proposed discount comprises a 20% discount for early admissions and a 10% discount for other mitigating factors.

[115] As the FMA submitted, a 30% discount sits above the 20% discount awarded in *Warminger*, on the basis of Mr Warminger's lack of previous contraventions, his health and the impact on his career. In *Zhong*, Venning J awarded discounts of 25% and 35% to Mr Meng and Mr Qian respectively for early admissions, no previous contraventions and the impact of the proceeding on their careers. In *ANZ* and *AIA*, discounts of 30% were awarded for self-reporting, cooperation, remediation of customers and early admissions; this figure was 35% in *Cigna* and *Vero*.

[116] Neither self-reporting nor remediation are relevant here; though the defendants have paid compensation to investors as indicated, this does not amount to full compensation and therefore is not comparable to those other cases. As indicated, those payments should also not be double counted at the starting point and personal factors stages. Nor were the admissions entered at an early stage, but they were entered before briefs of evidence were served.

[117] Again, it may have been possible to consider the defendants' personal circumstances, such as the extent of genuine remorse, on a more individualised basis but this would likely have been at the margins. Mr Dixon also acknowledged that while ability to pay is a relevant factor, I could not draw any inferences here.

Nor could I draw any inference in relation to any applicable insurance, which he said had not been a relevant consideration. Overall, I am satisfied that the 30% discount for each is within the proper range.

[118] Finally, I note that as CBLC is in liquidation the FMA and CBLC have agreed that the FMA will not seek to enforce payment of the penalty against CBLC in the liquidation, so that CBLC's assets are used to repay creditors and investors as much as possible, but CBLC will cause to be paid the FMA's actual costs in this proceeding and the related IPO proceeding (which have been capped for this purpose), but only to the extent those costs are not otherwise covered by the other defendants through penalties ordered against them.

[119] Mr Dixon submitted it is also important for general deterrence for the Court to make an order in respect of CBLC's penalty to identify the level of seriousness it attributes to CBLC's conduct. He submitted this would serve the purpose of providing a precedent to the commercial community that reflects the seriousness of the contravention.

[120] As Mr Goodall KC submitted for CBLC, I accept this subordination was an important mechanism in the settlement.

[121] Accordingly, I conclude that the following recommended penalties for CBLC and each of the INEDs is within the proper range and should be approved:

(a) CBLC: $5.78 million.

(b) Sir John Wells: $1 million.

(c) Mr Anthony Hannon: $1.1 million.

(d) Mr Paul Donaldson: $1 million.

(e) Mr Ian Marsh: $1 million.

Result

[122] I make declarations of contravention as follows:

CBLC

(a) In relation to the first cause of action, a declaration that as at 24 August 2017 CBLC, as a listed issuer, contravened a s 38 Part 2 fair dealing provision, specifically s 22 of the Financial Markets Conduct Act 2013, by making the One-Off Representations.

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

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

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

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

(f) In relation to the seventeenth cause of action, a declaration that as at 30 July 2017 CBLC, as a listed issuer, contravened a s 385 Part 5 market provision, specifically s 270 of the Financial Markets Conduct

Act 2013, by failing to disclose the imposition of the Central Bank Conditions.

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

Sir John Wells

(h) In relation to the second cause of action, a declaration that as at 24 August 2017 Sir John Wells 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 Representations.

(i) In relation to the sixth cause of action, a declaration that as at 15 November 2017 Sir John Wells 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.

(j) In relation to the eighth cause of action, a declaration that as at 31 January 2018 Sir John Wells 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.

(k) In relation to the tenth cause of action, a declaration that as at 10 October 2017 Sir John Wells 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.

(l) In relation to the fourteenth cause of action, a declaration that as at 22 December 2017 Sir John Wells 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.

(m) In relation to the eighteenth cause of action, a declaration that as at 30 July 2017 Sir John Wells 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.

(n) In relation to the twenty-second cause of action, a declaration that as at 30 January 2018 Sir John Wells 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 Condition.

Anthony Hannon

(o) In relation to the second cause of action, a declaration that as at 24 August 2017 Anthony Hannon 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 Representations.

(p) In relation to the sixth cause of action, a declaration that as at 15 November 2017 Anthony Hannon 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.

(q) In relation to the eighth cause of action, a declaration that as at 31 January 2018 Anthony Hannon 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.

(r) In relation to the tenth cause of action, a declaration that as at 10 October 2017 Anthony Hannon 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.

(s) In relation to the fourteenth cause of action, a declaration that as at 22 December 2017 Anthony Hannon 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.

(t) In relation to the eighteenth cause of action, a declaration that as at 30 July 2017 Anthony Hannon 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.

(u) In relation to the twenty-second cause of action, a declaration that as at 30 January 2018 Anthony Hannon 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 Condition.

Paul Donaldson

(v) In relation to the second cause of action, a declaration that as at 24 August 2017 Paul Donaldson 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 Representations.

(w) In relation to the sixth cause of action, a declaration that as at 15 November 2017 Paul Donaldson 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.

(x) In relation to the eighth cause of action, a declaration that as at 31 January 2018 Paul Donaldson 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.

(y) In relation to the tenth cause of action, a declaration that as at 10 October 2017 Paul Donaldson 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.

(z) In relation to the fourteenth cause of action, a declaration that as at 22 December 2017 Paul Donaldson 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.

(aa) In relation to the eighteenth cause of action, a declaration that as at 30 July 2017 Paul Donaldson 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.

(bb) In relation to the twenty-second cause of action, a declaration that as at 30 January 2018 Paul Donaldson 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 Condition.

Ian Marsh

(cc) In relation to the second cause of action, a declaration that as at 24 August 2017 Ian Marsh 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 Representations.

(dd) In relation to the sixth cause of action, a declaration that as at 15 November 2017 Ian Marsh 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.

(ee) In relation to the eighth cause of action, a declaration that as at 31 January 2018 Ian Marsh 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.

(ff) In relation to the tenth cause of action, a declaration that as at 10 October 2017 Ian Marsh 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.

(gg) In relation to the fourteenth cause of action, a declaration that as at 22 December 2017 Ian Marsh 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.

(hh) In relation to the eighteenth cause of action, a declaration that as at 30 July 2017 Ian Marsh 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.

(ii) In relation to the twenty-second cause of action, a declaration that as at 30 January 2018 Ian Marsh 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 Condition.

[123] I make pecuniary penalty orders under s 489 of the FMCA as follows:

(a) CBLC: $5.78 million.

(b) Sir John Wells: $1 million.

(c) Mr Anthony Hannon: $1.1 million.

(d) Mr Paul Donaldson: $1 million.

(e) Mr Ian Marsh: $1 million.

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

[125] This judgment is to be circulated to counsel 24 hours before it is made publicly available to enable counsel to address any confidentiality issues arising.

Gault J

Solicitors / Counsel:

CIV-2019-404-2745
Mr J A Farmer KC and Mr JCL Dixon KC, Barristers, Auckland
Mr J Caird and Ms N Blomfield, Simpson Grierson, Auckland (plaintiff's instructing solicitors)
Mr J K Goodall KC, Barrister, Auckland
Ms A Challis and Mr A Colgan (1st defendant's instructing solicitors), McElroys, Auckland
Mr M Corlett KC, Barrister, Auckland
Mr K C Francis, Mr T J Lindsay and Mr S McNae (2nd, 4th, 6th and 7th defendants' instructing solicitors), Lindsay & Francis, Auckland
Mr D M Salmon KC, Barrister, Auckland
Mr J Cundy (3rd defendant's instructing solicitor), Barrister & Solicitor, Auckland
Mr DPH Jones KC, Barrister, Auckland
Mr CDSC Morris (8th defendant's instructing solicitor), CMQ Law, Auckland

Copy to:

CIV-2019-404-2739
Mr J Billington KC and Ms C M Meechan KC, Barristers, Auckland
Mr G Turner, Ms T Wood and Mr D Robinson (3rd defendant's instructing solicitors), Duncan Cotterill, Auckland