IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2745
[2025] NZHC 1691

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 – DISCONTINUED

Continued …

Hearing:	7 May 2025 with further memoranda filed on 9 and 12 May 2025
Appearances:	N M Blomfield and H J King for FMA DPH Jones KC and DCS Morris for C J Mulholland
Judgment:	25 June 2025

JUDGMENT OF GAULT J
(Pecuniary penalty)

This judgment was delivered by me on 25 June 2025 at 4:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Continued …

AND

ANTHONY CHARLES RUSSELL HANNON
Fourth Defendant – DISCONTINUED

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

NORMAN GERALD PAUL DONALDSON
Sixth Defendant – DISCONTINUED

IAN KELVIN MARSH
Seventh Defendant – DISCONTINUED

CARDEN JAMES MULHOLLAND
Eighth Defendant

Introduction

[1] Following my judgment of 26 February 2025 making three declarations of contravention that Mr Mulholland was involved in breaches by CBL Corporation Limited (in liq) (CBLC) of s 270 of the Financial Markets Conduct Act 2013 (FMCA),[1] the Financial Markets Authority (FMA) and Mr Mulholland have agreed the pecuniary penalty they consider is appropriate for Mr Mulholland and made recommendations to the Court.

[2] The declarations of contravention are that:[2]

(a) from 24 August 2017 Mr Mulholland was involved in CBLC's contravention of s 270 when it failed to disclose approximately $35 million of premium receivables due to CBL Insurance Limited (in liq) (CBLI) that were over a year past due and their solvency impact (Aged Receivables Information);

(b) in January 2018 Mr Mulholland was involved in CBLC's contravention of s 270 when it failed to disclose the Central Bank of Ireland (CBI) direction to CBL Insurance Europe dac (CBLIE) to apply a capital add-on essentially requiring it to hold additional cash reserves of €31.5 million (Central Bank of Ireland Information); and

(c) from 25 January 2018 Mr Mulholland was involved in CBLC's contravention of s 270 when it failed to disclose that CBLI's reserves needed strengthening by approximately $100 million (Reserving Information).

[3] The parties recommend a pecuniary penalty of $641,250 but acknowledge that the amount of any pecuniary penalty to be imposed is a matter for the Court.

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1 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2025] NZHC 295, [2025] NZCCLR 1 (*Mulholland* judgment).

2 At [883].

Mr Mulholland's conduct

[4] The FMA's submissions helpfully summarised the contravening conduct found in my lengthy judgment. Mr Jones KC, for Mr Mulholland, took no issue with this summary, which I adopt for convenience:

> **2. CONDUCT**
>
> 2.1 Mr Mulholland was Chief Financial Officer of the CBL Group (Group). He had been with the Group since 2007 and was a senior executive.[3] He was held out to the market as being responsible for all the Group's financial operations,[4] and as having a central role in ensuring that CBLC complied with its continuous disclosure obligations.
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> 2.2 Mr Mulholland was one of three members of the Disclosure Committee – the others being the Managing Director (Peter Harris) and the Chairman (Sir John Wells). CBLC published its Continuous Disclosure Policy on its website, which identified the members of the Disclosure Committee.[5] It also made representations regarding the role and composition of the Disclosure Committee in other public documents, such as the CBL Group's 2015 Annual Report.[6]
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> 2.3 While the Board was ultimately responsible for ensuring CBLC complied with its continuous disclosure obligations,[7] the Disclosure Committee was formed to help the Board discharge its responsibilities[8] and played a conduit, triaging or recommending role with respect to potentially material information and market disclosure.[9]
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> 2.4 Mr Mulholland was also named in CBLC's Media and Public Relations Policy, which referred to CBLC's continuous disclosure obligations, as the principal Regulatory Public Disclosure Officer with responsibility to the Group Managing Director and a consultation requirement with the Chairman. Mr Mulholland was a point of contact for NZX when continuous disclosure queries were raised.[10]
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> 2.5 Yet Mr Mulholland's evidence at trial was that the Disclosure Committee was limited to proofreading market announcements prior to final release,[11] that he didn't recall being appointed the principal Regulatory Public Disclosure Officer,[12] and that Henry Ray (Group

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3 *Mulholland* judgment, above n 1, at [211].
4 At [208].
5 At [189].
6 At [192].
7 At [198].
8 At [188].
9 At [199].
10 At [205] and [206].
11 At [201], [202] and [204].
12 At [206].

Financial Controller reporting to Mr Mulholland) was, for all intents and purposes, the Group Chief Financial Officer.[13]

2.6 The Court found on multiple occasions that Mr Mulholland downplayed his knowledge and role within the Group in his evidence.[14] It held that Mr Mulholland understood the continuous disclosure requirements and his role in these as an executive officer,[15] and that he "had an important role in the operation of the Disclosure Committee".[16]

Mr Mulholland was involved in CBLC's failure to disclose existence and solvency impact of $35 million in premium receivables aged over one year past due date – 24 August 2017

2.7 Mr Mulholland has been found liable for his involvement in a contravention by CBLC of s 270 for failing to disclose Aged Receivables Information.

2.8 Aged receivables were one of two key drivers of CBLI's solvency in 2017, and the $35 million premium receivables had the effect of reducing CBLI's solvency ratio by around 30% or more (to well below its minimum solvency ratio of 170% as required by the Reserve Bank of New Zealand (RBNZ)) due to the 100% resilience capital factor that applied under the Solvency Standard.[17]

2.9 CBLC should have disclosed the Aged Receivables Information immediately on 24 August 2017.[18] It was plainly material information that was not protected by safe harbours exceptions, and the Court was satisfied "a reasonable person would expect the existence and solvency impact of the aged receivables to have a material effect on the price of CBLC shares".[19]

2.10 Mr Mulholland admitted he knew of the existence of the aged receivables and their solvency impact.[20] His evidence that he believed the reference to the SFS reconciliation in Note 6 to the Interim Financial Statements as at 30 June 2017 (Interim Financial Statements) was sufficient to disclose the uncertainty around the aged receivables, and that the solvency impact of them was also disclosed elsewhere in the Interim Financial Statements, was not accepted by the Court.[21]

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13 *Mulholland* judgment, above n 1, at [208] and [211].
14 At [191], [200], [206], [211] and [356].
15 At [191].
16 At [200].
17 At [461](b) and [773].
18 At [775].
19 At [773].
20 At [778].
21 At [780] and [781].

2.11 Further, despite acknowledging that CBLI's solvency "was an important metric and mattered to investors", Mr Mulholland nevertheless submitted at trial that the Aged Receivables Information was not material. However:[22]

> …he ultimately accepted that an adjustment for the aged receivables was a significant change in solvency and that the drop in solvency as a result of the aged receivables was material information an investor needed to know.

2.12 In view of the information that was made available to Mr Mulholland by his team in the lead up to 24 August 2017 regarding the aged receivables and their solvency impact, the Court held that "Mr Mulholland must have known that the existence and solvency impact of the aged receivables was material".[23] It also rejected Mr Mulholland's suggestion that he believed disclosure of the Aged Receivables Information was exempted by the safe harbour exceptions (specifically that the information comprised matters of supposition and was insufficiently definite to warrant disclosure) as there was no evidence to support this.[24]

2.13 Given Mr Mulholland's responsibilities as a senior executive officer of CBLC, a member of the Disclosure Committee, and principal Regulatory Public Disclosure Officer, together with his knowledge as Chief Financial Officer of the existence and impact of the aged receivables, it was incumbent on him to act:[25]

> If an executive officer with relevant responsibility also knows the essential facts giving rise to the need for disclosure and fails to raise the issue, he or she may intentionally participate by an omission that has a practical connection with the contravention.

2.14 Mr Mulholland's failure in those circumstances to ensure the Board had considered the Aged Receivables Information for the purposes of continuous disclosure, knowing that the Aged Receivables Information was disclosable material information not generally available to the market, led to him being personally liable as an accessory to CBLC's breach:[26]

> However, he was involved in the announcement and, given his role, he must have known that the Board (and the Disclosure Committee) had not considered disclosure of this information. He did nothing to prompt the Board to consider continuous disclosure despite his roles as CFO, a member of the Disclosure Committee (advised to the market) helping the Board discharge its responsibilities by providing recommendations, principal Regulatory Public Disclosure Officer, and reviewer of draft market announcements which

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22 *Mulholland* judgment, above n 1, at [782].
23 At [783].
24 At [785] and [786].
25 At [792].
26 At [793].

could easily have included reference to this information. In all the circumstances, I consider that Mr Mulholland's omission to raise the need for continuous disclosure had a practical connection with the contravention in relation to non-disclosure of the existence and solvency impact of the aged receivables.

2.15 There was no evidence Mr Mulholland reasonably relied on advice or information from others in relation to disclosure of the Aged Receivables Information, or that he took reasonable steps to ensure CBLC complied with its obligations in s 270, and so no affirmative defences were available to him.

Mr Mulholland was involved in CBLC's failure to disclose that Central Bank of Ireland had directed CBLIE to apply a capital add-on of €31.5 million – January 2018

2.16 Mr Mulholland has been found liable for his involvement in a contravention by CBLC of s 270 for failing to disclose the Central Bank of Ireland Information.

2.17 CBLC's product disclosure statement highlighted regulatory risk as one of the key risks to its ongoing operations, and that this risk included loss of licence.[27] This would naturally extend to CBLC's trading entities, including CBLIE which, by 2017 was the most significant contributor to the CBL Group's cash flow.[28] Based on CBLC's unaudited financial statements from December 2017, a capital add-on of the quantum specified was also unachievable, as such capital was not readily available within the CBL Group.[29] It was clear therefore that loss of licence was a very real risk to CBLIE.

2.18 In January 2017, CBLIE had become the subject of "increasingly intensive regulatory and supervisory engagement" by CBI, culminating in the imposition of the Third Central Bank Direction on 13 January 2018.[30] The Third Central Bank Direction had been preceded by other directions and warnings from CBI, to the extent that CBI had advised CBLIE in November 2017 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.[31]

2.19 CBLC should have disclosed the Central Bank of Ireland Information by 30 January 2018 at the latest, when the Board was first advised of its existence. Again, it was clearly material information that was not protected by safe harbours exceptions, and the Court was satisfied that a reasonable person would expect the Central Bank of Ireland Information to have a material effect on the price of CBLC shares.[32]

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27 *Mulholland* judgment, above n 1, at [231](e) and [825].
28 At [825].
29 At [824].
30 At [825].
31 At [531].
32 At [825].

2.20 As a director of CBLIE, Mr Mulholland acknowledged he was aware of the Central Bank of Ireland Information from 13 January 2018, and the Court held that he must have been aware of the implications of the capital add-on by 30 January 2018 at the latest.[33]

2.21 Notwithstanding this, Mr Mulholland denied he knew the Central Bank of Ireland Information was material information.[34] Instead, he submitted that the capital add-on was simply a movement of capital within the Group. However, in light of his acceptance that the warning from CBI in November 2017 (to cease writing insurance) would be "catastrophic", together with his approach to the imposition of similar sanctions on another CBLC subsidiary (SFS), and the significant quantum of the capital add-on, his position was not accepted by the Court.[35]

2.22 The Court therefore held that Mr Mulholland "must have known that the third CBI direction's capital add-on was material information by 30 January 2018 at the latest when it was ultimately quantified, and likely soon after 13 January 2018".[36] Further, it rejected that disclosure was exempted by the safe harbour exceptions (particularly those relating to confidentiality and legal advice) – while Mr Mulholland said that disclosure could not be made without also disclosing the existence of RBNZ's separate enquiries into the Group (and that legal advice had been given to this effect), the Court found the different regulators' investigations were not "intertwined" such that disclosure could have been made without any reference to RBNZ.[37]

2.23 In addition to Mr Mulholland's responsibilities in his role at CBLC (which in and of themselves imposed a duty to encourage disclosure of material information), he was also a director of CBLIE. While accepting that Mr Harris and Mr Donaldson, as directors of both CBLC and CBLIE, were in a position to consider disclosure of the Central Bank of Ireland Information (but did not), their failure to do so did not exonerate Mr Mulholland.[38] Rather:[39]

> Mr Mulholland must have known that the Board had not considered disclosure of this information given his role as a director of CBLIE and his involvement with disclosure issues. He did nothing to prompt Mr Harris, the Disclosure Committee or the Board to consider disclosure of this information from 13 January 2018, even after the required add-on was quantified.

2.24 Mr Mulholland should therefore have observed that Mr Harris and Mr Donaldson had failed to inform the Board and/or sufficiently consider disclosure themselves, and his resulting failure to raise the

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33 *Mulholland* judgment, above n 1, at [833].
34 At [824].
35 At [624]-[628] and [835].
36 At [835].
37 At [837]-[842].
38 At [846].
39 At [846].

need for disclosure had a practical connection with CBLC's contravention.[40]

Mr Mulholland was involved in CBLC's failure to immediately disclose the need for CBLI to increase reserves by $100 million – 25 January 2018

2.25 Finally, Mr Mulholland has been found liable for his involvement in a contravention by CBLC of s 270 for failing to immediately disclose the Reserving Information.

2.26 Reserving also had a prominent position in the risks section of CBLC's product disclosure statement.[41] As an insurance company, CBLI's (and by extension CBLC's) profit and loss were affected by any reserving changes, particularly at the quantum specified in the Appointed Actuary's update to CBLC on 25 January 2018.[42] The effect on CBLC's share price following its 18 August 2017 announcement regarding reserve strengthening is clear evidence of the market's view of reserving's importance.[43]

2.27 CBLC should have disclosed the Reserving Information immediately on 25 January 2018.[44] It was not disputed that it was material information that a reasonable person would expect to have a material effect on the price of CBLC's shares.[45] Further, the Court was satisfied that no safe harbours exceptions applied.[46]

2.28 Mr Mulholland admitted that he knew by 25 January 2018 some form of "significant strengthening" was likely – his evidence was that the exact figure was not certain at this stage, and therefore no disclosure was required.[47] The Court did not accept this:[48]

> He must have known by 25 January 2018 that the amount of reserve strengthening needed was a material number even though the exact figure was still being finalised. He accepted that anything in the range of $67m-$120m earlier identified would be material, and he had no reason to consider on 25 January that the amount might reduce so much that it would not be material. Indeed, he requested a meeting on the morning of 30 January – before PwC's 30 January update – to discuss the solvency issue, saying that on the current reserving for CBL, "we will be under 100%" (at [657] above). He knew the share price had fallen in August 2017 following a smaller reserve strengthening announcement. Mr Mulholland must have known this information was material.

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40 *Mulholland* judgment at, above n 1, [846].
41 At [856].
42 At [856].
43 At [856].
44 At [862].
45 At [856].
46 At [859] and [860].
47 At [867].
48 At [870].

2.29 The draft nature of the Appointed Actuary's recommendation therefore did not excuse CBLC's failure to disclose, and the Court held that the Reserving Information was not insufficiently definite such that it did not need to be disclosed until 30/31 January 2018 (at which point Mr Mulholland admitted that it required disclosure).[49]

2.30 Consistent with other contraventions, Mr Mulholland maintained that, regardless of materiality, disclosure was a matter for the Board, and he therefore did not participate in CBLC's contravention.[50] Similar to the Central Bank of Ireland Information, Mr Mulholland became aware of the Reserving Information ahead of the majority of the CBLC Board, together with two directors (in this case, Mr Harris and Mr Hannon).[51] The Court held that Mr Harris' and Mr Hannon's failure to pass the information regarding the Reserving Information to the Board, or appropriately consider immediate disclosure, does not excuse Mr Mulholland – instead:[52]

> Mr Mulholland must have known that the Board had not considered the need for continuous disclosure given his role as CFO and involvement with the reserve strengthening issue as well as disclosure.

2.31 The Court held that Mr Mulholland should therefore have raised the need to disclose with the Board on 25 January 2018, but took no steps prior to CBLC being placed in a trading halt on 2 February 2018.[53] The Court went further, highlighting evidence that suggested the Board was expecting Mr Mulholland to advise them on continuous disclosure issues, as he previously had in December 2017.[54] CBLC's failure to disclose after the Board was informed on 30 January 2018 was irrelevant – by taking no steps to consider disclosure after receiving the Appointed Actuary's draft report on 25 January 2018, Mr Mulholland was personally liable as an accessory to CBLC's resulting breach.[55]

Approach to fixing pecuniary penalty

[5] I repeat the Court's approach to pecuniary penalties adopted when considering and imposing penalties against CBLC and the independent non-executive directors (INEDS), and against Mr Harris.[56]

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49 *Mulholland* judgment, above n 1, at [873].
50 At [875].
51 At [878].
52 At [878].
53 At [879].
54 At [879].
55 At [876] and [879].
56 *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [81]-[83] and [85]-[87]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [112]-[119].

[6] 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.

[7] Section 492 provides:

> **492 Considerations for court in determining pecuniary penalty**
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> In determining an appropriate pecuniary penalty, the court must have regard to all relevant matters, including—
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> (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
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> (b) the nature and extent of the contravention or involvement in the contravention; and
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> (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
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> (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
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> (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
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> (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.

[8] Although deterrence is not expressly set out as a factor, deterrence is a relevant consideration when determining a pecuniary penalty.[57] 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:[58]

> (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
>
> (b) promote and facilitate the development of fair, efficient, and transparent financial markets.

Agreed penalty

[9] As indicated, the FMA and Mr Mulholland agreed the quantum of the proposed penalty to recommend ($641,250) but acknowledged that the amount of any pecuniary penalty to be imposed is a matter for the Court.

[10] 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.[59]

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57 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [44]-[45] and [55]; *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [83]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [115]. See also *Financial Markets Authority v Warminger* [2017] NZHC 1471, (2017) 11 NZCLC 98-054 at [35]-[36], under the preceding s 42Y of the Securities Markets Act 1988.

58 Financial Markets Conduct Act, s 3.

59 *Commerce Commission v Kuehne + Nagel International AG* [2014] NZHC 705 at [21]; *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [30]-[32]; *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610 at [47]; *Financial Markets Authority v Tiger Brokers (NZ) Ltd* [2023] NZHC 1625 at [36]; *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [85]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [117]. See also *Financial Markets Authority v Hill* [2024] NZHC 1353 at [28].

[11] The Court must be satisfied that the proposed pecuniary penalty satisfies the objectives of the FMCA and reflects the particular circumstances of the case before it. When assessing whether the final figure proposed is within the proper range, the Court need not accept each step of the methodology proposed – it is the final amount that matters.[60]

Approach to fixing pecuniary penalty

[12] The three-stage approach to fixing pecuniary penalties is well-settled and applies to the FMCA. The Court:[61]

(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 penalty

[13] Section 490(1) provides that the maximum penalty for a single breach of s 270 will be the greater of:

(a) the consideration for the relevant transaction;

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60 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [32], citing *Commerce Commission v Air New Zealand Ltd* [2013] NZHC 1414, (2013) 13 TCLR 618 at [27]; *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [86]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [118]. See also *Financial Markets Authority v Hill* [2024] NZHC 1353 at [29].

61 *Financial Markets Authority v ANZ Bank New Zealand Ltd* [2021] NZHC 399, (2021) 16 TCLR 28 at [37]; *Financial Markets Authority v Cigna Life Insurance New Zealand Ltd* [2022] NZHC 3610 at [49]; *Financial Markets Authority v Zhong* [2022] NZHC 480 at [58]; *Financial Markets Authority v Zhong* [2023] NZHC 2196 at [21]; *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [87]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [119]. See also *Financial Markets Authority v Hill* [2024] NZHC 1353 at [30].

(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; or

(c) $1 million for an individual and $5 million in any other case.

[14] As was the case for the other defendants, it is agreed the maximum penalty for Mr Mulholland is to be calculated by reference to s 490(1)(c), being $1 million in respect of each of Mr Mulholland's contraventions. As such, Mr Mulholland's maximum penalty for the three contraventions is $3 million.

[15] For completeness, the FMA submits that s 506 does not apply here because the reference in the section to the "same conduct" refers to the specific acts or omissions constituting the breach.[62] In this case, there are three distinct sets of conduct involving different material information occurring at different times.

Starting point

[16] The FMA and Mr Mulholland agreed to recommend to the Court a starting point of $675,000 in light of the relevant factors in s 492, the starting points adopted for the INEDs and Mr Harris in respect of seven contraventions, and the maximum penalty. The recommended starting point is lower for Mr Mulholland primarily because there are three rather than seven contraventions and, while he had clear obligations and responsibilities with respect to continuous disclosure (as a senior officer, a member of the Disclosure Committee and as principal Regulatory Public Disclosure Officer), he was not the ultimate decision-maker with respect to market disclosure.

[17] In terms of s 492(a) and the relevant purposes of the FMCA,[63] my assessment in relation to Mr Harris also applies to Mr Mulholland:[64]

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62 *Financial Markets Authority v Kiwibank Ltd* [2023] NZHC 2856 at [25]; *Financial Markets Authority v CBL Corp Ltd (in liq)* [2023] NZHC 3842 at [90]; and *Financial Markets Authority v CBL Corp Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [122].

63 Sections 3, 4 and 229.

64 *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2322, [2024] NZCCLR 187 at [128].

> … 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. … The conduct was completely inconsistent with promoting the confident and informed participation of business, investors and consumers in New Zealand's financial markets.

[18] As the FMA submitted, the lack of disclosure by CBLC meant investors were denied timely access to material information and continued to trade, uninformed, for an extended period of more than five months.

[19] In terms of the nature and extent of the involvement in the contraventions (s 492(b)), the lack of timely and accurate disclosure involved two key financial metrics: CBLI's Reserving and Aged Receivables Information. In addition, there was a failure to disclose regulatory action being taken by the CBI against the Group's key subsidiary, CBLIE. I have addressed Mr Mulholland's significant involvement in these contraventions. The impact on the market was serious and far-reaching.

[20] Turning to the nature and extent of loss (s 492(c)), it was agreed that loss need not be quantified. There is insufficient information before me to do so. I accept Mr Jones' submission that any comparison, or references to loss asserted in the shareholder proceedings or the liquidator proceedings, is inapt as far as it relates to Mr Mulholland. He was a defendant in only one of the shareholder proceedings. The cause of action in that proceeding was nothing to do with the contraventions proved in this proceeding.

[21] As I said in relation to the other defendants, self-evidently the non-disclosures related to material information, that is, information a reasonable person would expect to have a material impact on the share price. CBLC shares traded in large numbers during the relevant period. But I do not draw an inference as to quantum. As counsel accepted, the breaches at least caused investors a loss of opportunity. However, Mr Mulholland did not obtain a realised gain or avoid a loss.

[22] As for payment of compensation (s 492(d)), it was not suggested that Mr Mulholland contributed personally to the settlement of the shareholder and liquidator proceedings which were resolved in 2023. However, the FMA accepted that steps Mr Mulholland took to facilitate payment of the settlement sum set aside for CBLC investors reduces his culpability, though not to the same extent as other defendants who personally contributed. This is taken into account by way of personal mitigation below.

[23] The circumstances in which the involvement in the contraventions took place (s 492(e)) were that CBLC and the wider CBL group were facing increasing financial concerns and regulatory intervention from the second half of 2017. I refer again to Mr Mulholland's significant involvement in these contraventions.

[24] Mr Mulholland has not previously been found liable under the FMCA or any other enactment for similar conduct (s 492(f)) and has no previous convictions, albeit his credit for this is tempered somewhat by the three contraventions over a period of months. I take his lack of previous contraventions into account by way of personal mitigation below.

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

[26] I have already acknowledged the need for specific and general deterrence. The penalty imposed against Mr Mulholland as a senior officer with specific responsibilities in relation to disclosure needs to reflect the importance of listed companies making prompt and accurate disclosures to the market, as well as his specific involvement in the contraventions. As such, it is important that the penalty in this case achieves both specific and general deterrence. The starting point needs to be high enough so that a penalty is not seen as merely a cost of doing business.

[27] Considering the above factors and the previous cases (against directors),[65] I am satisfied that the recommended starting point for Mr Mulholland of $675,000 is within the appropriate range. It reflects Mr Mulholland's role in the three contraventions –

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[65] The Australian penalty decisions against chief financial officers occurred when the maximum penalty was lower than it is under the FMCA, but also reflect lower penalties than for directors.

with specific responsibilities, but not ultimate decision-making, in relation to continuous disclosure.

Personal aggravating and mitigating factors

[28] The FMA and Mr Mulholland agreed there are no personal aggravating factors warranting an increase to the starting point, which I accept.

[29] They also agreed to recommend a reduction of five per cent ($33,750) for Mr Mulholland's personal mitigating factors – facilitation of compensation to investors in the shareholder proceedings. The recommended reduction is lower for Mr Mulholland than the INEDs and Mr Harris since Mr Mulholland did not make admissions – resulting in a six-week trial as he was the last remaining defendant – and he did not have other personal mitigating factors to the same extent as the other defendants.

[30] I accept that Mr Mulholland is entitled to a modest reduction for agreeing to the settlement of the shareholder proceedings to ensure investors received funds from the available insurance rather than be expended on a lengthy trial. I was advised he also abandoned a claim against the liquidators of CBLC for unpaid wages and entitlements. I am satisfied the recommended reduction of five per cent is within the appropriate range.

Conclusion on penalty

[31] It follows that I accept the recommended penalty of $641,250 is within range. I therefore make an order pursuant to s 489(2)(c) that Mr Mulholland pays a pecuniary penalty of $641,250.

Section 493 order

[32] Section 493 of the FMCA provides the Court must also order that the penalty must be applied first to pay the FMA's actual costs in bringing the proceedings. The FMA seeks an order pursuant to s 493 that Mr Mulholland's penalty be applied first to the FMA's actual costs in bringing this proceeding. Such an order is mandatory if the Court orders that a person pay a pecuniary penalty. Order accordingly.

Costs

[33] The parties have reached an agreement on the issue of costs and seek an order by consent that Mr Mulholland pays the FMA's costs and reasonable disbursements in the amount of $606,216.53.

[34] *Financial Markets Authority v Zhong* was the first case where this Court had to consider what impact, if any, a s 493 order has on the Court's general discretion to award costs.[66] Robinson J noted that in none of the previous cases did the FMA seek costs in addition to the pecuniary penalty and mandatory s 493 order. He accepted the FMA's submission that an order under s 493 does not preclude an award of costs under the High Court Rules 2016. Counsel assisting had submitted that the mandatory s 493 order overrides the Court's general discretion to award costs or, alternatively, that where the FMA's actual costs will be paid by the application of the pecuniary penalty, there are no additional costs for the FMA to recover. However, Robinson J said:

> [37] I do not take such a broad view. An order under s 493 requires that penalties be *applied* to the FMA's actual costs; but it is not, of itself, a costs order. An order under s 493 does not create a payment obligation. Here, Mr Zhong and Ms Ding have been ordered to pay penalties, and the Court has ordered that these be applied first to FMA's costs. But Mr Zhong and Ms Ding have not been ordered to pay the FMA's actual costs.
>
> [38] It follows that an ordinary costs order is not a costs order "on top" of the pecuniary penalty order. Although the costs order itself must not exceed the FMA's actual costs, there is no reason in principle why the costs order, together with the pecuniary penalty order, cannot. I agree with Mr Williams that in such a situation, any balance of funds paid by way of pecuniary penalty remaining after their application towards the FMA's actual costs would be paid to the Crown. But for the mandatory s 493 order, all funds paid by way of pecuniary penalty would be paid to the Crown.[67]
>
> [39] I also agree with Mr Williams that to find otherwise would undermine an important purpose of pecuniary penalties, which is to deter misconduct. It would be incongruous if an unsuccessful defendant was able to avoid the ordinary liability to pay costs by virtue of having been ordered to pay pecuniary penalties under s 489 of the FMCA. I do not consider that Parliament intended this to be the effect of s 493.
>
> [40] Finally, I note that at s 492 of the FMCA, Parliament has set out various matters which the Court must have regard to when determining an appropriate penalty. The FMA's costs of bringing the proceeding is not one of them. This reinforces the conclusion that Parliament did not intend the

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66 *Financial Markets Authority v Zhong* [2024] NZHC 2126, [2024] NZCCLR 101 at [31].
67 *Chief Executive of the Department of Internal Affairs v Mansfield* [2013] NZHC 2064 at [80].

> s 493 order to be a costs order, or otherwise to override the Court's general discretion to award costs.

[35] I agree that an order under s 493 requires penalties be *applied* to the FMA's actual costs; but it is not, of itself, a costs order. I also agree that s 493 does not preclude the FMA from seeking and obtaining a costs order. There will be cases where on its face the pecuniary penalty ordered is insufficient to fully cover the FMA's actual costs. Further, at the time of the orders, it may well not be known whether the pecuniary penalty will be paid or paid in full. Thus, it may well be appropriate for the FMA to seek a costs order as well. However, I raised with counsel a concern that, where s 493 applies, a separate costs order should not have the effect of contravening the principle that an award of costs should not exceed the (actual) costs incurred by the party claiming costs.[68] Counsel seemed to agree. In such cases, a proviso to the costs order that the FMA may not recover more than its actual costs would suffice. This would not undermine the importance of deterrence which is taken into account in setting the pecuniary penalty.

[36] I invited the parties to file supplementary memoranda addressing the FMA's actual costs if they wished. The FMA went further and filed a memorandum addressing the interrelationship between s 493 and a costs order. The FMA accepted that the costs award should not exceed its actual costs in bringing the proceeding, but submitted, relying on *Zhong*, that the FMA will never obtain more than its actual costs since the balance will be paid to the Crown. In that regard, Robinson J said that, but for the mandatory s 493 order, all funds paid by way of pecuniary penalty would be paid to the Crown.

[37] That default position may not preclude a sharing arrangement between the Crown and the FMA. At the hearing, counsel for the FMA advised that there is a memorandum of understanding between the FMA and the Crown but did not provide detail as to its contents. That is a matter between the FMA and the Crown. However, in the absence of evidence, a proviso may still be appropriate if there is potential for the FMA to recover more than its actual costs against the relevant defendant. In this proceeding, the FMA did not seek costs against the other defendants. While they did

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[68] High Court Rules 2016, r 14.2(1)(f).

not take the FMA to trial, a fair portion of the FMA's pre-trial costs could have been shared among other defendants.

[38] Mr Mulholland did not accept that the principles articulated by the FMA arising from the *Zhong* penalty judgment are correct. However, he acknowledged that no issue arises in this case as it is accepted that the actual costs incurred by the FMA exceed the combined amount of the penalty and the agreed costs. Thus, the issue is moot in this case. On that basis, a proviso to the costs order is not required.

[39] Accordingly, I make a costs order by consent that Mr Mulholland pays the FMA's costs and reasonable disbursements in the amount of $606,216.53.

Gault J

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