IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2739
[2024] NZHC 1473

BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	CBL CORPORATION LIMITED (IN LIQUIDATION) First Defendant
	PETER ALAN HARRIS Second Defendant

Continued …

Hearing:	16 April 2024 and 22 May 2024 with memoranda received on 28 and 29 May 2024
Appearances:	JCL Dixon KC, N M Blomfield and G E Hughes for Financial Markets Authority No appearance for CBL Corporation Ltd (in liq) D M Salmon KC and J P Cundy for P A Harris No appearance for G J Turner, executor of the Estate of A L Hutchison DPH Jones KC (via VMR), DCS Morris and S Cameron for C J Mulholland
Judgment:	5 June 2024

JUDGMENT OF GAULT J
(Stay application)

This judgment was delivered by me on 5 June 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	GEOFFREY JOHN TURNER as executor of the ESTATE OF ALISTAIR LEIGHTON HUTCHISON Third Defendant
	CARDEN JAMES MULHOLLAND Fourth Defendant

CIV-2019-404-2745

BETWEEN	FINANCIAL MARKETS AUTHORITY Plaintiff
AND	CBL CORPORATION LIMITED (IN LIQUIDATION) First Defendant – DISCONTINUED
	SIR JOHN WELLS Second Defendant – DISCONTINUED
	PETER ALAN HARRIS Third Defendant
	ANTHONY CHARLES RUSSELL HANNON Fourth Defendant – DISCONTINUED
	GEOFFREY JOHN TURNER as executor of the ESTATE OF ALISTAIR LEIGHTON HUTCHISON Fifth Defendant – DISCONTINUED
	NORMAN GERALD PAUL DONALDSON Sixth Defendant – DISCONTINUED
	IAN KELVIN MARSH Seventh Defendant – DISCONTINUED
	CARDEN JAMES MULHOLLAND Eighth Defendant

[1] These two proceedings brought by the Financial Markets Authority (FMA), CIV-2019-404-2739 (the initial public offering (IPO) proceeding) and CIV-2019-404-2745 (the continuous disclosure (CD) proceeding) are due to be heard together. However, Mr Mulholland and Mr Harris have jointly applied for an order staying the IPO proceeding on fair trial grounds relating to a possible retrial following the Crown's application for leave to appeal to the Court of Appeal in *R v Harris*, CA623/2023 (the criminal proceeding).

[2] At the initial hearing of the application on 16 April 2024, I indicated that, given the allocated trial date scheduled to commence on 10 June 2024,[1] the application for stay is more properly treated as an application for an adjournment of the trial. Given the Court of Appeal hearing of the Crown's leave to appeal application in the criminal proceeding was scheduled for 21 May 2024, I adjourned the application for stay/adjournment until 22 May 2024.[2]

[3] On 7 May 2024, I adjourned the trial start date for two weeks until Tuesday, 25 June 2024.[3]

[4] Following the Court of Appeal hearing on 21 May 2024, on 22 May 2024 at 9:00 am the Court of Appeal granted the Crown leave to appeal in respect of two questions of law.[4] One of the questions relates to the Samoa transaction (see below).

[5] At the resumed hearing of the stay/adjournment application on 22 May 2024 at 10:00 am, counsel for Mr Mulholland and Mr Harris pursued the stay/adjournment and counsel for the FMA maintained their opposition. Given some uncertainty among counsel as to the effect of the Court of Appeal's leave decision on the prospect of a retrial, I directed counsel to file a joint memorandum by 27 May 2024 regarding the Crown's position in relation to seeking a retrial following the Court of Appeal's

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1 The trial of the two FMA proceedings has 16 weeks allocated albeit the trial estimate has refined to 8-12 weeks.

2 *Financial Markets Authority v CBL Corporation Ltd (in liq)* HC Auckland CIV-201-404-2739, 16 April 2024 (Minute) at [8](d).

3 *Financial Markets Authority v CBL Corporation Ltd (in liq)* HC Auckland CIV-2019-404-2739, 7 May 2024 (Minute) at [21].

4 *R v Harris* [2024] NZCA 176.

decision (having consulted with counsel for the Serious Fraud Office (SFO)). Further memoranda have now been referred to me.

Factual background

[6] CBL Corporation Ltd (in liquidation) (CBLC) is the parent company of a group of companies which operated as an international credit surety and financial risk insurer headquartered in Auckland. CBL Insurance Ltd (CBLI) is a wholly owned subsidiary of CBLC owned through LBC Holdings New Zealand Ltd.

[7] Mr Harris was the managing director of CBLI from December 2006 and CBLC from November 2013.

[8] Mr Hutchison (who has since died) was a non-executive director of CBLI from December 2008 and CBLC from November 2013.

[9] Mr Mulholland was the chief financial officer of CBLC and CBLI at all material times.

[10] On or about 14 February 2012, the Reserve Bank of New Zealand (RBNZ) granted CBLI a provisional insurance licence under the Insurance (Prudential Supervision) Act 2010 (IPSA). 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).[5] This included maintaining a solvency margin.

[11] On or about 4 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.

[12] The Samoa transaction occurred in October 2014. On 15 October 2014, CBLI deposited €12.5m with National Bank of Samoa (NBoS). On the same day, NBoS lent €12.5m to Federal Pacific Group (Singapore) PTE Ltd (FPGS). Also on the same day, FPGS lent €12.5m to Alpha Holdings A/S (Alpha), a Danish cedant insurer reinsured

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

by CBLI. NBoS paid the €12.5m directly to Alpha after it had received CBLI's deposit. The terms upon which CBLI deposited the €12.5m with NBoS were set out in an Instrument to Receive Term Deposit (Instrument to Receive) dated 15 October 2014. At the same time CBLI executed a Form of Undertaking in favour of NBoS in relation to its €12.5m loan to FPGS (also referred to as a Surety Bond). Mr Hutchison personally guaranteed FPGS' loan to NBoS.

[13] 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.

[14] On or about 13 October 2015, following the IPO, CBLC listed on the NZX and ASX. The IPO raised NZ$125 million.

[15] 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 NZ$147 million.

[16] 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.

[17] 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.

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

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

[20] Legal proceedings followed, brought by shareholders (representative proceedings), the FMA (the IPO and CD proceedings) and the liquidators of CBLI and CBLC. So did the SFO prosecution in the criminal proceeding.

[21] In 2022, I directed that the FMA and shareholder proceedings be heard together.[6]

[22] The shareholder and liquidator proceedings have been resolved.

The IPO proceeding

[23] The Samoa transaction features substantially in the IPO proceeding.

[24] In the IPO proceeding the FMA alleges that CBLC, Mr Harris, Mr Hutchison (now his estate) and Mr Mulholland breached ss 57 and 82 of the Financial Markets Conduct Act 2013 (FMCA) through omissions and/or false or misleading statements in offer documents issued by CBLC in connection with its IPO in 2015. Those allegations concern, in particular, the failure to disclose related party information and the impact of inter-related transactions in 2014 involving CBLI, NBoS, FPGS and Alpha – the Samoa transaction.

[25] The first cause of action is against CBLC for breach of s 57(1)(a)(i) of the FMCA – failure to disclose material information that Mr Hutchison was a related party. 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 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 the solvency ratio and purpose statement. The solvency ratio was allegedly false or misleading because of the Samoa transaction and the purpose statement was 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.

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

[26] Against Mr Harris and Mr Mulholland, the FMA seeks declarations of contravention, pecuniary penalties and banning orders.

The criminal proceeding

[27] The criminal proceeding against Mr Harris and Mr Mulholland went to trial in 2023. One of the charges (charge 8) was that Mr Harris and Mr Mulholland engaged in false accounting in relation to the Samoa transaction.[7] The Crown alleged that with intent to deceive they omitted to disclose in CBLI's Group Annual Report for the year ended 31 December 2014 that CBLI's €12.5 million deposit at NBoS was, together with the Surety Bond, collateral for NBoS's €12.5 million loan to FPGS.

[28] Both defendants were acquitted on all charges. As indicated, the SFO/Crown sought leave to appeal on two questions of law, one of which relates to the Samoa transaction. The Crown's application for leave to appeal indicated that it seeks a retrial in relation to charge 8.

[29] The Court of Appeal's decision granting leave to appeal relating to the Samoa transaction framed the question as follows:[8]

> (b) Did the Judge err in law when he concluded that he could not be satisfied beyond reasonable doubt that a deposit of €12.5 million together with a surety bond from CBL Insurance Ltd to the National Bank of Samoa, were collateral to a loan made by the National Bank of Samoa to Federal Pacific Group (Singapore) PTE Ltd?

[30] The Court added:[9]

> Question (b) as suggested by the Crown had a second element — whether the Judge could be satisfied to the requisite standard that the respondents acted with intent to deceive. We do not grant leave to appeal in respect of this element, because we consider that more explanation is required for the Judge's factual findings than is contained in [245] of the Reasons for Verdicts Judgment dated 21 September 2023. We envisage that, if the appeal is allowed in relation to question (b) set out above, the Court will give consideration to the exercise of the power contained in s 300(1)(d) of the Criminal Procedure Act to remit the matter to the High Court in accordance with the opinion of the Court in relation to question (b).

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7 Crimes Act 1961, s 260(b).
8 *R v Harris* [2024] NZCA 176 at [2](b).
9 At [4].

Further memoranda

[31] As indicated, I directed counsel to file a joint memorandum regarding the Crown's position in relation to seeking a retrial following the Court of Appeal's decision (having consulted with counsel for the SFO). Their joint memorandum advised that the Crown's position in relation to a retrial in the criminal proceeding is as follows:

(a) The Crown has sought a retrial as its proposed outcome of a successful appeal on the second question of law (relating to charge 8, the false accounting charge).

(b) Counsel for the Crown [Mr Dickey] has advised that:

(i) He does not read the Court of Appeal's judgment at [4] as limiting that Court at the substantive appeal only to a remedy under s 300(1)(d) of the Criminal Procedure Act 2011, and there remain other available remedies under s 300, including the possibility of a retrial.

(ii) The Court of Appeal has drawn attention to an alternative remedy from that proposed by the Crown that may well respond to the redrafted leave question if resolved in the Crown's favour.

(iii) The Crown should not therefore purport to limit the Court of Appeal's full range of options under s 300 without the Court having heard full argument on the substantive appeal.

(iv) The Crown cannot and will not limit the options open to the Court of Appeal, including a retrial if the appeal is successful on the second question of law.

(v) That is not to say that the Crown may not prefer and seek the 300(1)(d) path to resolution of the outstanding case.

[32] Counsel for the FMA also sought leave to make further observations. In relation to the Samoa transaction, the FMA noted that the Crown's original question of law was whether the Judge erred in acquitting Mr Harris and Mr Mulholland on charge 8, because the only inference reasonably available on the evidence was that a deposit by CBLI of €12.5 million with NBoS was collateral for a loan by NBS to a company related to Mr Hutchison, and the defendants acted with intent to deceive in omitting or causing it to be omitted from CBLI's financial statements. On this question, the Crown sought a retrial and that prospect formed the basis for the stay/adjournment application in the IPO proceeding. The FMA also noted that the Court of Appeal granted leave to appeal on a modified question relating to the Samoa transaction. The FMA submitted that the Court of Appeal tellingly stated that a retrial was not the only outcome of a successful appeal. The Court noted that it would need to consider remitting the matter to the trial court for judgment consistent with its determination on the appeal point. In that case, there would be no retrial.

[33] The FMA submitted that observation of the Court was not a necessary part of the judgment, but it must have had a purpose. The FMA submitted it should be understood as indicating that a retrial is not the inevitable result of a successful appeal – indeed, it is not even the most likely one. The FMA submitted that has pertinence here. While the FMA accepted that a retrial remains a theoretical possibility, it submitted the Court of Appeal judgment suggests that the likelihood is less than might otherwise have been the position at the time the stay application was filed or the parties' submissions were served. Thus, the FMA submitted, the potential for any risk to the defendants' fair trial rights is further reduced.

Issue and applicable principles

[34] The issue is whether it is in the interests of justice to grant the adjournment. As the Court of Appeal said in *Commissioner of Police v Wei*, this requires the Judge to undertake a balancing exercise, assessing the interests of each party, to reach a conclusion as to where the interests of justice lie.[10]

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[10] *Commissioner of Police v Wei* [2012] NZCA 279 at [40], citing *O'Malley v Southern Lakes Helicopters Ltd* HC Christchurch CP 513/89, 4 December 1990.

[35] There is no general rule that civil proceedings must be adjourned if related criminal proceedings are pending. Equally, there is no rule that a civil plaintiff is entitled to a hearing before an impending criminal trial.[11]

Discussion

[36] I first address the interests of Mr Mulholland and Mr Harris – essentially addressing the risk of prejudice if the trial in the IPO proceeding is not adjourned pending a possible criminal retrial. Mr Jones KC, supported by Mr Salmon KC, submitted there are identical allegations relating to the same subject matter in both proceedings and, as a result, there is an overlap of evidence including cross-examination. They submitted that Mr Mulholland and Mr Harris will need to give evidence to properly defend the IPO proceeding, thus engaging their fair trial rights in the criminal proceeding.[12] Mr Dixon KC submitted that the fair trial risk is reasonably remote and can be managed.

[37] The first aspect is the overlap between the criminal proceeding and the IPO proceeding. While Mr Dixon submitted this was overstated, he acknowledged there is a good deal of overlap. I accept that is at least the case. The status of the deposit in the Samoa transaction is live in both proceedings. The role of Mr Harris and Mr Mulholland in the Samoa transaction is a key part of the IPO proceeding and the criminal proceeding insofar as a retrial is a possibility. I turn to that next.

[38] As part of the FMA's submission that the risk of prejudice is overstated, it asks the Court to engage in an assessment of the likelihood of a retrial. I do not consider that I am in a position to do so. I doubt an analogy with name suppression pending a conviction appeal is apt, where the likelihood of a retrial is considered at the

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11 *Commissioner of Police v Wei* [2012] NZCA 279 at [41], citing *Versailles Trade Finance Ltd (in administrative rec) v Clough* [2001] EWCA Civ 1509, [2001] EWCA Civ 1509; *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 (CA); *D Holdings Ltd v Secretary for Internal Affairs* HC Wellington CIV-2005-485-967, 28 April 2006, *Burrell Demolition Ltd v Wellington Regional Council* CA161/01, 18 March 2002 at [14]. The Court of Appeal's footnote also referred to *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 (SC) at [126], where McGrath J said for the plurality that there was no rule preventing inquiry (in professional disciplinary proceedings) into some of the essential facts in issue in a criminal trial where they are relevant to an accusation of a different character. See also the Crimes Act 1961, s 405, which provides that no civil remedy for any act or omission is suspended because the act or omission amounts to an offence.

12 New Zealand Bill of Rights Act 1990, s 25.

discretionary stage.[13] Even if it were appropriate in this context to seek to predict the outcome of the criminal appeal and possible remission to the Judge under s 300(1)(d) of the Criminal Procedure Act, there is no sufficient evidential basis to do so. I proceed on the basis indicated by Mr Dickey, that the Crown cannot and will not limit the options open to the Court of Appeal, including a retrial if the appeal is successful on the second question of law.

[39] Assuming a possible retrial, I accept the FMA's submission that it is necessary to identify the fair trial jeopardy with some particularity – whether it be disclosure of a defence, the risk of the evidence of Mr Harris and Mr Mulholland in the IPO proceeding being used against them in a criminal retrial, or otherwise. I also accept the FMA's submission that the applicants have somewhat overstated the prejudice to them arising from the IPO trial preceding a possible retrial. I accept that the SFO must already have a grasp of their defences given the earlier criminal trial (and preceding liquidator examinations and SFO investigation). I accept too that the proposed evidence of Mr Harris and Mr Mulholland is likely to be exculpatory and, if so, it is unlikely that the Crown would seek to lead it at all.[14]

[40] However, these are not complete answers to the risk of prejudice. The defences in the earlier criminal trial reflected elections by Mr Harris and Mr Mulholland not to give evidence. Their position in the IPO proceeding will likely be different given the different standard of proof and that they have provided briefs of evidence (although those briefs are not in evidence before me on this application) indicating that they intend to give evidence. There is a material difference between putting the Crown to proof and advancing a positive defence. The evidence of Mr Harris and Mr Mulholland in the IPO proceeding is likely to go well beyond what was ascertained by the SFO in the earlier criminal trial. Further, however exculpatory their proposed evidence is, inculpatory statements may occur in cross-examination. It cannot be assumed that their evidence in the civil trial will be entirely exculpatory.

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13 *R (CA340/2015) v R* [2015] NZCA 287 at [36].
14 As in *Purucker v Huebler* [2021] NZHC 968 at [20](b).

[41] Nor can it be assumed that any retrial would be a Judge-alone trial even though that was the defendants' election in the earlier criminal trial and the same election seems likely in the event of any retrial.

[42] The FMA submitted that any such prejudice could be addressed by way of procedural orders. I have already made strict confidentiality orders to enable service of the briefs of evidence of Mr Harris and Mr Mulholland.[15] The other orders proposed by the FMA for the trial are that:

(a) the notes of the defendants' evidence not be permitted to be searched on the Court file;

(b) the media and others not publish the defendants' evidence; and

(c) the evidence of the defendants be conducted in chambers.

[43] Mr Dixon accepted that it would be necessary to suppress evidence relating to the Samoa transaction and that it may be necessary to suppress any inculpatory factual findings in the Court's judgment.

[44] I accept that such restrictive confidentiality orders would manage the risk of disclosure to the SFO and hence use of inculpatory material against Mr Harris and Mr Mulholland in a retrial. Given the clear purpose of such orders, Mr Jones' concern that the Crown could nevertheless seek to vary the orders to use inculpatory statements in a retrial seems unwarranted. Although he submitted that prejudice to a fair trial is irremediable, the ultimate sanction could be a stay of the criminal proceeding. I also accept that, in the event of a retrial by jury, such restrictive confidentiality orders (together with jury directions) would manage the risk of jury prejudice arising from publicity, at least if the IPO judgment was delivered well before the retrial.

[45] However, such restrictive confidentiality orders would be problematic for the IPO proceeding itself. Even the existing confidentiality orders may need to be

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15 *Financial Markets Authority v CBL Corporation Ltd (in liq)* HC Auckland CIV-2019-404-2739, 7 May 2024 (Minute) at [11].

revisited as giving evidence gets nearer, when the position will likely be more difficult to manage. The other proposed orders would conflict with the principle of open justice. Mr Dixon submitted they would be conceptually temporary (pending expiry of criminal fair trial rights) but they may need to remain in force for a lengthy period.

[46] Further, as well as the open justice implications for the trial and the Court's judgment in the IPO proceeding, such orders would not entirely remove the risk of fair trial prejudice given the overlap between FMA and SFO witnesses, including Mr Sialaoa (manager at NBoS at the relevant time), who Mr Jones and Mr Salmon indicated would be cross-examined further and differently in the IPO proceeding. Mr Dixon submitted the risk of influence on witnesses in a retrial is difficult to see given these witnesses have already given evidence in the earlier criminal proceeding and been briefed in the IPO proceeding, but I consider it cannot be ruled out. Accepting that the tactical advantage of surprise is not itself a fair trial right and may be lost on any retrial, here the FMA/SFO witnesses would be cross-examined on the proposed evidence of Mr Harris and Mr Mulholland in the IPO proceeding even assuming the witnesses do not see the briefs. With such cross-examination occurring before a retrial, a risk of fair trial prejudice remains.

[47] Turning to the FMA's interests, I accept that it will be prejudiced if there is an adjournment of the trial of the IPO proceeding. An adjournment would likely mean that the IPO proceeding will not be heard until at least 2026 even if the criminal appeal is ultimately dismissed or the proceeding determined after exercise of the power in s 300(1)(d) of the Criminal Procedure Act. As the FMA submitted, if allocating a new trial date for the IPO proceeding has to await the outcome of a retrial, the new trial date could be as late as 2028 or 2029. Such delays would be unsatisfactory for all participants, witnesses and the Court.

[48] Further, separate trials of the two FMA proceedings will involve witnesses having to give evidence twice and will increase the cost.[16] The alternative of also adjourning the CD proceeding is not favoured by anyone. The FMA also submitted that memories will fade with delay, but that has no doubt already occurred despite the

[16] Counsel's updated trial estimate is 8-12 weeks for the two proceedings together and 6-8 weeks for the CD-only trial. This saving is no doubt less than the total hearing time for a separate IPO trial.

contemporaneous documents, since the events in issue in the IPO proceeding date from 2014/2015 and all witnesses have now provided briefs of evidence in the IPO proceeding.

[49] I also accept that deferring the IPO trial will prejudice the FMA insofar as it seeks to rely on evidence in the IPO proceeding as internal propensity evidence in the CD proceeding. However, this may be seen as a consequence of deciding to proceed with the trial of the CD proceeding in any event, for understandable reasons.

[50] In terms of the public interest, I accept that a lengthy adjournment is of concern to the FMA given its regulatory role and the importance of the proceeding to the market. The FMA says it would mean a delay to the resolution of matters of key relevance to New Zealand's financial markets. I accept that the IPO proceeding concerns what the FMA considers to be the most serious conduct by the defendants across its proceedings. It relates to the non-disclosure of material information said to be known prior to an IPO and alleged contraventions of key aspects of the FMCA on which there are currently no judicial decisions in New Zealand. It is a case of significant precedential and strategic importance to the FMA. In particular, the FMA says that important aspects are to obtain clarity or guidance for market participants around:

(a) the meaning of the phrase "materially adverse from the point of view of an investor" in s 82 of the FMCA, and the interpretation of the definition of "material information" in an IPO under s 59;

(b) the elements that must be proven for accessorial liability, where the accessory is not a director;

(c) the meaning and scope of the defences under the FMCA, in light of the elements to be proven for accessorial liability;

(d) the significance of, and interrelationship between, s 534, 502, and 487(2); and

(e) the calculation of penalty, in circumstances where there is an allegation that there is a loss avoided that is said to be readily ascertainable.

[51] Some of these issues arise in the CD proceeding anyway. However, I accept that some issues arise only in the IPO proceeding, in part because of the unusual combination of circumstances in the FMA's two proceedings: CBLC is taking no further steps to defend the IPO proceeding, Mr Mulholland was not a director, and Mr Harris has filed a notice of admissions in the CD proceeding. So, for example, assuming the offeror contravened s 82, issues about the effect of a director being deemed to have done so despite a defence being available will only arise in the IPO proceeding. Even so, as Mr Salmon submitted, the absence of a Court decision on such an issue is unlikely to be affecting the current market behaviour of directors. This case involves a very specific factual context. However, I accept the related party transaction issues may be of wider relevance.

[52] Further, while the Court's determination of legal issues could be released to provide market guidance, the proposed confidentiality restrictions may inhibit the meaningful publication of a decision on some issues. The FMA's concern about the importance of the proceeding to the market in terms of its educative role may not be fully addressed with a proceeding and judgment covered by secrecy. In any event, the desirability of market guidance in the context of the IPO proceeding cannot carry too much weight against the risk of prejudice to fair trial rights.

[53] The FMA also referred to possible prejudice to CBLC and Mr Hutchison's estate. However, they have not sought to participate in this interlocutory application and will not participate in the trial whenever it occurs, so I do not consider their interests weigh against adjournment. Nor are the shareholders waiting for declarations of contravention on which they can rely to recover damages. The shareholder proceedings have already been settled.

[54] I do accept the FMA's submission that it cannot be assumed that a final guilty verdict in any subsequent retrial is likely to be determinative of liability in the IPO proceeding. I also accept that there is no reason in principle why a pecuniary penalty could not be imposed before sentencing in the event of a guilty verdict.

[55] Finally, while the FMA's role is distinct from that of the SFO, and each has statutory independence, they are both Crown agencies and their interests are somewhat aligned. In that sense, there is some analogy with the criminal proceeds context, where the Court of Appeal has said that in a case where the prosecuting agency is, in effect, the same party as the plaintiff in the civil proceeding, considerations of entitlement of a civil plaintiff to pursue his or her case without delay are obviously diluted substantially.[17] While acknowledging the FMA's different role, for so long as the Crown maintains the possibility of a retrial in the criminal proceeding, the FMA may have to accept the consequence in terms of deferring a trial of its case for declarations of contravention and pecuniary penalties. The position may well be different if the FMA was pursuing urgent relief in relation to ongoing conduct.

[56] Overall, weighing the interests of the parties set out, and despite inconvenience to the Court, I conclude that the balance and the interests of justice favour granting an adjournment to avoid the risk of prejudice to Mr Mulholland and Mr Harris pending a possible criminal retrial. This outweighs the FMA's interests, including that of avoiding delay at the expense of open justice.

[57] Given that there may not be a retrial, delay can be minimised by allocating a new trial date in the IPO proceeding now for as early as possible in 2026 on the basis that this date might need to be revisited following the outcome of the criminal appeal.

Consequential timetable directions

[58] In a further joint memorandum dated 29 May 2024, counsel propose consequential timetable directions depending on the outcome of the stay/adjournment application. Irrespective of the outcome, they propose adjourning the trial start date from 25 June to 8 July 2024.

[59] I accept that the FMA will now need time to recalibrate its briefs of evidence and nominations for the common bundle to reflect a CD-only trial, that Mr Harris' brief was only served on 28 May 2024, and that the CD-only trial will be shorter – counsel have estimated 6-8 weeks. However, I decline to adjourn the start date further,

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[17] *Commissioner of Police v Wei* [2012] NZCA 279 at [41].

for two main reasons. First, it should be possible to remove IPO-only material from briefs and the bundle in time for a 25 June start date. If necessary, the revised briefs can be provided in batches. Secondly, counsel underestimate the implications for the Court of sliding the trial date again. Maintaining the longer trial window in the Court roster despite the revised hearing estimates has been an indulgence, but that cannot be extended now that the stay/adjournment application has been determined. Slipping the start date further merely extends the period that the trial judge is out of the roster (including judgment-writing time after the hearing).

[60] Accordingly, I direct counsel to confer in relation to an amended timetable (Appendix C to the joint memorandum of 29 May 2024) maintaining the 25 June 2024 trial start date. This is to be filed within two working days.

[61] I make the directions sought in paragraphs 23(a) and (b) and 26 of the memorandum of counsel for the FMA dated 3 May 2024 by consent.

Costs

[62] Given the nature and timing of the application, my preliminary view is that costs should lie where they fall. If costs cannot be agreed, I will receive memoranda not exceeding three pages within 20 working days and determine costs on the papers.

Result

[63] The hearing of the IPO proceeding is adjourned to a new fixture commencing on 13 April 2026 (six weeks allocated).

[64] My directions dated 21 July 2022 are varied accordingly.

Gault J

Solicitors / Counsel:

CIV-2019-404-2739
Mr JCL Dixon KC (for the plaintiff Financial Markets Authority), Barristers, Auckland
Mr G E Hughes, Financial Markets Authority, Auckland
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Mr J K Goodall KC (for the 1st defendant CBL Corporation Ltd (in liq)), Barrister, Auckland
Ms A Challis and Mr A P Colgan (1st defendant's instructing solicitor), McElroys, Auckland
Mr D M Salmon KC (for the 2nd defendant Peter Alan Harris), Barrister, Auckland
Mr J Cundy (2nd defendant's instructing solicitor), Barrister and Solicitor, Auckland
Mr J Billington KC and Ms C M Meechan KC (for the 3rd defendant Geoffrey John Turner as executor of the Estate of Alistair Leighton Hutchison), Barristers, Auckland
Mr G Turner, Ms T Wood and Mr D Robinson (3rd defendant's instructing solicitors), Duncan Cotterill, Auckland
Mr DPH Jones KC (for the 4th defendant Carden James Mulholland), Barrister, Auckland
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CIV-2019-404-2745
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