**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-2745**
**[2025] NZHC 295**

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

Continued …

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|---|---|
| Hearing: | 25, 26, 27 June, 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 18, 23, 24, 27, 30, 31 July, 1 and 2 August 2024 (plus memoranda received on 20 and 21 August, 9 and 25 October and 1 November 2024) |
| Appearances: | JCL Dixon KC, W R Potter, N M Blomfield, S A Comber, JEM Greer and C G Paterson for FMA<br>DPH Jones KC, DCS Morris and S E Cameron for C J Mulholland |
| Judgment: | 26 February 2025 |

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**JUDGMENT OF GAULT J**

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*This judgment was delivered by me on 26 February 2025 at 3:00 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

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## Introduction

[1] The Financial Markets Authority (FMA) alleges that Mr Carden Mulholland was involved in five contraventions of the Financial Markets Conduct Act 2013 (FMCA) by CBL Corporation Ltd (CBLC) between August 2017 and February 2018.[1] Mr Mulholland was the chief financial officer (CFO) of the CBL Group.

[2] The alleged contraventions are:

***Fair dealing***

(a) a misrepresentation to investors on 24 August 2017 that CBLC's operating profit for the half-year to June 2017 had been materially reduced because its subsidiary, CBL Insurance Ltd (CBLI), had made a "one-off" increase of $16.5 million (m) to the amount that it was setting aside (i.e. reserving) for future claims against its insurance policies – in breach of the fair dealing provisions in ss 19, 22 and/or 23 of the FMCA;[2]

***Continuous disclosure***

(b) a failure to disclose to the market from 24 August 2017 that approximately $35m of premium receivables due to CBLI were over a year past due (aged receivables), and the solvency impact of the aged receivables under the Solvency Standard for Non-Life Insurance Business 2014 (Solvency Standard)[3] – in breach of the continuous disclosure obligations in s 270 of the FMCA and cl 10.1 of the NZX Ltd Main Board/Debt Market Listing Rules (Listing Rules);[4]

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1 A separate proceeding (CIV-2019-404-2739) alleging involvement in other contraventions was to be heard together with this proceeding but was adjourned until 2026 on 5 June 2024: *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 1473.

2 Third amended statement of claim, second cause of action.

3 *Solvency Standard for Non-life Insurance Business 2014* (Reserve Bank of New Zealand, December 2014) [*Solvency Standard*]; issued by the Reserve Bank of New Zealand under s 55 of the Insurance (Prudential Supervision) Act 2010, which was applicable to CBLI from 31 December 2015.

4 Tenth cause of action. The NZX Ltd Main Board/Debt Market Listing Rules were the relevant listing rules at all relevant times; specifically, the versions issued on 22 May 2017 and 1 October 2017.

(c) a failure to disclose to the market on or shortly after 11 October 2017 that CBLI signed a term sheet to sell the aged receivables to Castlerock Receivables Management Ltd[5] (Castlerock and Castlerock transaction) and its effect – in breach of the continuous disclosure obligations in s 270 of the FMCA and cl 10.1 of the Listing Rules;[6]

(d) a failure to disclose to the market on or shortly after 13 January 2018 that the Central Bank of Ireland (CBI) had directed CBLC's subsidiary, CBL Insurance Europe dac (CBLIE), to apply a capital add-on, essentially requiring it to hold additional cash reserves of €31.5m – in breach of the continuous disclosure obligations in s 270 of the FMCA and cl 10.1 of the Listing Rules;[7] and

(e) a failure to disclose to the market from 25 January 2018 until 5 February 2018 that CBLI's reserves needed strengthening by approximately $100m – in breach of the continuous disclosure obligations in s 270 of the FMCA and c 10.1 of the Listing Rules.[8]

[3] In the alternative to the four continuous disclosure contraventions, the FMA alleges a failure to disclose to the market (at least by the end of January 2018) the cumulative material effect of the information concerning receivables, directions and conditions issued by CBI, and reserving – in breach of the continuous disclosure obligations in s 270 of the FMCA and cl 10.1 of the Listing Rules.[9]

***The way the case unfolded***

[4] These alleged contraventions represent a considerably streamlined version of the FMA's case. The case was prepared for trial on the basis of the second amended statement of claim dated 30 June 2023, which contained 24 causes of action against eight defendants. However, by March 2024, the FMA had discontinued against Mr Alistair Hutchison's estate and settled with six other defendants. This left

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5 Subsequently renamed MRO2 Ltd.
6 Twelfth cause of action.
7 Twenty-second cause of action.
8 Eighth cause of action.
9 Twenty-fourth cause of action.

Mr Mulholland as the only defendant at trial. Four interrelated consequences are noteworthy.

[5] First, on 19 June 2024 the FMA applied for leave to file a third amended statement of claim to streamline its case against Mr Mulholland. Mr Dixon KC, for the FMA, advised that the FMA would not pursue a number of causes of action, but that a good deal of evidence relating to those causes of action would still be adduced at trial.

[6] Second, also on 19 June 2024, Mr Mulholland applied to strike out certain causes of action on the ground of abuse of process. There was some overlap between these applications. Mr Jones KC, for Mr Mulholland, indicated that Mr Mulholland would not oppose the third amended statement of claim without prejudice to his strike out application. Leave to amend was deferred pending consideration of the position of Mr Peter Harris (CBLC's managing director). The FMA had settled with Mr Harris, but had not discontinued pending a separate decision in relation to his admitted involvement and penalty. Leave to file the third amended statement of claim was granted on 17 July 2024 without prejudice to the strike out application.[10] The strike out application was heard on 18 July 2024 and dismissed on 24 July 2024.[11]

[7] Third, CBLC and all its directors except Mr Hutchison (who died in December 2021) have admitted some of the FMA's causes of action, and the proceeding against them has been determined on the basis of those admissions and discontinuance of the remaining causes of action. For reasons that I will address later,[12] the FMA has proceeded against Mr Mulholland on the basis that the admissions of other defendants, including CBLC as the company contravener, are inadmissible against Mr Mulholland.

[8] Fourth, the trial proceeded without oral evidence from any of the directors of CBLC/CBLI. Insofar as the directors' internal (intra-company) acts and omissions are

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[10] *Financial Markets Authority v CBL Corporation Ltd (in liq)* HC Auckland CIV-2019-404-2745, 17 July 2024 (Minute).

[11] *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2026 (results judgment); and *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2235 (reasons judgment).

[12] At [30]-[31].

relevant, the FMA relied on the extensive documentary record from CBLC/CBLI, and evidence from two members of Mr Mulholland's finance team (Mr Henry Ray and Mr Joel Clements), along with others who interacted with the CBL Group (including witnesses from the Reserve Bank of New Zealand (RBNZ), CBI, PwC, Deloitte, Castlerock and CBLC's institutional investors).

[9] Mr Mulholland denies that there were any contraventions by CBLC and, if there were, that he was involved in them. A focus of his defence is the delineation between corporate governance and management. He says that CBLC's disclosure decisions were made by the board of directors in possession of all relevant information and that, as a non-director in company management, he was not responsible for disclosure, and his acts or omissions did not cause any contravention. He says that he provided material information to the board of CBLC/CBLI (referred to as the Board)[13] to make decisions on disclosure, and he had no further duty or responsibility.

[10] The trial was completed within six weeks although there was a substantial amount of oral and documentary evidence.[14] As well as the FMA's witnesses of fact, the FMA called evidence from four independent experts – an actuary (Mr Brown), an auditor (Mr Borrie), a company director (Mr Pilkington) and an investment banker (Mr Pigou). Mr Mulholland was the one defence witness. It is neither feasible nor necessary to set out in full or exhaustively review all the evidence or counsels' extensive submissions. I have carefully considered the relevant evidence and counsels' submissions as they relate to that evidence and the issues. My analysis will focus on the ingredients of each contravention, the principal evidence that bears on them, my conclusions in relation to them and the reasons for those conclusions.

[11] The structure of this judgment is that, following some factual background, I address the applicable legal principles and then set out in some detail the facts that are largely uncontested and that provide the basis for my later analysis and conclusions in respect of the issues in dispute. Given the nature of the case, the way it unfolded,

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13 These companies shared the same board of directors, and met together, from June 2015.

14 Before trial, I varied the default rule in r 9.5(4) of the High Court Rules 2016 so that documents that were merely footnoted in openings or briefs of evidence, but not substantively referred to, were not automatically received into evidence: *Financial Markets Authority v CBL Corporation Ltd (in liq)* HC Auckland CIV-2019-404-2745, 21 June 2024 (Minute).

the approach to accessory liability (addressed from [63] below) and the extent of the documentary evidence, this factual section is necessarily long. However, it avoids the need to include such detailed reference to the facts out of sequence in the later analysis of the issues in each cause of action.

**Factual background**

[12] In 1973, CBLI was founded (initially named Contractors Bonding & Discount Corporation Ltd). In 1979, it changed its name to Contractors Bonding Ltd.

[13] In 1996, CBLI was purchased by interests connected with Mr Harris and Mr Hutchison.

[14] Although based in Auckland, in 2000 CBLI initiated expansion offshore with the objective of transforming the Group into an international player in the insurance industry, whilst retaining its core competencies in credit risk – particularly in the building sector. CBLI expanded into the financial risk insurance business. Its focus was on non-traditional insurance lines, with a particular emphasis on offshore construction and property industries – most relevantly, construction insurance in France (French Construction Insurance) from about 2005 when CBL began working with Securities and Financial Solutions Europe (SFS). I will address this type of insurance in more detail below. The large majority of CBLI's business was as a reinsurer.[15]

[15] In 2007, Mr Mulholland was employed by CBLI as its CFO. At that time, CBLI was part of a small group of companies that were effectively owned by Mr Harris and Mr Hutchison. The group comprised an insurance and bonding company (CBLI) and two small warranty companies. Mr Mulholland's role at this early stage was more of a company accountant role. He reported to Mr Harris, CBLI's chief executive officer (CEO), who also became managing director. Mr Mulholland was never a director of CBLI.

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[15] Reinsurance is an agreement to indemnify an insurer in respect of a proportion of underlying risk in exchange for a share of the premium received by the insurer. The entity accepting the risk is the reinsurer, and is said to accept inwards reinsurance. The entity ceding the risk is the cedant, or ceding company, and is said to place outward reinsurance.

[16] In September 2010, parts of the Insurance (Prudential Supervision) Act 2010 (IPSA) came into force. IPSA introduced significant changes to the way in which New Zealand insurers were to be regulated (addressed further below). Under IPSA, RBNZ is the designated prudential supervisor of insurers in New Zealand.[16] This included CBLI, even though the vast majority of its insurance business derived from overseas markets. RBNZ's supervision of CBLI fell under the Insurance Oversight team within the Prudential Supervision Department. RBNZ's role does not include undertaking an assessment of the obligations of a listed insurer to make market disclosures.

[17] Mr Mulholland suggested to Mr Harris that the time was right to appoint a senior financial controller who would have overall control and responsibility for all statutory reporting, and for ensuring the regulatory reporting requirements were able to be met. In July 2011, Mr Ray was employed as CBLI's financial controller.

[18] In 2011, the CBL Group acquired European Insurance Services Ltd (EISL). EISL had been incorporated in 2006 and was based in the United Kingdom, but operated solely in France. EISL was licensed as a managing general agent (MGA) by the Financial Conduct Authority in the United Kingdom, and had insurance underwriting authority. I explain the role of an MGA at [137] below. The core products EISL provided were in French Construction Insurance, and these were distributed through a network of around 800 independent insurance brokers. EISL was one of the largest independent MGAs in France. The revenue recognised for EISL consisted of commissions, policy fees, and profit commissions associated with the placement of insurance contracts. Mr Mulholland was a director of EISL.

[19] As IPSA came into force, existing insurers in New Zealand had 18 months to obtain a provisional insurance licence and three years to obtain a full licence. The requirements to obtain a provisional licence were minimal. RBNZ was obliged to issue provisional licences to businesses classified as insurers, subject to some conditions.

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16 Insurance (Prudential Supervision) Act, s 12(b).

[20] On 14 February 2012, CBLI was issued a provisional insurance licence, allowing it to carry on insurance business in New Zealand under the supervision of RBNZ. From the outset, RBNZ saw CBLI as an outlier, largely because its business model was different from other insurers and almost all of its business was overseas. On being provisionally licensed, CBLI became subject to licence conditions that activated various requirements at various dates through to 2013.[17] The onus was on CBLI to apply for a full licence.

[21] On 18 June 2012, CBLC was incorporated. CBLC was initially a shell company. Mr Mulholland was a placeholder director until CBLC's board was appointed and shares in other companies in the CBL Group were transferred to it. This occurred in November 2013, and CBLC became the parent company of the CBL Group. From then onwards, Mr Mulholland was not a director of CBLC. Mr Mulholland remained CFO of CBLI, but also became CFO for the CBL Group, and was employed by CBLC.[18]

[22] By May 2013, RBNZ's Insurance Oversight team had expressed some concerns about CBLI's business, particularly around governance and risk management. At that point, they also raised issues regarding the solvency of CBLI. They felt that CBLI raised a number of red flags. These included its fast rate of expansion, its unique business model, and a number of indications that internal controls may have been below the standard expected of a regulated insurer.[19]

[23] Because of its concerns, RBNZ decided to commission KPMG to conduct an independent review of CBLI's ability to carry on business in a prudent manner. KPMG's findings were delivered in a report on 16 August 2013 (KPMG Report). The KPMG Report considered that CBLI had the management ability and intent to carry on its business in a prudent manner in accordance with s 20 of IPSA, but said there

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[17] Insurers with provisional licences had a licence condition specifying a commencement date for solvency requirements (addressed further below). CBLI had solvency requirements from 31 December 2012.

[18] Mr Mulholland remained CBL Group CFO until his employment was terminated by the interim liquidators on 26 February 2018. In October 2017, he had given six months' notice of his resignation for family reasons.

[19] For example, numerous errors were found in CBLI's Adjusted Audit Variance Report for the year-end 31 December 2012.

was a need for the development of the company's policies and practices to continue with a particular focus on strengthening claims reserving and risk management.

[24] On 4 September 2013, RBNZ issued CBLI a full insurance licence to carry on insurance business in New Zealand under RBNZ supervision, pursuant to s 19 of IPSA. RBNZ's letter to Mr Harris required CBLI, as part of the ongoing requirements of the licence, to address the concerns raised by the KPMG Report. The areas that needed to be addressed to RBNZ's satisfaction included:

(a) the alleged insufficient formal processes and documentation with regard to risk management; and

(b) the KPMG comments about claims reserving and management.

[25] In November 2013, the CBL Group through its subsidiary LBC Holdings Europe Ltd acquired CBLIE (then called Achmea Insurance Ireland Ltd).[20] CBLIE was a licensed European insurer headquartered in Dublin, Ireland, and was regulated by CBI. This acquisition provided the CBL Group with a licensed European insurer able to write business throughout the European Union.[21] Following the acquisition, CBLIE focused on specialist, non-traditional profitable business lines throughout Europe. Its principal business activity was writing property, suretyship, legal expenses, and miscellaneous financial loss insurance throughout Europe. Mr Mulholland was a director of CBLIE.

[26] In 2015, CBLC carried out an initial public offering (IPO) and dual-listed on the New Zealand Stock Exchange (NZX) and Australian Stock Exchange (ASX).

[27] As explained in more detail below, in 2017 CBLI and its European ceding (fronting) insurers came under increasing regulatory scrutiny. This partly arose from concerns about the adequacy of CBLI's reserving. CBLI's Appointed Actuary[22] at PwC was also providing updates in relation to reserving. Issues with CBLI's solvency

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[20] CBLIE was incorporated as Interpolis Insurance Ireland Ltd on 3 June 1994. It changed its name to Eureko Insurance Ireland Ltd in 2006, and to Achmea Insurance Ireland Ltd in 2011.
[21] Following the acquisition, all the risks that had been written by CBLIE were novated back to the vendors, and the existing business went into run-off.
[22] See below from [177].

calculations also arose. Ultimately, in February 2018, after CBLC's shares had been placed in a trading halt and the need for further reserving and write-off of the aged receivables was disclosed to the market, CBLC's shares were suspended, and interim liquidators of CBLI were appointed by the Court on the application of RBNZ.[23]

## FMCA – applicable legal principles

### *Contraventions*

[28] Section 486 of the FMCA provides:

> **486 When court may make declarations of contravention**
>
> (1) The court may, on the application of the FMA or any other person, make a declaration of contravention if it is satisfied that a person has—
>
> (a) contravened a civil liability provision; or
>
> (b) been involved in a contravention of a civil liability provision.
>
> (2) The court may also make a declaration of contravention under section 489(2)(b).

[29] Each of the fair dealing and continuous disclosure provisions of the FMCA relied on by the FMA in this case (ss 19, 22, 23 and 270) is a "civil liability provision", as defined in s 485.[24]

[30] It is common ground that for a person to be involved in a contravention of the FMCA, there must be a contravention. Here, that means that for Mr Mulholland to be liable, there must be a (primary) contravention by CBLC. As indicated, it is also common ground that earlier admissions by CBLC in this proceeding are inadmissible against Mr Mulholland and that the FMA has to establish the primary contraventions. I note s 487 of the FMCA, which provides:

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

23 *Reserve Bank of New Zealand v CBL Insurance Ltd* [2018] NZHC 264.
24 Financial Markets Conduct Act 2013, ss 38(1), 385(1) and (3)(c), and 485(a) and (d).

(2) Accordingly, a declaration of contravention is conclusive evidence of the matters that must be stated in it under section 488.

[31] Consistent with the approach to s 1317F of Australia's Corporations Act 2001 (Cth) considered in *Australian Securities and Investments Commission (ASIC) v Rich*,[25] I accept that the intention of s 487 appears to be to make the matters declared in accordance with s 488 binding in separate proceedings brought by an applicant other than the FMA for a compensatory order or other civil liability order against the defendant who is the subject of the declaration. It does not assist the FMA against other defendants in this proceeding. Otherwise, as Mr Dixon submitted, it would unduly hamper the ability of the regulator and a defendant to settle matters between them as it would empower other defendants to intervene to stop declarations being made against their interests. That is contrary to the public interest in ensuring prompt resolution of proceedings.

*Fair dealing*

[32] Part 2 of the FMCA concerns fair dealing. It includes provisions prohibiting misleading or deceptive conduct, the making of false or misleading representations, and the making of unsubstantiated representations.

[33] Section 19 provides:

**19 Misleading or deceptive conduct generally**

(1) A person must not, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to—

(a) any dealing in financial products; or

(b) the supply or possible supply of a financial service or the promotion by any means of the supply or use of financial services.

(2) A person must not engage in conduct that is misleading or deceptive or likely to mislead or deceive in relation to any dealing in quoted financial products.

(3) Subsection (2) applies regardless of whether or not the dealing is in trade.

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25 *Australian Securities and Investments Commission (ASIC) v Rich* [2004] NSWSC 836, (2004) 50 ACSR 500 at [67]-[68].

[34] Section 22 relevantly provides:

> **22 False or misleading representations**
>
> A person must not, in trade, in connection with any dealing in financial products, the supply or possible supply of financial services, or the promotion by any means of the supply or use of financial services, make a false or misleading representation—
>
> (a) that the products or services are of a particular kind, standard, quality, grade, quantity, composition, or value, or have had a particular history; or
>
> …
>
> (d) that the products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
>
> …

[35] It is common ground that a representation is a statement of present or past fact and a false or misleading representation is an untrue statement of present or past fact. However, it is also accepted that a statement as to future events or as to the opinion of the maker may be taken to imply that there is a reasonable basis for the statement, so as to amount to a representation about a present fact.[26]

[36] It is also common ground that the issue is how typical investors would have interpreted the statement. It is important to assess statements in their context – that is, in all the circumstances.[27]

[37] Section 23 provides:

> **23 Unsubstantiated representations**
>
> (1) A person must not, in trade, make an unsubstantiated representation.
>
> (2) A representation is **unsubstantiated** if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.

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[26] *Weine v Tadd Management Ltd* [2024] NZCA 323, (2024) 16 TCLR 855 at [29], in the context of misrepresentation under s 35 of the Contract and Commercial Law Act 2017.

[27] *Ridgway Empire Ltd v Grant* [2019] NZCA 134, (2019) 20 NZCPR 236 at [11] (Supreme Court refused leave to appeal: *Ridgway Empire Ltd v Grant* [2019] NZSC 85); and *Weine v Tadd Management Ltd*, above n 26, at [30].

(3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.

(4) In this section and sections 24 to 27, **representation** means a representation that is made—

(a) in respect of financial products or financial services; and

(b) in connection with—

(i) any dealing in financial products; or

(ii) the supply or possible supply of financial services or the promotion by any means of the supply or use of financial services.

[38] Sections 19-23 apply not only to conduct in New Zealand, but also to conduct outside New Zealand by any person resident, incorporated, registered, or carrying on business in New Zealand to the extent that that conduct relates to dealing in financial products, or the supply of a financial service, that occurs (in part or otherwise) within New Zealand.[28]

[39] In this case, it is admitted that CBLC was "in trade" and that the relevant conduct was in relation to/in connection with a "dealing in financial products".

[40] It is common ground that liability for a primary contravention of any of the relevant fair dealing provisions is strict liability.[29] There is no requirement for the misleading representation or conduct to be intentionally false.

[41] In the context of this case, ss 19 and 22 overlap in applying to misleading statements and it is unnecessary to consider the alternative references to "deceptive" conduct and "false" representations.

[42] Therefore, to prove the relevant fair dealing contravention by CBLC, the FMA must prove:

(a) sections 19 and 22 – that CBLC's representation to investors describing the reserve increase as "one-off" was misleading;

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28 Financial Markets Conduct Act, s 33(1)(b).

29 Although the pecuniary penalty provision, s 489 of the Financial Markets Conduct Act, is discretionary.

(b) section 22(a) – that CBLC's representation was that products or services were of a particular kind, standard, quality, grade, quantity, composition, or value, or have had a particular history;

(c) section 22(d) – that CBLC's representation was that products or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits;

(d) section 23 – that CBLC did not have reasonable grounds for the representation, and a reasonable person would expect the representation to be substantiated.

[43] Given the overlap between ss 19 and 22, it is also unnecessary to address the further requirements of s 22(a) and (d) as to the nature of the representation, but I accept that a representation about an issuer's financial results or performance amounts to a representation about its value and the value of its shares.

*Continuous disclosure*

[44] Part 5 of the FMCA relates to dealing in financial products on markets. Subpart 4 of pt 5 specifically deals with continuous disclosure. It provides:

> Subpart 4—Continuous disclosure
>
> **270 Listed issuers must disclose in accordance with listing rules if continuous disclosure listing rules apply**
>
> (1) A listed issuer must notify information in accordance with the continuous disclosure provisions of the listing rules for the licensed market if—
>
> (a) the listed issuer is a party to a listing agreement with the licensed market operator; and
>
> (b) the listed issuer has information that those continuous disclosure provisions require it to notify; and
>
> (c) the information is material information that is not generally available to the market.
>
> (2) Subsection (1) does not affect or limit the situations in which action can be taken (other than under this Act) for a failure to comply with provisions of the listing rules for a licensed market.

**271 What are continuous disclosure provisions**

In this Act, **continuous disclosure provisions** means provisions that require a listed issuer that is a party to a listing agreement with a licensed market operator to notify information about events or matters as they arise for the purpose of that information being made available to participants in the licensed market.

**272 No contravention of continuous disclosure provisions by person who takes reasonable steps to ensure listed issuer complies**

A person **(A)** does not, in relation to the contravention by a listed issuer of a continuous disclosure obligation or a term or condition of a continuous disclosure exemption, contravene, or become involved in the contravention of, that obligation or term or condition if—

(a) A took all steps (if any) that were reasonable in the circumstances to ensure that the listed issuer complied with the obligation or term or condition; and

(b) after doing so, A believed on reasonable grounds that the listed issuer was complying with the obligation or term or condition.

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

**231 Meaning of material information**

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

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

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

[46] At all relevant times, CBLC was listed on NZX (the licensed market operator), was party to a listing agreement with NZX, and the Listing Rules applied. As Venning J said in *Financial Markets Authority v Jackson*, while the Listing Rules create a contractual obligation on an issuer, s 270 of the FMCA confirms the obligation to comply with the continuous disclosure provisions is also a statutory obligation.[30] The continuous disclosure obligations are intended to provide the market with material information relating to the issuer to preserve the integrity of the market.[31]

[30] *Financial Markets Authority v Jackson* [2018] NZHC 2052, (2018) 12 NZCLC 98-066 at [15].
[31] At [34].

[47] At all relevant times, r 10.1.1(a) of the Listing Rules stated that:

> 10.1.1 Without limiting any other Rule, every Issuer shall:
>
> (a) once it becomes aware of any Material Information concerning it, immediately release that Material Information to NZX, provided that this Rule shall not apply when:
>
> (i) a reasonable person would not expect the information to be disclosed; and
>
> (ii) the information is confidential and its confidentiality is maintained; and
>
> (iii) one or more of the following applies:
>
> (A) the release of information would be a breach of law; or
>
> (B) the information concerns an incomplete proposal or negotiation; or
>
> (C) the information comprises matters of supposition or is insufficiently definite to warrant disclosure; or
>
> (D) the information is generated for the internal management purposes of the Issuer; or
>
> (E) the information is a trade secret.
>
> In this Rule 10.1.1, an Issuer is aware of information if a Director or an executive officer of the Issuer … has come into possession of the information in the course of the performance of his or her duties as a Director or executive officer.

[48] The proviso in r 10.1.1(a) gives rise to exceptions to the obligation to immediately release, known as "safe harbour" provisions.[32] I note the obligation to release information applies unless the requirements of paragraphs (i), (ii) *and* (iii) are met even though paragraph (iii) requires only one of (A)-(E) to apply. Thus, confidentiality (paragraph (ii)) is a prerequisite, but is insufficient alone to exempt release. Paragraph (i) and one of the limbs of paragraph (iii) must also apply.

[49] "Material information" was defined in the Listing Rules in essentially the same way as in the FMCA.[33] It is an objective test. It is also an expectation-based test, considered without the benefit of hindsight.

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32 See *Guidance Note – Continuous Disclosure* (NZX, April 2017), s 7 (Guidance Note).

33 Rule 1.6.1.

[50] Footnotes to the Listing Rules are intended as a guide for users and an aid in interpretation and, only to that extent, form part of the Listing Rules.[34] The following footnotes to r 10.1.1 are relevant:

(a) Footnote 1 provided a list of information that was likely to be material information under this rule, including:

> - a change in the Issuer's financial forecast or expectation.
> - any proposed change in the general nature of the business of an Issuer or its group.

(b) Footnote 3 provided:

> For the purpose of Rule 10.1.1(a)(i), a "reasonable person" would not expect the information to be disclosed if the release of the information would:
>
> (a) unreasonably prejudice the Issuer; or
>
> (b) provide no benefit to a person who commonly invests in securities.

(c) Footnote 10 provided that an issuer "should also be guided by the principle that if in doubt it should disclose the information."

[51] There is also an NZX Guidance Note on Continuous Disclosure (Guidance Note). The relevant version of this Guidance Note was dated April 2017. Its header stated that its purpose was to "provide guidance to NZX Issuers which are subject to continuous disclosure obligations". Section 3 of the Guidance Note addressed material information, referring to the definition/test in s 3.1. Section 3.1 included that:

> When considering whether information is material, issuers should be guided by the principle that if in doubt, they should disclose the information (see footnote 10 to rule 10.1). As noted above, the obligation to disclose material information immediately is a fundamental obligation and NZX may take disciplinary action against issuers for non-compliance. Therefore, NZXR [NZX Regulation] encourages issuers to take a cautious approach when determining whether information is "material information".

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[34] Rule 1.6.5.

[52] The Guidance Note also included the following in s 3.2:

> "Reasonable person" is not defined in the rules, but in NZXR's view, a "reasonable person" is a person who commonly invests in securities, and holds such securities for a period of time, based on their view of the inherent value of the securities.

[53] Section 3.3 of the Guidance Note addressed material effect. Explicitly without altering the nature of the expectation-based test, the Guidance Note included:

> In monitoring issuers' compliance with continuous disclosure, NZXR will consider price movements in securities when determining whether information has had a material effect on the price of an issuer's quoted securities:
>
> - A price movement of 10% or more in a quoted security will generally be treated by NZXR as evidence that information has had a material effect on the price of those quoted securities.
>
> - A price movement of 5% or less in a quoted security will generally be treated by NZXR as evidence that information has not had a material effect on the price of those quoted securities.
>
> Whether price movements between 5% and 10% are evidence of a material effect will depend on the specific facts and circumstances. A price movement of 5% may not be considered a "material effect" in respect of an illiquid security, but for issuers with large market capitalisations and highly liquid securities, price movements of this magnitude may be considered evidence of a "material effect".

[54] Section 3.6 addressed incomplete information and upcoming events:

> **3.6 Dealing with incomplete information and upcoming events**
>
> In some situations an issuer may receive information about an event over time. The issuer may not be able to make a determination regarding the materiality of the information based on the initial or piecemeal information alone. In such cases, no immediate disclosure obligation will be triggered. However, if an issuer requires further information in order to determine whether or not initial information is material information, the additional information must be sought as soon as possible. An issuer will have a disclosure obligation upon further information being received by the issuer allowing a determination that the information is material to be made.
>
> If an issuer is able to determine that it holds material information based upon initial or incomplete information alone, that information must be immediately disclosed to the market, regardless of the fact that there may be additional information to follow. The issuer cannot simply wait until they have received all information concerning a material event before a disclosure obligation will arise.

> There may also be situations where an issuer becomes aware that a material event is going to occur but the event has not yet actually occurred. An issuer will be required to immediately disclose the event upon becoming aware that the event will occur instead of waiting until the event has occurred. For example, if an issuer becomes aware that it will breach a financial covenant, and the fact of such prospective breach is information that a reasonable person would expect to have a material effect on the price of that issuer's quoted securities (i.e. the fact of the prospective breach is material information) the issuer must disclose this information immediately, regardless of the fact that the breach has not actually yet occurred. The types of factors that issuers may need to consider in determining whether a particular breach or pending breach is material include:
>
> - The nature of the covenant;
> - The particular loan or facility involved;
> - The impact of the breach or pending breach;
> - Discussions with the lender; and
> - The issuer's current financial position.
>
> Lastly, some information will only become material once it is signed off by the issuer's board. For example, if the chief financial officer of an issuer puts forward a proposal to write down the carrying value of an asset, that proposal may only be considered complete if and when it is approved by the issuer's board. No disclosure obligation would arise until board sign-off has occurred.

[55] As NZXR said in its investigation report into Fletcher Building Ltd:[35]

> The Guidance Note states that a material risk that actual results will materially differ from an announced projection, forecast or expectation is likely to be Material Information. That material risk of a deviation will usually arise before the actual change in the forecast is confirmed. It is the material risk of a future material deviation that is the Material Information, in these circumstances.

[56] Sections 4 and 5 of the Guidance Note dealt with timing in relation to becoming aware of information and disclosure respectively. Section 4 stated:

> **4. When does an issuer become aware of information?**
>
> **4.1 When directors and executive officers become aware of information**
>
> Rule 10.1.1 states that an issuer becomes "aware of information" if a director or an executive officer of the issuer (and in the case of a managed fund, a director or executive officer of the manager) has come into possession of the information in the course of the performance of his or her duties as a director

35 *Investigation Report, Fletcher Building Limited - Continuous Disclosure* (NZX Regulation, January 2018) at 7.

> or executive officer. A rule of thumb has been to define "executive officer" as a person who reports directly to a board of directors or a person who reports directly to a person who reports directly to a board of directors.
>
> A director or executive officer of an issuer who becomes aware of information, must consider, immediately, whether that information is "material information" (by considering the material information test discussed in sub-section 3.1 above) and must therefore be disclosed. Issuers must implement appropriate systems and procedures to ensure that material information is promptly identified and decisions as to whether disclosure is required are made (refer to 'Compliance procedures' in section 6 below for further information).

[57] I accept in this respect that the Guidance Note does not itself impose a legal duty on executives of an issuer to consider whether information of which they are aware is material. Whether executives have such a duty under their employment arrangements and the issuer's compliance procedures is a separate question.

[58] Section 5 dealt with the requirement to disclose "immediately":

> **5.1 What does "immediately" mean?**
>
> Once an issuer becomes aware of material information, it must be immediately released to the market. In NZXR's view, "immediately" means "promptly and without delay".
>
> There will inevitably be a period of time between a director or executive officer of an issuer becoming aware of material information and the release of that information to the market. This does not mean, by default, that an issuer has failed to release information immediately. How promptly an issuer is able to release an announcement will depend on the particular circumstances and the particular nature of the material information. NZXR will consider these factors when determining whether an issuer has complied with the requirement to release material information immediately (or 'promptly and without delay'). For example, it may depend on:
>
> - The nature, amount and complexity of the information concerned;
> - Where the information originated from and whether the information needs to be checked or verified; and
> - How long it takes the issuer to draft the necessary announcement, including to ensure the announcement is complete, accurate and not misleading.
>
> Issuers need to have appropriate systems and procedures in place to meet their continuous disclosure obligations. This point is discussed further below under the 'Compliance Procedures' section of this guidance note. Note also the interaction with the use of trading halts in this area, as discussed in section 5.3.

**Board oversight**

> Issuers must disclose material information as soon as they become aware of it, regardless of when the next board meeting is scheduled. For example, where an issuer becomes aware that it has breached a material financial covenant, the issuer must disclose this information as soon as it becomes aware of it, and may not wait until the next scheduled board meeting to address the issue.
>
> Where a decision or recommendation is incomplete until it is signed off or approved by an issuer's board, the issuer should prepare an announcement in advance, so that it can be released immediately after board sign-off. NZXR considers that an issuer will generally meet the requirement to release information immediately (or 'promptly and without delay') by releasing it immediately after the conclusion of the relevant board meeting.
>
> Board oversight of continuous disclosure is important, but issuers need to balance the requirement to disclose material information "immediately" with the practical issues relating to the operation of a board. That means that arrangements need to be in place to ensure timely disclosure, and it may not be possible for the board as a whole to be involved in decision making in relation to disclosure where the issuer has unexpectedly become aware of material information. Please refer to the section 6 below titled, 'Compliance Procedures' for further commentary in relation to board oversight of continuous disclosure.

[59] Section 6 of the Guidance Note addressed compliance procedures and provided that they should deal with the following matters:

> - Enabling identification of price sensitive information in different areas of the business;
> - Considering information generated by the issuer as a matter of routine, such as monthly trading metrics, to determine whether a market update is required;
> - Responding to sudden or unexpected events in a timely manner;
> - Enabling issues and incidents to be appropriately escalated so that disclosure obligations are considered by responsible individuals;
> - Identifying individuals who have authority to agree and sign off urgent market announcements;
> - Identifying individuals who have responsibility for discussing disclosure issues with NZX i.e. individuals with sufficient knowledge of the business and sufficient authority to agree the release of an announcement or to request a trading halt where necessary;
> - Preparation of draft announcements in advance of board meetings or other planned events, such as entering into agreements;

- Enabling appropriate board oversight of issuers' compliance with continuous disclosure[; and]
- Where possible, releasing material information prior to market open.[36]

[60] In relation to trading halts, the Guidance Note stated that an issuer may need to request a trading halt to meet its continuous disclosure obligations in certain circumstances, but also that trading halts should not be requested as a tactic to delay release of information.[37] A trading halt can usually only be imposed for up to two business days,[38] which indicates that this period is at the outside margin of immediate disclosure.

[61] Therefore, to prove each of the relevant continuous disclosure contraventions of s 270 by CBLC, the FMA must prove that:

(a) CBLC was aware of the alleged information;

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

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

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

(e) CBLC did not immediately release the information to NZX.

[62] I deal separately with the onus of proof in relation to the safe harbour exceptions below.

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36 However, NZXR notes that an issuer's ability to release prior to market open will partly depend on where the material information originates from (i.e. whether information originates from the issuer itself or in response to information from a third party) and does not negate the requirement to disclose all material information immediately.

37 Section 5.3.

38 *Guidance Note – Trading Halts and Suspensions* (NZX, May 2017), s 2.3.

### *Involvement in contraventions – accessory liability*

[63] Section 533 of the FMCA deals with involvement in contraventions; that is, accessory liability. It provides:

> **533 Involvement in contraventions**
>
> (1) In this Act, a person is **involved in a contravention** if the person—
>
> (a) has aided, abetted, counselled, or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.
>
> (2) Subsection (1) does not apply to proceedings for offences (but *see* Part 4 of the Crimes Act 1961, which relates to parties to the commission of offences).

[64] Here, the FMA relies on s 533(1)(c), that Mr Mulholland "has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention".

[65] It can immediately be seen that, unlike listed issuer liability for the primary contravention, accessory liability has a knowledge component explicit in s 533(1)(c). Counsel were not aware of any case that has specifically addressed the meaning of this phrase. Nor were counsel aware of any case that has determined the approach for accessory liability under the fair dealing or continuous disclosure provisions of the FMCA.[39]

[66] In a recent s 265 market manipulation case, *Financial Markets Authority v Zhong*, Robinson J said:[40]

> Section 533 is in essentially the same terms as s 83 of the Commerce Act 1986 and s 43 of the Fair Trading Act 1986. Authorities in relation to these statutory

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[39] The approach was not in issue in the earlier judgments in this proceeding although I touched on it in the judgment concerning Mr Harris delivered after the end of this hearing: *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 2322 at [108]-[110]. I also touched on it in the strike out judgment in the IPO proceeding: *Financial Markets Authority v CBL Corporation Ltd (in liq)* [2024] NZHC 3597 at [28].

[40] *Financial Markets Authority v Zhong* [2023] NZHC 766, [2023] NZCCLR 28 at [42].

> provisions confirm that they are to be applied in the same way as those governing accessory liability in the criminal law. [An] accessory will only be liable if he or she intentionally participates in a contravention.[41]

[67] Neither counsel suggested that accessory liability requires deliberate breach of the FMCA. It was largely common ground that being "knowingly concerned in" a contravention requires what has been described as the "orthodox" approach to accessory liability,[42] by analogy with the approach applying in criminal law; that is:

(a) actual knowledge (including wilful blindness) of the essential facts giving rise to the contravention; and

(b) intentional participation in the contravention.

[68] I say "largely common ground" as to these requirements because Mr Dixon accepted in this Court that the FMA must establish actual knowledge in light of Court of Appeal authority,[43] but stated that it may seek to argue otherwise in a higher court.

[69] It is evident from the authorities that there is some overlap between these limbs of actual knowledge and intentional participation. Arnold J said in *New Zealand Bus Ltd v Commerce Commission* (*NZ Bus*)[44] that an accessory will be liable only if he or she intentionally participates in the contravention, which he said means simply that the person must have knowledge of the essential matters which go to make up the contravention. Mr Jones emphasised that, for example, a person who participates by assisting another to take property unlawfully while believing the other person has rights to the property would not intentionally participate. However, it may equally be said that such a person lacks knowledge of an essential fact giving rise to the

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41 See *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433 [*NZ Bus*] at [260]; and *Specialised Livestock Imports Ltd v Borrie* CA72/01, 20 September 2002 [*Specialised Livestock*] at [155]-[157].

42 *NZ Bus*, above n 41, at [137]-[140] per Hammond J and [260] per Arnold J.

43 *Specialised Livestock*, above n 41, at [155]-[156]; and *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [66] per William Young P and Arnold J, in relation to the Fair Trading Act 1986; and *NZ Bus*, above n 41, in relation to business acquisitions under the Commerce Act 1986, where the Court considered possible alternatives to a knowledge-based approach (at [141]-[160] per Hammond J and [266]-[267] per Arnold J. Wilson J agreed with Hammond J as to both reasoning and result and was in general agreement with Arnold J's observations (at [269]). In this Court, Miller J had concluded that actual knowledge was required: *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [231]-[235].

44 *NZ Bus*, above n 41, at [260], citing *Yorke v Lucas* (1985) 158 CLR 661 (HCA).

contravention, namely that the other person has no right to the property. Even so, I accept that, aside from knowledge of the essential matters making up the contravention, participation must be intentional.

[70] Despite the common ground, Mr Jones submitted that the FMA's reliance on Mr Mulholland's duties amounted to "dumbing down" the test to one of negligence. As he submitted, the FMCA does not include the equivalent of the civil penalty provision in s 180(1) of the Australian Corporations Act, which provides that officers as well as directors of a corporation must exercise their powers and discharge their duties with reasonable care and diligence. However, Mr Dixon clearly acknowledged that the FMA has to establish actual knowledge of the essential facts giving rise to the contravention and intentional participation. I accept that the FMA's references to Mr Mulholland's duties (under CBLC's policies or otherwise) were consistent with this acknowledgment; that is, seeking inferences as to his knowledge and intentional participation in a case involving omissions. I also accept Mr Jones' submission that failing to comply with a duty is only one of the relevant factors to consider when assessing whether conduct was intentional.

[71] In any event, despite the measure of agreement, there remained some dispute as to the precise test or its application:

(a) In relation to actual knowledge of the essential facts giving rise to the contravention:

(i) Mr Dixon accepted in this Court that for fair dealing cases, there must be knowledge that the representation is misleading or deceptive or likely to mislead or deceive, is false or misleading, or is unsubstantiated (as applicable under each section);[45]

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45 *Specialised Livestock*, above n 41; *Body Corporate 202254 v Taylor*, above n 43, at [66]; and *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 (HC), relating to equivalent provisions in the Fair Trading Act 1986. Given these authorities, the FMA did not seek to argue otherwise in this Court but may seek to do so in a higher court. See also *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88, (2023) 111 NSWLR 304 [*Anchorage Capital*] at [329]-[342]; and the discussion of *Anchorage Capital* in the High Court of Australia's judgment in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2024] HCA 27, (2024) 419 ALR 30 which was the subject of further submissions after the hearing (see below at [83]-[84]).

(ii) however, Mr Dixon submitted that for continuous disclosure cases, knowledge of the facts on which the Court concludes that information is material will suffice,[46] whereas Mr Jones submitted the accessory must know the information is material;

(iii) there is a further dispute about knowledge of the (in)applicability of the safe harbours.[47]

(b) In relation to participation:

(i) Mr Dixon submitted that Mr Mulholland must have intentionally engaged in conduct that "implicates" him in the contravention, or which has a "practical connection" to the contravention,[48] or which is otherwise "sufficiently related" to the contravention;[49]

(ii) whereas Mr Jones submitted that Mr Mulholland must have intentionally acted, or omitted to act, in a way that helped or contributed to CBLC's contravention (that is, there must be a causal link).

[72] I deal with these three disputed issues in turn.

*Knowledge of materiality*

[73] The first issue is whether, in relation to continuous disclosure, it is necessary for the FMA to establish that Mr Mulholland knew the information was material. As indicated, counsel were not aware of any New Zealand case on point.

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46 Nevertheless, given the uncertainty of the law on this point, the FMA ran its case on the basis that it would satisfy the Court that Mr Mulholland knew that the information was material.

47 Again, given the uncertainty on this point, the FMA ran its case on the basis that it would satisfy the Court that Mr Mulholland knew that none of the pleaded safe harbours applied.

48 Citing *Australian Securities and Investments Commission v GetSwift Ltd* [2021] FCA 1384 at [1793] and [1795], which cited (inter alia) the Full Federal Court in *EYZ Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134, (2018) 360 ALR 261 at [11].

49 Citing *Australian Competition and Consumer Commission v SensaSlim Australia Pty Ltd (in liq) (No 5)* [2014] FCA 340, (2014) 98 ACSR 347 at [543], albeit that paragraph states "there must be, at least, some practical involvement by the person in the acts or omissions constituting the contravention".

[74] A similar issue arose in *NZ Bus* in the context of accessory liability for a breach of s 47 of the Commerce Act 1986 concerning a business acquisition which the Commerce Commission alleged would substantially lessen competition. In the Court of Appeal, Hammond J said that although the relevant accessory liability section in that case provided an overall framework, it did not necessarily provide a "one-size-fits-all" solution.[50] As Arnold J said, a finding that s 47 has been contravened requires an evaluative assessment on the part of the Court, taking into account a wide range of facts and circumstances.[51] This creates difficulties even on the orthodox approach as any finding that a contravention of s 47 has occurred would be based on a wide range of "essential facts", and it would be necessary to show that the alleged accessory knew all these "essential facts" that led the Court to conclude that the acquisition breached s 47.[52] Moreover, he said that an approach to accessory liability which does not recognise the difficulty of predicting with assurance whether a particular merger or acquisition will be held to contravene s 47 may result in the scope of accessory liability being widened to the point that it has a "chilling" effect.[53] In the event, the Court determined that whatever test was adopted, there was no accessory liability.

[75] In Australia, the issue has arisen in the Federal Court in several first-instance cases. In *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (in liq)* (*Sino*),[54] Davies J had to determine whether Mr Shao was liable under s 674(2A) of the Corporations Act, which applies to a person who is "involved in a listed disclosing entity's contravention". After setting out the definition of "involved in a contravention" that appears in s 79 of the Corporations Act (which is in equivalent terms to s 533 of the FMCA), Davies J said:[55]

> Thus, to find that Mr Shao was "involved" in the company's contravention of s 674(2), the Court needs to be satisfied that Mr Shao: (i) knew that the company's profit had deteriorated in the second half of the 2013 calendar year; and (ii) knew that this was information which was not generally available and was information which a reasonable person would have expected, if it were

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50 *NZ Bus*, above n 41, at [146], referring to s 83 of the Commerce Act for business acquisitions.
51 At [261]-[263].
52 At [263].
53 At [265]. As Mr Dixon noted, such a concern does not arise in the context of the Financial Markets Conduct Act – at least in the context of continuous disclosure – where the counterfactual is not fewer individuals becoming directors; but instead, more disclosure to the market.
54 *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (in liq)* [2016] FCA 934, (2016) 115 ACSR 437.
55 At [54]. No doubt given the admissions in that case, this was the only discussion of the test.

generally available, to have had a material effect on the company's share price. Mr Shao in his defence admitted the second element and made partial admissions about the matters of which he had knowledge.

[76] In *Australian Securities and Investments Commission v Vocation Ltd (in liq)* (*Vocation*),[56] the Australian Securities and Investments Commission (ASIC) submitted to Nicholas J that in *Sino* Davies J was in error. After referring to the legislative history, and authorities including *Yorke v Lucas*,[57] Nicholas J did not accept ASIC's submission that knowledge of the underlying facts was sufficient to found liability under s 674(2A).[58]

[77] In *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* (*Big Star*),[59] ASIC submitted that in *Vocation* Nicholas J was wrong. Banks-Smith J reviewed the authorities since *Yorke v Lucas*,[60] noted the applicable "plainly wrong" approach to departing from precedents in the Federal Court, and concluded that Davies J and Nicholas J were not plainly wrong.[61]

[78] In *Australian Securities and Investments Commission v GetSwift Ltd* (*GetSwift*),[62] ASIC argued that it was sufficient to prove that the accessory ought to have known that a reasonable person would expect that the information, if it had been generally available, would have had a material effect on the price or value of the relevant securities. Lee J did not accept that submission,[63] agreeing with Banks-Smith J in *Big Star*.

[79] Mr Dixon also relied on the recent decision of the Full Court of the Federal Court of Australia in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission*, which concerned accessory liability for unconscionable conduct.[64] It was not a breach of continuous disclosure

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56 *Australian Securities and Investments Commission v Vocation Ltd (in liq)* [2019] FCA 807, (2019) 371 ALR 155.
57 *Yorke v Lucas,* above n 44.
58 At [619].
59 *Australian Securities and Investments Commission v Big Star Energy Ltd (No 3)* [2020] FCA 1442, (2020) 389 ALR 17.
60 *Yorke v Lucas*, above n 44.
61 At [485].
62 *GetSwift*, above n 48.
63 At [1805]-[1806].
64 *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2023] FCAFC 54, (2023) 297 FCR 180.

case. In that case, accessory liability was also based on the phrase "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention". In the appeals, one ground related to the requisite knowledge for accessory liability. The majority judgment of Wigney and O'Bryan JJ rejected the appellants' submission that the primary judge erred in law in concluding that knowledge of all the circumstances by which the conduct is ultimately found to have been unconscionable is sufficient to establish knowing involvement in unconscionable conduct. Further, their judgment rejected the appellants' submission that it is also necessary to know of the "unconscionable character" of the conduct arising from those circumstances or that the relevant conduct was in breach of the "applicable normative standard" (although it was not necessary for the alleged accessory to understand that the conduct contravened the prohibition on unconscionable conduct in the statute). Referring to the submissions, the joint judgment said:[65]

> They find no support in the authorities concerning misleading and deceptive conduct, nor in any authorities concerning unconscionable conduct, and are wrong in principle. A requirement that an accessory must know that the impugned conduct breaches the standards or norms of behaviour required by the law of unconscionable conduct is in all practical senses equivalent to a requirement that an accessory must know that the impugned conduct breaches the law. Such a requirement has always been eschewed by the courts.

[80] The joint judgment continued with a comprehensive (and most helpful) review of the Australian authorities, beginning with *Yorke v Lucas*,[66] and concluded that:[67]

> All of the above authorities are consistent with the principle that accessorial liability is dependent upon knowledge of facts, not knowledge of legal obligations or the content of legal standards. Otherwise, persons who are ignorant of the law, or ignorant of the standards or norms of behaviour required by the law, would avoid liability for their participation in wrongful conduct. Consistently with the observation of Heerey J in *Coggin*, it would be perverse if the morally obtuse avoided liability for their involvement in unconscionable conduct by reason that they subjectively lacked a sufficient commercial conscience.

[81] The other Judge, Downes J, did not address this aspect of the appeals.

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65 At [299].

66 *Yorke v Lucas*, above n 44. Even the review of the misleading and deceptive conduct cases, including *Yorke v Lucas*, differentiates between requiring knowledge of the circumstances that render the representation false and knowledge that the conduct breaches the statutory standard.

67 *Productivity Partners*, above n 64, at [313].

[82] By reference to *Productivity Partners* and *NZ Bus*, Mr Dixon submitted that the FMA must establish that Mr Mulholland knew the facts on which this Court concludes that the information was material information, but not that he knew it to be material information. Mr Dixon submitted that whether or not information is material is inherently an evaluative conclusion or a matter of judgment, rather than a simple fact. He also submitted this approach is appropriate given the purposes of the FMCA and the continuous disclosure regime, which he submitted are more readily achieved by holding directors and senior officers to account when this test is met, and to give the affirmative defences under s 503 some meaningful work to do.

[83] After the hearing, counsel made further submissions following the High Court of Australia's judgment in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission*,[68] and a further recent decision of the Federal Court of Australia, *Australian Securities and Investments Commission v Noumi Ltd (No 4)* (*Noumi*).[69]

[84] In *Productivity Partners*, the High Court of Australia dismissed the accessories' appeals. The separate judgments refined the requirements as to the accessories' knowledge of the principal's unconscionable conduct. The joint judgment of Gageler CJ and Jagot J said that it was not necessary for the accessory to know that the impugned conduct was unconscionable for him to be found to have been knowingly concerned in the contravention. The question whether conduct is unconscionable or not is one of characterisation, not fact. To be knowingly concerned in the contravention it was necessary only that it be proved that the accessory knew the essential matters which together made up the conduct ultimately characterised by the primary judge and the Full Court as unconscionable, not that he knew that the conduct could, let alone would, be so characterised.[70] Gageler CJ and Jagot J said:[71]

> This is why the Court of Appeal of the Supreme Court of New South Wales was right in *Anchorage Capital* to conclude that the alleged accessories had to know that the representation was false and the circumstances in which the representation was made. But in saying that "[w]here the contravention is the

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[68] *Productivity Partners*, above n 64.
[69] *Australian Securities and Investments Commission v Noumi Ltd (No 4)* [2024] FCA 1192.
[70] At [12], and [82]-[83]. See also Gordon J at [148]-[150] and [153]-[154], and Beech-Jones J at [339], [341] and [360].
[71] At [83].

> prohibition on engaging in misleading or deceptive conduct, one can be 'knowingly concerned' in it only if one knows that the conduct is misleading or deceptive",[72] their Honours are not to be misunderstood as saying that the person had to know that the conduct (the false representation) was capable of being, or would be characterised as, misleading or deceptive or as conduct proscribed by s 18 of the ACL. In context, it is apparent that their Honours meant only that the person had to know the representation was false (mere knowledge of facts from which a person might have deduced or inferred falsity being insufficient) and the circumstances in which the representation was made. Knowledge of the potential or actual character, quality, nature, or status of the conduct as misleading or deceptive for the purposes of the statutory prohibitions against such conduct was not required.

[85] In *Noumi*, in the context of accessory liability for continuous disclosure contraventions, Jackman J in the Federal Court recently summarised the position as follows:[73]

> In order for a person to be knowingly concerned in a contravention, that person must have been an intentional participant, with actual knowledge of the essential elements constituting the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670 (***Yorke***); *Productivity Partners Pty Ltd v ACCC* [2024] HCA 27; (2024) 98 ALJR 1021 (***Productivity Partners***) at [12] and [82] per Gageler CJ and Jagot J; Gordon J at [154] (Steward J agreeing at [308]); Edelman J at [263]; Beech-Jones J at [339], [351]–[352], [364]–[365] (Gleeson J agreeing at [211]). However, it is not necessary to prove that the accessory knew that the company was in breach of its continuous disclosure obligation: *Productivity Partners* at [83] per Gageler CJ and Jagot J.

[86] I accept that the assessment of materiality in the continuous disclosure context is quintessentially a matter of judgement.[74] As indicated, the test for materiality in the continuous disclosure context is an objective, expectation-based test. It requires an evaluative assessment but is distinguishable from the characterisation of unconscionable conduct referred to in *Productivity Partners*. Although objective, it is essentially a factual assessment. Consistent with the Australian approach in the continuous disclosure cases referred to at [75]-[78] above and more recently in *Noumi*,[75] I consider the relevant "essential fact" that must be known by the accessory in this continuous disclosure context is that a reasonable person would expect the

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72 *Anchorage Capital*, above n 45, at [330].

73 *Noumi*, above n 69, at [16].

74 Shelley Griffiths "Two market share two structures: Fair dealing and enforcement" in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 1111 at 1123.

75 *Noumi*, above n 69, at [67](e) and [72](e).

information, if it were generally available to the market, to have a material effect on the price of CBLC shares.

[87] I do not consider that advancing the purposes of the FMCA and the continuous disclosure regime requires dispensing with knowledge of this essential fact. Nor do I consider that the Court should be driven to such a conclusion based on the affirmative defence in s 503. As the FMA acknowledged, officials warned against the existence of a defence being used to suggest that being involved in a contravention has a wider meaning than under other Acts.[76] The existence of a general affirmative defence of reasonable reliance or taking all reasonable steps that applies to contraventions of all civil liability provisions does not make it necessary or appropriate to dispense with knowledge in relation to the materiality component of continuous disclosure.

*Knowledge of safe harbours*

[88] The second issue is whether the FMA must prove that the accessory knew the safe harbours were inapplicable. Mr Dixon submitted that the safe harbours are defences that must be established by the issuer, rather than an element of the primary contravention that needs to be disproved by the FMA, and therefore it need not prove that Mr Mulholland knew that none of the safe harbours applied. On the other hand, Mr Jones submitted that if Mr Mulholland establishes an evidential basis for the applicability of a safe harbour, then it is for the FMA to disprove that.

[89] Again, there is no New Zealand case on this point. However, decisions of the New Zealand Markets Disciplinary Tribunal support the FMA's position that safe harbours must be established by the issuer. For example, in *NZX Ltd v Enprise Group Ltd*, the Tribunal said:[77]

> To rely on an exception, an Issuer must be able to demonstrate that all three limbs apply – (1) the information must be confidential, <u>and</u> (2) of the type that a reasonable person would not expect to be disclosed, <u>and</u> (3) one of the factors in [r 10.1.1(a)(iii)] must apply.

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[76] *Financial Markets Conduct Bill: Officials' Report to Commerce Committee* (Ministry of Business, Innovation & Employment, MBIE-MAKO-1005173, July 2012) at [44].

[77] *NZX Ltd v Enprise Group Ltd* NZMDT 6/2023, 8 December 2023 at [56].

[90] Of course, the Tribunal was addressing a statement of case against the issuer under the Listing Rules, not a claim under s 270 of the FMCA.

[91] In Australia, the Full Federal Court in *Masters v Lombe* also said that the issuer bears the onus to establish the safe harbour exceptions, albeit this was in the context of appeals against a liquidator's denial of proofs of debt raising continuous disclosure claims against the issuer, and without elaboration. [78]

[92] In relation to an accessory, the point was addressed in *Big Star*.[79] The nature of the accessory's reliance on the similar safe harbour exceptions in Listing Rule 3.1A of the ASX Listing Rules was unclear. Banks-Smith J said:

> [25] Plainly ASIC bears the burden of proving its case. However, to the extent Mr Cruickshank raised what ASIC described as "affirmative defences", ASIC does not bear that onus.
>
> [26] As explained by Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2014] FCA 1157 at [488] (not disturbed on appeal), in some cases a defence will operate by denying factual matters which are necessary ingredients in the applicant's case. In those cases, the onus will lie upon that party to prove that matter and not on the defendant to disprove it. But where a defence consists of a matter of exculpation or excuse, then the onus will lie on the party asserting the exculpation or excuse to prove the facts said to justify it. This is consistent with the general principle enunciated by Walsh JA in *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125:
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>> [T]he burden of proof [in the sense of establishing a case] lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g., if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an 'avoidance' of the claim which, prima facie, the plaintiff has.
>
> [27] In this case, Mr Cruickshank has advanced affirmative claims including that Antares was contractually bound by a confidentiality term or requirement and that Wade Energy 'would walk away' if its name were disclosed, that Mr Cruickshank took all reasonable steps to ensure Antares complied with its obligations and that he exercised his business judgement in good faith. These matters are advanced by Mr Cruickshank's Concise Response filed in the proceedings …

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[78] *Masters v Lombe* [2021] FCAFC 161, (2021) 392 ALR 326 at [142] and [146].

[79] *Big Star*, above n 59.

…

> [306] I have referred above to matters raised by Mr Cruickshank as positive assertions in his Concise Response. It is by no means clear that Mr Cruickshank seeks to rely on the exceptions in Listing Rule 3.1A: in his submissions the assertion is made that ASIC must disprove the application of each of the exceptions. I do not accept that ASIC has that obligation. It is not for ASIC to embark on a wide-ranging assessment of whether and how any of those exceptions might apply. The purpose of pleadings and the concise statement process is to delineate and expose (subject to questions of privilege) the respective cases of the parties. That course was undertaken here. The fact that these [proceedings] are civil penalty proceedings does not direct any different approach. There are examples where the exceptions in Listing Rule 3.1A have been described as defences and have operated as such where a positive case is pleaded: see, for example, *TPT Patrol v Myer Holdings* at [7], [1126], [1293].
>
> [307] Regardless, I will deal with the contention that Antares was obliged to maintain confidentiality …

[93] Later in the judgment, when addressing what it was necessary to establish the accessory knew, Banks-Smith J applied the formulation from *Sino* referred to above at [75], adapted in this way:

> [489] Accordingly, applying what was said in *Sino*, the Court must be satisfied that at a time contemporaneous with the contravention, Mr Cruickshank:
>
> (a) knew of the relevant information;
>
> (b) knew that the information was not generally available; and
>
> (c) knew that the information was information which a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price.
>
> [490] The statutory terms require that other matters also be taken into account. For example, as to the first limb, it is not enough having regard to the elements of the contravention and the wording of s 674(2)(b) that there be knowledge of the information. What the provision requires having regard to s 674(1) is that there be information that the Listing Rules required Antares to disclose to the ASX. That brings into consideration the exceptions in Listing Rule 3.1A. Further, s 674 and the meaning of 'material effect' is informed by s 677, so that the question may arise as to whether the information would, or would be likely to, influence persons who commonly invest in shares to acquire or dispose of shares. These textual matters are relevant.
>
> [491] Many of the authorities consider whether a person has been knowingly concerned in a contravention concerning statutory provisions where the testing of whether that person has the requisite knowledge is not necessarily a complicated task. For example, for misrepresentation cases, the question is generally whether or not the person knew the identified representation to be false or incorrect: examples include *Yorke v Lucas*.

> [492] The statutory text of s 674 governing the contravention in this case is more nuanced.
>
> [493] It is necessary to establish that Mr Cruickshank knew the particular information; *knew that it was not information that was exempted from disclosure by Listing Rule 3.1A*; that it was not generally available and that it was information that, in the context of what was being disclosed by way of the PSA Announcements and what was otherwise publicly available to the market, a reasonable person would have expected, if it were generally available, to have had a material effect on the company's share price, or would be likely to influence persons who commonly invest in shares to acquire or dispose of shares.
>
> (emphasis added)

[94] Mr Dixon submitted that this is not the correct approach and appeared to be inconsistent with the Court's earlier analysis. He submitted that this formulation from *Big Star* was not applied in *GetSwift*,[80] where Lee J adopted what Banks-Smith J said at [489] without reference to [493]. However, Listing Rule 3.1A was not in issue in *GetSwift*.

[95] Returning to New Zealand, the starting point is s 270(1) of the FMCA. It relevantly states that:

> (1) A listed issuer must notify information in accordance with the continuous disclosure provisions of the listing rules for the licensed market *if—*
>
> …
>
> (b) *the listed issuer has information that those continuous disclosure provisions require it to notify…*
>
> (emphasis added)

[96] In r 10.1.1(a) of the Listing Rules, the safe harbour provisions were expressed as a proviso to the disclosure obligation ("provided that this Rule shall not apply when …"). The Guidance Note referred to the safe harbour provisions as "exceptions".[81]

[97] I also note that in the statement of claim, in the relevant causes of action alleging the primary contravention by CBLC, the FMA pleaded that the "exceptions

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80 *GetSwift*, above n 48, at [1805]-[1806].

81 The ASX Listing Rules also express the safe harbours as "exceptions".

to disclosure under the NZX Listing Rules did not apply" (or that "[n]one of the relevant exceptions to disclosure under the NZX Listing Rules applied") to the relevant information. This might suggest that excluding the safe harbour exceptions is a necessary ingredient of the FMA's case. The allegation was denied in the statement of defence, which said further that if such information existed, the exceptions to disclosure under the Listing Rules applied with particular refence to relevant exceptions relied on. However, the relevant causes of action against Mr Mulholland in the statement of claim did not include any specific reference to the exceptions. That may simply reflect the fact that the claim in each of the relevant causes of action merely repeated the preceding paragraphs, including the relevant claim of contravention by CBLC, and pleaded that Mr Mulholland was involved in the contravention pleaded in the preceding cause of action (with particulars that he had been directly or indirectly knowingly concerned in, or a party to, the contravention). Nor did the statement of defence specifically raise the exceptions in relation to the causes of action against Mr Mulholland. The statement of defence did raise as affirmative defences the defences available under ss 272 and 503 of the FMCA.

[98] Given the wording of s 270(1) of the FMCA and r 10.1.1(a) of the Listing Rules, and the FMA's approach in the statement of claim, I do not consider the safe harbour exceptions amount to an affirmative defence. Their inapplicability was pleaded in the statement of claim – they were not treated as a defence falling outside the admission and denial of the facts alleged by the plaintiff.[82] They are exceptions to the disclosure obligation itself, not matters of excuse if non-disclosure occurs. Proving that the continuous disclosure provisions of the Listing Rules require the issuer to notify the information is an essential element of the cause of action against the issuer – that is, the contravention. As indicated, that is consistent with the way the FMA pleaded its claim against the issuer. It follows that s 502, which provides that conduct must still be treated as contravening a civil liability provision even if the conduct does not lead to any liability because of the availability of a defence, does not apply.

[99] Even so, I consider the proviso is properly characterised as creating exceptions which it is necessary for the issuer to raise. A bare denial of the FMA's allegation that

[82] *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [21].

the “exceptions to disclosure under the NZX Listing Rules did not apply” would not suffice. It would be a form of “pregnant negative” requiring particulars. As Banks-Smith J said in *Big Star*, it is not for the regulator to embark on a wide-ranging assessment of whether and how any of those exceptions might apply.[83]

[100] Here, as indicated, particulars were provided in the statement of defence. Also, in the FMCA civil enforcement context involving discovery and briefs of evidence (leaving aside regulatory powers), there is much less scope for the regulator to be surprised by a safe harbour exception. If necessary, it may be appropriate for the issuer (or other contradictor) to bear an evidential onus. Mr Jones accepted that the FMA is not required to disprove every safe harbour exception, only exceptions that are raised. Here, evidence was adduced by both parties in relation to particular safe harbour exceptions. Also, given the wording of cl 10.1.1(a) of the Listing Rules (at [47]-[48] above), the FMA need only disprove one of paragraphs (i), (ii) and (iii).

[101] As indicated, it is common ground that for accessory liability, the FMA must establish a primary contravention by CBLC. It is also common ground that the FMA must establish that Mr Mulholland knew of the essential facts giving rise to the contravention. Given my analysis of the role of the safe harbour exceptions in the contravention by the issuer, I consider the essential facts of the contravention include the fact that the information was not information that was exempted from disclosure by the safe harbour exceptions. Therefore, I conclude that the FMA must establish that Mr Mulholland knew that the information was not information that was exempted from disclosure by the safe harbour exceptions in the Listing Rules. This is consistent with the formulation ultimately applied by Banks-Smith J in *Big Star*, the only Australian case that appears to have dealt with the point in the context of accessory liability. I note, however, that here too the requisite knowledge is as to the essential facts relevant to the safe harbour exception, not the legal effect.

[102] I do not consider this gives rise to a difficulty suggested by the FMA – that accessories can avoid liability with purported reliance on a safe harbour that is not supported on the evidence – for the reasons already given about proper pleading and,

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83 At [306].

if necessary, an evidential onus. The purposes of the FMCA and the continuous disclosure regime do not require, once the primary contravention is proved, shifting the onus to the defendant accessory to prove knowledge of and reliance on a safe harbour exception by way of a defence. That would be inconsistent with requiring the FMA to prove that accessories knew of the essential facts giving rise to the contravention.

*Participation / causation*

[103] The third issue concerns the necessary connection between the accessory's acts or omissions and CBLC's contravention. Mr Jones characterised this as a causal link (albeit he subsequently acknowledged that "but for" causation is not required), whereas Mr Dixon submitted that only some of the alternative terms in s 533 (such as "procure") require causation in the sense of cause and effect, and that a lesser connection is otherwise sufficient. This issue is of significance given Mr Mulholland's emphasis that CBLC's decisions were made by the board of directors in possession of all relevant information and that, as a non-director in company management, his acts or omissions did not cause any contravention. He submitted the FMA is effectively inviting the Court to "legislate" in relation to senior management's "obligations" concerning disclosure.

[104] Accepting that intentional participation is required, I consider that the reference in s 533(1)(c) to "concerned in" requires a practical connection between the act or omission and the contravention. The approach to the equivalent provision in Australia was recently confirmed by the Full Federal Court in *Productivity Partners*:[84]

> A person will be liable as an accessory to contraventions of s 21 of the ACL if they are "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention". The word "concerned" has been construed in accordance with its ordinary meaning - having to do with, having a part in, or being implicated or involved in: see *Ashbury v Reid* [1961] WAR 49 at 51 (Virtue, D'arcy and Hale JJ); *R v Tannous* (1987) 10 NSWLR 303 at 307-308 (Lee J, Street CJ and Finlay J agreeing); *R v Nifadopoulos* (1988) 36 A Crim R 137 at 140 (Kirby ACJ with Maxwell and Carruthers JJ agreeing). The statutory phrases "in any way" and "directly or indirectly" are important. They serve to emphasise that accessorial liability is not confined to a person

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84 *Productivity Partners*, above n 64, at [279]. See also *GetSwift*, above n 48, at [1793] and [1795], citing (inter alia) the Full Federal Court in *EYZ Accounting 123 Pty Ltd v Fair Work Ombudsman*, above n 48, at [11].

> who physically or practically undertakes the unlawful conduct, but extends to a person who is in a position of authority and expressly or implicitly approves or assents to the unlawful conduct: see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (*Rural Press*) at [48] (Gummow, Hayne and Heydon JJ, with Gleeson CJ and Callinan J agreeing at [2], Kirby J agreeing at [108]). We respectfully agree with the following explanation given by Le Miere J in *Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* (2006) 154 IR 228 (at [29], in relation to equivalent statutory language in s 48 of the Building & Construction Industry Improvement Act 2005 (Cth)):
>
>> A person is not involved in a contravention unless he assents to or concurs in the conduct which constitutes the contravention. To be involved in a contravention requires that the person have a practical connection with the contravention. However, it is not necessary that the person physically do anything to further the contravention. It is sufficient if the person, by what he said and agreed to do, in fact became associated with and thus involved, in the relevant sense, in the conduct constituting the contravention: see *R v Tannous* (1987) 10 NSWLR 303 at 308.

[105] The High Court of Australia appeals in *Productivity Partners* referred to me after the hearing did not turn on this issue. Insofar as the judges addressed the intentional participation requirement, Gordon J said that an accessory must "intentionally participate" in conduct that "implicate[s] or involve[s]" them in the primary contravention – that is, they must have "assented to" or "become associated with" the conduct that amounts to the primary contravention.[85] Edelman J referred to an "intention to participate in the essence of the conduct comprising the offence or contravention".[86]

[106] The position was also summarised recently by Jackman J in *Noumi*:[87]

> A person is "concerned in" the contravention if there is a practical connection between that person's act or omission and the contravention. It is not, however, necessary to establish that a person with knowledge of the essential elements making up the contravention also knows that those elements do amount to a contravention: *Yorke* at 667; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302 (***Giraffe World***) [185]–[186] (Lindgren J); *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 at [7]–[13] (Moore J), [74]–[75] (Stone J with whom Mansfield J agreed). An accessory does not have to have appreciated that the conduct was unlawful: *Giraffe World* at [186] (Lindgren J).

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85 At [146] (footnotes omitted).
86 At [265]; see also [258].
87 At [17].

[107] Mr Jones ultimately submitted after the hearing that, irrespective of *Productivity Partners*, "intentional help" is required in New Zealand, citing the Court of Appeal in *Specialised Livestock Imports Ltd v Borrie* (*Specialised Livestock*). However, the Court in that case was considering whether the accessories were "aiding, abetting, counselling or procuring" the contravention. I do not consider the reference to "help" adds to the requirements of the phrase "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention" in s 533(1)(c). Mr Dixon also referred to the phrase "sufficiently related", which the Court used in *Specialised Livestock*.[88] However, that reference was in the conclusion that what was done by the accessories "by way of assistance was not … sufficiently related to what their son represented orally and in writing", and not addressing the meaning of the phrase in s 533(1)(c). I proceed on the basis that "concerned in" in s 533 requires a practical connection between the accessory's act or omission and the contravention.

*Summary of requirements for involvement in contravention*

[108] Accordingly, in the case of fair dealing, I must be satisfied that, at the time of the relevant contravention by CBLC, Mr Mulholland:

(a) knew that the representation describing the reserve increase as "one-off" was misleading (or unsubstantiated);[89] and

(b) intentionally participated by acts or omissions that had a practical connection with the contravention.

[109] In the case of continuous disclosure, I must be satisfied that, at the time of the relevant contravention by CBLC, Mr Mulholland:

(a) knew:

(i) of the relevant information;

(ii) that the information was not generally available to the market;

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88 *Specialised Livestock*, above n 41, at [157].
89 At least in the factual sense: see n 45.

(iii) that the information was information which a reasonable person would have expected, if it were generally available to the market, to have had a material effect on CBLC's share price;

(iv) that the information related to CBLC shares in particular rather than to financial products generally or listed issuers generally;

(v) that the information was not information that was exempted from disclosure by the safe harbour exceptions in the Listing Rules that he raised;

(vi) that CBLC did not immediately release the information to NZX; and

(b) intentionally participated by acts or omissions that had a practical connection with the contravention.

*Affirmative defences*

[110] Mr Mulholland has pleaded two affirmative defences, under ss 272 and 503 of the FMCA. Section 272 is set out above at [44]. It was not pursued in closing submissions.

[111] Section 503 provides:

> *Defences for person involved in contravention of civil liability provisions*
>
> **503 General defences for person involved in contravention**
>
> (1) This section applies if—
>
> (a) a person (**A**) contravenes a civil liability provision; and
>
> (b) another person (**B**) is involved in the contravention.
>
> (2) In any proceeding under this subpart against B for involvement in the contravention of a civil liability provision, it is a defence if B proves that—
>
> (a) B's involvement in the contravention was due to reasonable reliance on information supplied by another person; or

(b) B took all reasonable steps to ensure that A complied with the provision.

(3) For the purposes of subsection (2)(a), **another person** does not include a director, an employee, or an agent of B.

(4) To avoid doubt, this section applies to an involvement in the contravention of any civil liability provision, including sections 82, 99, 427, 431P, and 431Y and clause 27 of Schedule 1.

[112] In summary, Mr Mulholland may rely on the statutory defence in s 503 if he proves that his involvement in the relevant contravention by CBLC was due to reasonable reliance on information supplied by another person (not being his director, employee or agent), or he took all reasonable steps to ensure that CBLC complied with the relevant provision of the FMCA.

## The facts and regulatory framework

[113] As indicated, before turning to the specific issues in dispute in each cause of action, I set out in necessary detail the facts that were mostly accepted and that provide the basis for my later analysis and conclusions. I say "mostly accepted" since a feature of the way this case unfolded (as mentioned in the introduction) is that the FMA relied substantially on the documentary record.

[114] This factual section begins with an explanation of CBLI's insurance business, key insurance concepts and the relevant regulatory framework (mixed fact and law). Most of this was not in dispute. I then deal with the CBL Group's structure, policies and personnel, followed by the lengthy factual chronology in issue.

[115] In assessing the facts, I keep in mind that Mr Jones emphasised that the FMA has the burden of proof, and it would be wrong to reverse that onus by criticising the defence for not calling evidence from the directors. I do not draw any adverse inference against Mr Mulholland in relation to the absence of direct evidence from the directors. As the Court of Appeal said in *Perry Corporation v Ithaca (Custodians) Ltd*, there is a principle of the law of evidence authorising (but not mandating) a particular form of reasoning.[90] The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing

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90 *Perry Corporation v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA) at [153].

evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:[91]

(a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);

(b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and

(c) the absence of the witness is unexplained.

[116] I do not draw the FMA's suggested inference that missing evidence from the directors would not have helped Mr Mulholland's case. They were co-defendants until discontinuances following settlement with the FMA. The absence of briefs of evidence from them is explicable.

[117] On the other hand, I do not accept Mr Jones' general submission that an adverse inference should be drawn against the FMA for its failure to call the directors to explain how they relied on Mr Mulholland, how they were at an information deficit, and/or what they would have done differently if Mr Mulholland had urged disclosure.[92] As indicated, an adverse inference may only arise when the evidence of a particular absent witness would explain or elucidate a particular matter that is required to be explained or elucidated – despite the extensive documentary record in this case. Here, the submission was not pursued with such particularity. Also, I have concluded that "but for" causation is not the correct test for accessory participation in this context. In the circumstances of this case, I do not consider it would be appropriate to draw an inference that missing evidence from the directors would not have helped the FMA's case. Relevant evidence from them was not "missing evidence" in the requisite sense. The absence of briefs of evidence from them is also explicable.

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[91] At [153].

[92] Mr Jones also referred to the absence of evidence from Mr Carl Griffiths (CBLC's corporate finance director from late 2016) and Mr Michael Parrott (CBLC's quality assurance manager), although he did not pursue adverse inferences in that respect.

[118] Even so, I keep in mind that, while I must decide the case on the evidence, there would have been much more evidence if the directors had not settled. For example, I accept that care needs to be taken when relying on Board minutes as evidence of what was discussed by the Board. They may not be a complete record of communications between directors. Other relevant documents such as emails should have been discovered, but they too may not record discussions.

[119] I have also exercised caution with the FMA's expert evidence insofar as it strayed into factual conclusions. The facts are for me to determine, based on all the admissible evidence.

[120] I am satisfied that the evidence establishes the following facts.

***CBLI's reinsurance business***

[121] CBLI was the CBL Group's primary operating subsidiary, largely operating as a reinsurer of insurance business in Europe – most commonly, the French construction business.

*French construction business*

[122] From 2014, roughly 40-50% of the CBL Group's business related to the specific builders' risks covered by French Construction Insurance. This French construction business was described as "niche" and "specialised" insurance.

[123] In broad terms, French Construction Insurance products are linked together to result in a comprehensive set of products that guarantee the solidity of a building and the quality of workmanship, during construction and for a period of 10 years following completion of the building. These insurance products are required by French law for every construction site. The intention is to allow a building owner to be indemnified and claim where a construction or latent defect issue arises, and to do so without having to incur the time and cost associated with making a claim against the building contractor and its insurer. In general terms, policies insure either the building contractor or the building owner.

[124] Responsabilité civile décennale (decennial liability insurance) (DL) is one of the several policy types that insure the building contractor during the construction phase and after the work is accepted. DL (or at least the responsabilité civile décennale (RCD) component of DL)[93] guarantees the repair of damage that appears within 10 years after the acceptance of the work. DL covers liability for physical injuries, physical damage or intangible damage as a result of latent defects arising from construction, repair or maintenance. The insurance must be taken out before building work commences.

[125] Dommages-ouvrage (DO) is one of the several policy types that insure the building owner during the construction phase and after the work is accepted. DO insures the building owner against damage resulting from latent defects for 10 years after the work is completed. It is, in simple terms, a 10-year "manufacturer's guarantee" on the quality of workmanship.

[126] A claim under a DO policy is 100% recoverable from the responsible builder's DL insurer. The cost of the claim is the cost of the repair. By law, no limit can be attached to this type of policy, so the insured will always be able to obtain the necessary funds to complete the project. Technically, DO was lower risk than DL, as it was 100% recoverable from the DL insurer.

[127] The purpose of DO insurance is to finance any essential work before the apportionment of responsibility, and then the claim is settled between the insurance companies of the parties concerned. When a claim is made under a DO policy, the DO insurer commissions an expert report and then pays the claim based on the findings. The insurer then calls a compulsory meeting of everyone involved (that is, the property owner and the building contractors), and the blame is legally apportioned to the responsible parties. The DO insurer then recovers proportionately from the insurer of the responsible parties.

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93 The other component, responsabilité civile professionnelle (RCP), is similar to contract works cover, and is also compulsory in France. This type of cover was typically sold by CBLI together with the RCD business (i.e. the DL business was sold as a package). RCP cover attaches to the contractor and provides liability cover if they are found liable for damaging third-party property during the period of construction. RCP cover is annually renewable and operates on a "claims made" basis.

[128] DL and DO were the two primary French Construction Insurance products (or policies) reinsured by the CBL Group. However, the CBL Group did not insure both DO and DL for the same property. This meant CBLI could take recoveries into account when pricing the DO business, which other insurers could not. Also, CBLI generally insured smaller property developments, describing its business as "niche". Mr Mulholland said CBLI did not reinsure high-risk developments. For example, it learnt that there were higher claims on buildings over three stories, swimming pools, solar panels and basement conversions, and stopped reinsuring these.

[129] This French Construction Insurance had to be insured by a regulated entity permitted to underwrite in France, which CBLI was not. A fronting insurer would first underwrite the insurance policy. The fronting insurer would then have a quota share treaty agreement with CBLI as reinsurer. This was a pro-rata reinsurance contract in which the insurer and reinsurer shared premiums and losses according to a fixed percentage. The fronting insurer would transfer a percentage of the risk within a book of the business to the reinsurer. The ultimate risk for the policies still ultimately sat with the fronting insurer.

[130] Mr Mulholland said CBLI had a comprehensive and detailed understanding of this line of business through its interests in EISL, CBLIE and later, SFS. He said Mr Harris, and Mr Massingham in the UK, had extensive experience in construction insurance. Since CBLI needed a fronting insurer, its reinsurance levels were high compared with reinsurers who simply reinsure business that is generated and understood by the fronting insurer.

*CBL Group's integrated business model*

[131] The CBL Group sold insurance and underwrote insurance risk in about 25 countries. It operated an integrated business model with various operating subsidiaries acting as MGA, licensed insurer and reinsurer.

[132] The main source of revenue for the CBL Group was gross written premium (GWP). GWP is a sales measure representing the monetary value of the total number of policies sold during the relevant accounting period. CBLI was the main contributor to the CBL Group's GWP.

[133] As a reinsurer, CBLI relied heavily on ceding insurers to generate revenue. CBLI had three primary ceding insurers through which significant amounts of its reinsurance business were written. These were Alpha Insurance A/S (Alpha), Elite Insurance Co Ltd (Elite) and CBLIE (already mentioned).

[134] Alpha was headquartered in Denmark and was regulated by the Danish Financial Supervisory Authority (DFSA). Alpha was wholly owned by Alpha Holdings A/S. Alpha operated in around 15 countries throughout Europe. From about 2006, Alpha provided origination and ceding services to CBLI, under which CBLI acted as a reinsurer to Alpha. As part of this arrangement, Alpha retained a proportion of premiums and claims deposits owed by Alpha to CBLI as reinsurance security. Aside from CBLI reinsuring risks written by Alpha, there were also shareholding and lending arrangements that formed part of the relationship.

[135] Elite was established in Gibraltar in 2004 and was regulated by the Gibraltar Financial Services Commission (GFSC). Elite was licensed to underwrite insurance in a number of different European jurisdictions including France. Elite specialised in coverage for a range of different insurance products, including French Construction Insurance. Similar to Alpha, but from about 2011, Elite provided origination and ceding services to CBLI, under which CBLI acted as a reinsurer to Elite. As part of this arrangement, Elite retained a proportion of premiums and claims deposits owed by Elite to CBLI as reinsurance security. Origination services were business that was sourced by Elite directly, whereas ceding services were reinsurance arrangements of business fronted by Elite and reinsured by CBLI.

[136] After CBLC's acquisition, CBLIE experienced significant growth in French Construction Insurance. This was primarily driven by the transition of DL and DO policy business from Elite to CBLIE. In 2016, CBLI notified the market of its intention to transfer this business. Brexit accelerated the plan. Among other advantages, having its own fronting licensed insurer in Europe meant CBLI could avoid paying fronting fees to Alpha or Elite, which were usually in the region of 5-10% of the GWP of the business ceded by Alpha/Elite and reinsured by CBLI. CBLIE became a key subsidiary as it provided the most reinsurance business to CBLI, wrote

the most premium after accounting for intra-group movements and was the subsidiary with the second-highest revenue for the CBL Group (after CBLI).

*CBLI's Managing General Agents*

[137] The risks insured by CBLI's ceding insurers were arranged through brokers and MGAs. A broker is an individual or firm that acts as an agent for an individual, body or firm in arranging insurance cover and in presenting claims under such cover. Brokers act as the agent of the insured or reinsured to arrange insurance or reinsurance with a licensed insurance company. Customers go directly to a broker, who sells policies to them. An MGA is an intermediary between a broker and an insurer with the power to bind insurers to the policies issued. An MGA is a unique type of broker that is given underwriting authority from a special type of primary insurer called a "front". An MGA has the power to bind its direct insurance partners to risk at prices no less than pre-defined minimum rates in the binding agreements called "binders". MGAs are also referred to as a "coverholder". MGAs have most of the customer interaction, collect gross premium and forward this premium to the insurer less any fees or commission charged by the broker and MGA. MGAs do not typically take on any of the underlying risk.

[138] The MGAs that were the two largest producers of DO and DL business for CBLI were EISL (mentioned above at [18]) and SFS.

[139] SFS was established in 2002 and began working with the CBL Group in 2005. It was a French company based in Luxembourg, and was regulated by the Commissariat aux Assurances (CAA), Luxembourg's supervisory body for the insurance sector. Alpha was instrumental in introducing CBLI to SFS. SFS was a leading MGA, and was the largest building risk insurance specialist in France. It wrote the largest proportion of French Construction Insurance for the CBL Group, and was therefore integral to its operation and growth.

[140] The CBL Group's expertise in French Construction Insurance was leveraged off EISL and SFS.

[141] CBLI maintained control over the type of business written by these MGAs through binders that specified the risk profile of business CBLI was prepared to underwrite.

[142] CBLI was reliant on SFS and Elite to form a view about the collectability of premiums and to reflect this in the "bordereau" as negative written premium. CBLI would then use the bordereau to recognise in its own accounts those receivables that were reversed as doubtful or bad debts.

***Key insurance concepts***

*Solvency*

[143] Mr Ray and other witnesses explained solvency in the IPSA context, which has a special meaning. While it is the ability of an insurer to meet its obligations to policyholders when they fall due, the IPSA prudential regime requires insurers to hold additional capital to protect the claim entitlements of policyholders under a range of adverse scenarios. Solvency requirements are important for insurer soundness and for maintaining public confidence in the sector. The minimum requirements are intended to ensure that insurer obligations to policyholders and other creditors are met in full with a reasonably high probability. Without solvency requirements, some insurers might choose to hold less capital, resulting in a greater risk that they will not meet their obligations.

[144] The Solvency Standard addresses the calculation (and reporting) of solvency for non-life insurers.[94] Broadly, to qualify for prudential purposes, a capital item must be of a permanent nature and freely available to meet losses. Actual Solvency Capital is the balance sheet capital less prudential adjustments to remove elements that do not qualify as capital for prudential purposes.

[145] In particular, Actual Solvency Capital comprises:

(a) Capital as defined in the Solvency Standard, which typically includes issued share capital and retained earnings; less

[94] *Solvency Standard*, above n 3.

(b) Deductions from Capital as defined in the Solvency Standard, such as intangible assets (including goodwill), future tax benefits, equity investments in related parties, loans to related parties, and dividends declared.

[146] The Solvency Standard also prescribes the calculation of Minimum Solvency Capital,[95] the required minimum capital for solvency purposes based on the insurer's risk profile.

[147] Minimum Solvency Capital is the sum of various risk capital charges as defined in the Solvency Standard relating to insurance risk, catastrophe risk, asset risk, foreign currency risk, interest rate risk, and reinsurance recovery risk.

[148] The Asset Risk Capital Charge is particularly relevant in this case. It reflects the exposure of the licensed insurer to losses on investment assets and financial risks to the licensed insurer arising from other exposures. It also reflects the risks to the licensed insurer from having large exposures to a single counterparty. For part of the calculation of the Asset Risk Capital Charge (relating to the Risk Weighted Exposures Charge component), the Solvency Standard contains prescribed Resilience Capital Factors (RCFs) applicable to different asset Exposure Classes.[96] The RCF represents the combination of the asset's credit risk and the market risk, which can also be described as the default risk and the volatility of price. In order to determine the applicable RCF, the licensed insurer must assign each of its assets to an Exposure Class. In the calculation of Minimum Solvency Capital, the total of the asset values in each Exposure Class must be multiplied by the RCF.

[149] The Exposure Classes and RCFs that are most relevant in this case are:

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[95] This is a minimum solvency level aimed at ensuring the insurer will remain solvent over the next 12 months with a probability of 99.5%. Meeting this requirement under the Solvency Standard (which included setting reserving with a probability of sufficiency (POS) of 75%) means there is a 99.5% chance of the insurer being solvent in 12 months' time.

[96] *Solvency Standard*, above n 3, at, Table 2 – Exposure Classes and Resilience Capital Factors. These were previously called Asset Risk Capital Factors (ARCFs).

| Exposure Class | Definition | Resilience Capital Factor |
|---|---|---|
| 1 Cash and Sovereign Debt | Notes and coin<br>Cash at bank on call<br>Debt or other obligations issued by or guaranteed irrevocably by the New Zealand government or a government or supra-national agency with a Counterparty Grade 1 | **0.5%** |
| 5 Unpaid premiums < 6 months past due | Unpaid **premiums** (including **premium** funding receivables) that are not yet due or are less than six months past the contractual due date for<br>payment to the **licensed insurer.** | **4%** |
| 9 Other fixed interest and short term unpaid **premiums** | Any debt obligation or cash management trust that has a Counterparty Grade 5 or is unrated<br>Subordinated debt of a counterparty with Counterparty Grade 1, 2 or 3<br>Unpaid **premiums** (including **premium** funding receivables) that are more than six months but less than twelve months past the contractual due date for payment to the **licensed insurer** | **15%** |
| 13 Other On Balance Sheet Assets not covered elsewhere | Any other on balance sheet asset not described in this table, including assets associated with Non-insurance Activities that are not dealt with elsewhere, but not including **reinsurance** assets covered under Section 3.6 and not including any coinsurance amounts recoverable from EQC | **40%** |
| 14 Assets incurring a full Capital Charge (if this row applies it must be used even if another row of this table could apply) | Loans to **directors** or associated parties of the **licensed insurer**<br>Unsecured loans to employees or agents of the **licensed insurer** in excess of $1,000<br>Assets under a fixed or floating charge<br>Obligations of a **related party** (except as provided in Exposure Class 7)<br>Unpaid **premiums** (including **premium** funding receivables) that are twelve months or more past the contractual due date for payment to the **licensed insurer** | **100%** |

[150] Thus, in the case of unpaid premium receivables, the relevant RCF applies irrespective of the actual assessment of collectability of the receivable for accounting purposes. Mr Mulholland acknowledged this was a relatively simple mathematical equation – under the Solvency Standard, CBLI was required to apply a 100% risk charge/RCF to all receivables older than 12 months regardless of how likely it was that these would be collected.

[151] Minimum Solvency Capital creates a capital buffer to ensure the insurer can continue to meet obligations to policyholders with a high probability under a range of adverse scenarios.

[152] The Solvency Standard also defines:

(a) Solvency Margin as the excess of Actual Solvency Capital over Minimum Solvency Capital, expressed in New Zealand dollars; and

(b) Solvency Ratio as the Actual Solvency Capital divided by the Minimum Solvency Capital, expressed as a decimal or a percentage.

[153] Thus, a capital buffer is where the insurer has a Solvency Margin greater than zero, or a Solvency Ratio that is greater than 100%. Insurers will generally have a further buffer (i.e. greater than these minimums) because dropping below these values would require the insurer to report to RBNZ, and to take actions to restore the value to above the minimums. Generally, insurers specify their buffer through a target capital or solvency level or range within a Capital Management Plan, depending on their board's risk appetite and the mitigations available to the insurer. The Capital Management Plan forms a part of the Risk Management Programme, which RBNZ receives a copy of during licensing and any subsequent updates. I address this and CBLI's Capital Management Plan further below at [219]-[221].

[154] Another reason to have a solvency position higher than the minimum requirements relates to the financial strength rating that each insurer in New Zealand is required to have. A higher Solvency Ratio and Margin would provide support for a higher financial strength rating. An insurer is required to publish its Solvency Ratio

and Margin, as well as its financial strength rating. In addition to this, the Solvency Ratio is a metric reflecting the financial strength of the insurer and is comparable between different insurers regardless of their size. Shareholders and potential investors would use a Solvency Ratio as part of their assessment of the financial strength and value of an insurer.

[155] An insurer's licence may be subject to conditions, including to maintain a Solvency Margin in accordance with an applicable solvency standard.[97] Like most non-life insurers, CBLI's insurance licence conditions (dated 4 September 2013) required that its Solvency Margin be at least $0; that is, equivalent to its Solvency Ratio being at least 100%.[98]

*Reserving*

[156] Mr Ray's explanation of reserving was not disputed. Claims reserving is the process by which an insurer estimates how much money it needs to set aside in order to pay claims that may arise (now or in the future) in respect of a policy for which premium has been earned.

[157] The total "net outstanding claims reserves" (often referred to as reserves) is made up of the "outstanding claims liability" on the insurer's statement of financial position less the "reinsurance and other recoveries" on outstanding claims on its statement of profit and loss.

[158] The outstanding claims liability is the present value of expected future payments relating to claims incurred at the reporting date, with an additional risk margin added to allow for inherent uncertainty in the central estimate. The expected future payments include payments for claims reported but not yet paid or paid in full. These are referred to as claims incurred but not reported (IBNR). They also include anticipated direct and indirect claims handling expenses, and notified (and unpaid) claims net of reinsurance and risk margin.

97 Insurance (Prudential Supervision) Act, s 21(2)(b).
98 This was increased in July 2017 as explained below.

[159] Reinsurance and other recoveries on outstanding claims is the present value of the expected future receipts calculated on the same basis as the outstanding claims liability. Expected future receipts were the future receipts from reinsurance and other third-party recoveries. Reinsurance receipts were where CBLI had its own reinsurance arrangements in place. These receipts were comparatively small and tended to be connected with the bonds business lines. Other third-party recoveries related to the DO line of business, where the DO insurer was able to have recourse to the DL insurer.

[160] The New Zealand Equivalent to International Financial Reporting Standard 4 Insurance Contracts (NZ IFRS 4) sets out the requirements for calculating the Net Outstanding Claims Liability. In summary, the Net Outstanding Claims Liability as per NZ IFRS 4 includes:

(a) the central estimate of expected claims and recoveries;

(b) discounting at a risk free rate;

(c) allowance for claim handling expenses; and

(d) a risk margin intended to provide the specified probability of sufficiency (POS).

[161] The risk margin is the portion of the balance sheet liability that is in excess of the claims liability best estimate. Appendix D of NZ IFRS 4 requires a risk margin for non-life insurance accounting methods. In addition, the Solvency Standard requires the risk margin to be calculated for solvency purposes at 75% POS. POS is the probability that the best estimate plus risk margin is at least as great as the ultimate cost of the liability. Put another way, POS is a measure of how likely it is that a liability estimate or claims reserve will be sufficient. A POS of 75% is based off a distribution curve and means that the liability held by the insurer is expected to be sufficient to meet the future costs of incurred claims 75% of the time.

*Loss ratios*

[162] A commonly used term when discussing reserves is the "loss ratio", which is the ratio of an insurer's claims paid plus claim-related expenses, divided by collected premiums, expressed as a percentage. In simple terms, the lower the loss ratio, the greater the profit the insurer makes on that line of business. If the loss ratio is above 100% then the insurer makes a loss on that line of business. The ultimate loss ratios are a key driver of the level of reserving that is held by an insurer.

[163] Initially, CBLI used assumed loss ratios to estimate and provision for its outstanding claims on its DO and DL business (although it developed alternate reserving methodologies from 2016). Insurers often use assumed loss ratios to estimate and provision for outstanding claims where a particular book of business is immature and does not have a long history of claims data from which outstanding claims can be estimated and provisioned. For DO and DL business, CBLI's claims experience was relatively young.

[164] CBLI's assumptions about the levels of recoveries the DO insurer would ultimately make from DL insurers affected the ultimate net loss ratio for DO business, with greater levels of recoveries resulting in a lower net loss ratio.[99] CBLI's estimate of its outstanding claims was therefore sensitive to changes in these assumptions.

[165] As CBLI did not write cover for both DL and DO for the same property, when covering a homeowner's DO policy it could recover from the relevant tradesperson's DL insurer. Mr Mulholland said this is what made CBLI unusual in the French Construction Insurance market and meant loss ratios from French insurers were not applicable to CBLI. Most of the large French insurers would write both DL and DO policies for the same property. As a result, they would not bother to claim under a DL policy when a claim was made by a homeowner under a DO policy. This resulted in a much higher loss ratio on DL books and a much higher average claim. As CBLI did not insure both sides of the same property, it always made a claim against a tradesperson's DL insurer. He said this, and CBLI's niche business of fewer high-risk

[99] Recoveries did not affect net loss ratios for DL business.

developments, was why it did not make sense to apply French insurers' loss ratios to CBLI's book.

[166] Mr Mulholland said he was not personally involved in collecting or reviewing the data on which reserving was based or in running any of the reserving analysis. He did not have the expertise to do this and relied heavily on the work performed by CBLI's claims team, internal actuary, finance team and on the conclusions of CBLI's Appointed Actuary.

*Importance of reserving and solvency*

[167] The claims reserving calculation is a critical calculation for an insurer as it impacts the solvency of the company. An inadequate valuation of reserves could mean:

(a) Actual Solvency Capital is overstated as retained earnings will be lower due to a greater level of claims being reported through the profit and loss statement;

(b) Minimum Solvency Capital is understated as the insurance risk charge is understated. This is because an inadequate valuation of claims will mean the Net Outstanding Claims Liability and the premium liability are understated and so the risk capital charges applied to these are understated; and accordingly

(c) the Solvency Margin and Solvency Ratio are overstated.

[168] An insurer may need to adjust its reserves for two reasons:

(a) First, it is experiencing growth and higher GWP, and therefore needs a greater level of reserves to reflect that additional business. This is referred to as "increasing" reserves.

(b) Second, the existing reserves it holds in respect of risks already written are insufficient because, for example, there has been a change in the

claims loss ratio assumptions. This is referred to as "strengthening" reserves. CBLI had been required to strengthen its reserves each financial year from 2012.

***Solvency reporting***

[169] All licensed insurers are required by the Solvency Standard to report the following solvency disclosures in their financial statements and on their websites:

(a) Actual Solvency Capital;

(b) Minimum Solvency Capital;

(c) Solvency Margin; and

(d) Solvency Ratio.

[170] In addition, licensed insurers are required to report their solvency position to RBNZ within a prescribed period of its half and full financial year end. From 2015, this prescribed period was four months.[100] Reporting used a solvency return template spreadsheet produced by RBNZ that recorded the solvency position as at the report date and also projected solvency for the next four years. The half-yearly solvency return must be accompanied by a certification by two directors of the licensed insurer. An insurer is also required to notify RBNZ immediately of any breach of its solvency requirements or likely breach within the next three years. The return can either be prepared by the insurer or its Appointed Actuary, but must be reviewed and signed off by the Appointed Actuary before filing with RBNZ. The year-end return must be accompanied by a certification by two directors of the licensed insurer, audited financial statements or group financial statements, an auditor's report, a s 78 report (referred to below at [179]) and a Financial Condition Report (FCR) completed by the Appointed Actuary. The purpose of these returns is so that RBNZ can monitor licensed insurers and ensure that they are meeting the requirements of their licence to remain solvent.

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[100] For CBLI, this was changed to monthly reporting in 2017, addressed below.

[171] Mr Mulholland said he did not produce any of the solvency returns that were submitted to RBNZ and that he had extremely limited knowledge on how these reports were put together. They were produced by Mr Ray initially and then later by Mr Clements with help and overview from Mr Ray. Mr Mulholland said he would read these once in draft form, they would remain in draft until all parties were able to clear each aspect of the reporting requirements, and they were deemed incomplete until such time. He said that once they were finalised, they were immediately announced to the market with all final results (after CBLC had listed). While he was not involved in their production, he was involved in approving them for uploading to RBNZ.[101] Only the half-yearly and year-end returns were attested to by two Board members.

[172] Insurers were not required to publish on their website the more detailed solvency returns that were submitted to RBNZ, so these were not publicly available. As a result, the only information on CBLI's solvency position that was publicly available was the Solvency Margin and Solvency Ratio, not the underlying calculations for them.

***Insurance supervision in Europe***

[173] In the European Union at the material time, almost all insurance and reinsurance undertakings were regulated by the Solvency II Directive.[102] Relevant to CBLIE in Ireland, the Solvency II Directive was transposed into Irish law as the European Union (Insurance and Reinsurance) Regulations 2015.[103] These contain requirements for solvency capital, corporate governance and risk management, and fit and proper requirements, and prescribe certain regulatory reporting and public disclosure obligations. A key requirement for insurance and reinsurance companies is that they maintain a specified level of solvency capital (known as the solvency capital requirement (SCR)).[104]

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101 For example, see [528] below.

102 Directive 2009/138/EC of the European Parliament and the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L 335/1 [Solvency II Directive].

103 European Union (Insurance and Reinsurance) Regulations 2015 (S.I. 485 of 2015), in force from 1 January 2016.

104 The SCR is the amount of funds that insurance and reinsurance companies are required to hold under the European Union (Insurance and Reinsurance) Regulations in order to have 99.5%

[174] Insurance supervision operates as part of an EU-wide framework for cooperation among national competent authorities. An example of such co-operation is the European Insurance and Occupational Pensions Authority's (EIOPA) Cross-Border Platform of Collaboration (Platform). As part of that Platform, CBI had ongoing supervisory engagement with EIOPA and other European and international regulators in relation to CBLIE during 2017 and 2018. In the context of CBLIE, membership included, but was not limited to, RBNZ, GFSC, CAA in Luxembourg, DFSA and the Autorité de Contrôle Prudentiel et de Résolution in France (ACPR).

***Regulatory confidentiality***

[175] Under s 150 of IPSA, directions by RBNZ given under subpt 1 of pt 4 must not be disclosed without the written consent of RBNZ. This applied to at least some of RBNZ's directions to CBL. There was no equivalent provision in Ireland's Central Bank (Supervision and Enforcement) Act 2013, under which CBI carried out its supervisory and enforcement functions in respect of CBLIE. While CBI's power in that Act to make directions or impose conditions on regulated undertakings included the power to add incidental provisions which may include confidentiality restrictions, Ms O'Mahony from CBI was not aware of any instances where the Bank had imposed confidentiality restrictions on a regulated insurer or financial services provider. She said that, were CBI to decide in a given case to impose confidentiality restrictions over directions made, she would expect it to do so expressly in the body of the directions by stating that the direction was to remain confidential and not be shared outside the intended recipients.

[176] RBNZ, CBI and GFSC (but not DFSA) are signatories to the International Association of Insurance Supervisors Multilateral Memorandum of Understanding on Cooperation and Information Exchange (MoU).[105] The MoU facilitates the exchange of information between insurance supervisors. The MoU has a strict confidentiality regime and a confirmation of compliance is requested as a prerequisite to joining.

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confidence they could survive the most extreme expected losses (i.e. claims on insurance policies) over the course of a year. There is a separate minimum capital requirement (MCR) that is generally set at a lower threshold level of 85% confidence.

[105] Multilateral Memorandum of Understanding on Cooperation and Information Exchange (15 February 2007, revised 10 July 2014).

Any information exchanged under the MoU must not be passed on, unless the authority from which the information originated provides explicit approval.[106]

***Appointed Actuary***

[177] IPSA requires all licensed insurers in New Zealand to have an Appointed Actuary.[107]

[178] Initially, CBLI's Appointed Actuary was Mr Peter Davies. He left the role on or about 11 September 2014 and Mr Grant Mackay from PwC became the Appointed Actuary. Mr Paul Rhodes (who was based in Wellington) was the PwC engagement partner and peer review actuary. On about 1 November 2015, Mr Mackay left PwC and Mr Rhodes took over as Appointed Actuary.[108] Mr Ben Coulter of PwC worked with Mr Rhodes on the CBLI engagement from 2016. Mr Rhodes gave evidence.

[179] Under IPSA and the Solvency Standard, in broad terms the role of the Appointed Actuary involves:

(a) being engaged by the licensed insurer to carry out an annual review of the insurer's actuarial information contained in, or used in the preparation of, the financial statements (as described in ss 77 and 78 of IPSA);[109]

(b) being engaged by the licensed insurer to carry out a yearly and half-yearly review of the insurer's Solvency Margin calculations;

(c) being engaged by the licensed insurer to prepare an annual FCR for the insurer (a much more detailed report covering the whole of the insurer's operations and risks); and

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106 At Annex B cl 9.
107 Insurance (Prudential Supervision) Act, s 76(1).
108 Mr Rhodes remained the Appointed Actuary until he resigned effective 29 January 2019. Mr Mackay joined CBLI as in-house actuary in September 2017, addressed below.
109 The report produced from this review is generally referred to as the s 78 report. Actuarial information is defined in s 77(4).

(d) making disclosures to RBNZ in accordance with s 127 of IPSA (such as if the licensed insurer is failing to maintain a Solvency Margin or is likely to fail to maintain a Solvency Margin at any time within the next 3 years).[110]

[180] The Solvency Standard provides that the Appointed Actuary is "responsible to the board of the **licensed insurer** for performing or reviewing all aspects of the Solvency Margin calculations to ensure the calculations are complete and accurate".

[181] PwC was also engaged by CBLI to prepare a six-monthly liability valuation report (valuation report). Insurers need to provision for future claims that will be made on policies already written by the insurer. This is known as the outstanding claims provision, or outstanding claims reserve. The amount of the provision is set by the insurer's management. The purpose of the valuation report was to document the assumptions used, the models employed and the calculations of the insurer's outstanding claims, to assist management in setting the outstanding claims provision.

[182] When reviewing solvency calculations, the Appointed Actuary relies on the insurer's audited financial statements as accurately recording the insurer's assets and liabilities. However, the Appointed Actuary needs to use professional judgement; for example, where the treatment of a particular item is not clear. In this regard, I note the Solvency Standard contains an appendix on materiality which includes:

> Values or components generating variations in amounts of 10% or more of the Solvency Margin must be presumed Material, while those generating variations in amounts of 5% or less of the Solvency Margin may be presumed immaterial. The Materiality of values or components generating variations between 5% and 10% will be a matter for professional judgement.

***Auditor***

[183] Of course, insurance companies are not exempt from audit requirements. Crowe Horwath had been CBLI's auditor, but in October 2015 Deloitte took over as the CBL Group's auditor. At Deloitte, Mr Brendan Lyon and Mr Michael Wilkes were

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[110] The insurer has a similar reporting obligation under s 24, and the FCR must also advise the insurer whether, in the Appointed Actuary's opinion, the insurer needs to consider reporting to RBNZ under s 24.

the dual lead engagement partners, and Mr Bennie Greyling was the lead audit manager. Mr Greyling gave evidence.

[184] Deloitte's audit processes included an independent review of the actuarial valuation of CBLI's outstanding claims reserve by Deloitte's internal actuaries. This meant there was further independent review of the actuarial valuation to assist Deloitte in forming its view of the reasonableness of the amounts in the financial statements. Deloitte would also conduct a separate limited assurance engagement in order to express an opinion on whether anything had come to its attention that caused it to believe that CBLI's annual solvency return had not been prepared, in all material respects, in accordance with the Solvency Standard. Deloitte's actuarial team would review claims following the release of PwC's valuation reports.

### *CBL Group structure, policies and personnel*

#### *CBLC and CBLI boards of directors*

[185] From June 2015, the board of directors for CBLC was the same as the board of directors for CBLI, and meetings were held together.[111] Sir John Wells was the independent non-executive chairman. Mr Hutchison was a non-executive director. Mr Anthony (Tony) Hannon, Mr Ian Marsh and Mr Paul Donaldson were independent non-executive directors. Mr Harris was on the Board as managing director.[112] The Board had a mix of significant and relevant experience, but only Sir John Wells had public company board experience.

#### *Audit and Financial Risk Committee*

[186] The Audit and Financial Risk Committee (ARC) was established as a committee of the CBLI Board in or around 2008. This committee was restructured to include CBLC after the IPO in October 2015. From then onwards, the members of the ARC were Mr Hannon (chair), Mr Donaldson and Mr Marsh. Mr Mulholland and Mr Ray had been members of the ARC prior to this, along with Mr Hannon. They continued to attend most ARC meetings, along with Mr Harris, Mr Clements

111 Board minutes often refer to CBLC as "CCL".
112 I refer to Mr Harris' management role further below at [207].

(employed as CBLI's financial controller in September 2015 as part of the IPO listing process when Mr Ray became the CBL Group financial controller) and Mr Michael Parrott (CBLC's quality assurance manager). Thus, four of CBLC's six directors usually attended ARC meetings. From December 2015, Ms Diana Puketapu also attended most ARC meetings. She joined as a consultant to the ARC to provide assistance around corporate governance. Mr Ray was responsible for preparing meeting agendas and packs, and taking minutes of the meetings (although he and Mr Clements shared this responsibility after Mr Clements started). Mr Rhodes and Mr Coulter from PwC also attended, as did personnel from Deloitte.

*Continuous Disclosure Policy and Disclosure Committee*

[187] On 4 September 2015, the Board approved a Charters and Policies Manual which included a Continuous Disclosure Policy. The Charter stated that the Board was responsible for (among other things):

> ensuring the Company satisfies its continuous disclosure obligations under the NZX Listing Rules and the ASX Listing Rules, and that the market has available all relevant information required to make informed investment decisions, and assessments of the Company's prospects, in accordance with the Company's Continuous Disclosure Policy…

[188] The Charter also said the Board would not delegate any of its responsibilities to committees. However, committees would be formed to help the Board discharge its responsibilities by providing recommendations on specific areas of company business.

[189] Although the Charter itself did not refer to a Disclosure Committee, the Continuous Disclosure Policy was published on the CBLC website and included the following:

> …
>
> 1.4 The objective of this Policy is to see that the Company immediately discloses all material information (defined below) to NZX and ASX in accordance with this Policy, NZX Listing Rule 10.1.1 and ASX Listing Rule 3.1 and that its disclosure is factual, complete, balanced and expressed in a clear manner that allows an investor to assess the impact of the information when making an investment decision.
>
> …

1.6 The Company [needs] to endeavour to achieve that all staff understand and comply with the obligations contained in this Policy, the NZX Listing Rules, the ASX Listing Rules and other applicable law.

…

**3. Material information (NZX Listing Rule 10.1.1 and ASX Listing Rule 3.1)**

3.1 The Company's Managing Director and the CFO must be informed of any potential material information or proposal immediately after any officer of the Company or any member of Senior Management becomes aware of that information or proposal (**Disclosure Information**).

…

3.7 Decisions on what information is Disclosure Information will be made by a committee appointed by the Board (**Disclosure Committee**) as outlined below.

3.8 Note that:

(a) material information must be immediately disclosed unless each of the "limbs" of the disclosure exception are satisfied; and

(b) the disclosure obligation "resurrects" once one or more of the limbs of the exception are no longer fulfilled.

3.9 Under NZX Listing Rule 10.1.1 and ASX Listing Rule 3.1, the Company must, following a decision of the Disclosure Committee, immediately notify the market, via an announcement to NZX and ASX of any information concerning the Company that the Disclosure Committee believes is Disclosure Information. NZX has taken the view that "immediately" means "promptly and without delay".

3.10 The Company must not, under any circumstances, disclose material information to any person not bound by obligations of confidentiality prior to the Company releasing the information to the NZX and ASX. If unreleased material information is unintentionally communicated by the Company or any staff member, in any forum, the CFO must be advised immediately so that following a decision of the Disclosure Committee the market can be informed.

**4. Examples of Material Information**

4.1 For the purposes of this Policy, the following information is likely to be "**material information**" (as set out in NZX Listing Rule 10.1.1 and as further defined below):

…

(b) reaching an agreement with a significant new customer or supplier, deciding on a new area of business or major

expansion or renewal of business with existing customers or suppliers;

(c) any significant government or regulatory changes, issues, complaints or problems affecting or notified to the Company or impacting on our business or operations;

(d) a significant risk or default of a supplier or major customer, or any major impact on our sales or production forecasts (adverse or advantageous);

…

(g) a material change in the Company's financial forecast or expectation;

…

(i) a transaction where the consideration payable or receivable by the Company is equal to a significant proportion of the Company's assets (i.e. 5% or more of the written-down value of the Company's consolidated assets). A transaction with a lower value could be significant in a particular case;

…

(p) buying or selling assets where the gross value or consideration paid or received represents more than 10% of the average market capitalisation of the Company.

…

…

**5. Disclosure Committee**

5.1 The Board will appoint a Disclosure Committee which must consist of

(a) Managing Director;

(b) CFO; and

(c) Chair of the Board;

(d) or if any of the above people are unavailable, then the Chair of the Audit and Financial Risk Committee.

5.2 The Company will also seek the Company's legal counsel's advice on whether matters are material and accordingly whether those matters should be disclosed.

5.3 The Disclosure Committee must:

(a) monitor compliance by the Company and its officers and employees with this Policy;

(b) review this Policy at least once each financial year;

(c) provide a report to the Board on any matters dealt with in the preceding period under this Policy; and

(d) require that all material information provided to NZX and ASX is also placed on the Company's website.

…

**7. Information briefings with analysts**

7.1 No undisclosed material information may be disclosed in any meeting with an investor or analyst. As noted in paragraph 3.10 above, if any inadvertent disclosure of material information occurs in such circumstances the CFO must be advised immediately so that the market can be informed or a referral to the Disclosure Committee can be made.

…

7.3 The Managing Director and CFO must review any written presentation material prepared for meetings prior to the meeting to determine whether all information has previously been disclosed to the market or may require disclosure.

…

**8. Release of information to the public**

8.1 Only the Managing Director and the CFO are authorised to provide comment about financial aspects of the Company, or speak on behalf of the Company, to the media or external parties.

…

**10. Trading halts**

10.1 Where the Company is unable to make disclosure to NZX and ASX immediately upon becoming aware of that material information (or if trading in the Company's shares is suggestive of a false or disorderly market) then the Managing Director, CFO or the Disclosure Committee must apply for a trading halt on NZX and ASX.

…

**11. Informing employees**

11.1 This Policy or a summary of it will be distributed to all employees to help them understand the Company's continuous disclosure obligations, their individual reporting responsibilities and the need to keep the Company's information confidential.

…

> 11.3 Any questions about the Company's continuous disclosure obligations or this Policy should be referred to the CFO.
>
> …

[190] The CBL Group's New Zealand lawyers, MinterEllisonRuddWatts (MERW), created a continuous disclosure presentation that was circulated to all staff. This detailed the key legal requirements and deadlines for disclosing information and buying/selling shares.

[191] Mr Mulholland said he was always conscious of CBLC's disclosure obligations and would not have knowingly breached them. While at times he sought to downplay his knowledge of these obligations and said he had no previous experience of disclosure in a publicly listed company or training, he accepted that he understood what material information was, that there were safe harbour exceptions, and that a company is aware of information when an executive officer has come into possession of the information in the course of his or her duties. He accepted that he understood the Guidance Note required an executive officer of an issuer who became aware of information to consider immediately whether that information was material information, and required issuers to implement appropriate systems and procedures to ensure that material information was identified and went up through the channels.

[192] The CBL Group's annual report for the year ended 31 December 2015 contained the following:[113]

(a) a Corporate Governance Statement including:

> **Roles and responsibilities of the Board**
>
> The Board is responsible for the governance of the Company and for promoting the success of the Group in a manner designed to create and build sustainable value for shareholders and in accordance with the duties and obligations imposed upon them by the constitution of the Company and by law, while having due regard to other stakeholder interests and the requirements of the NZX Listing Rules and the ASX Listing Rules.
>
> Issues of substance affecting the Company are considered by the Board, with advice from external advisers as required …

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113 The annual report for 2016 was to similar effect.

The Board delegates certain functions to its three Board Committees: Audit and [Financial] Risk Committee, Governance and Remuneration Committee and Disclosure Committee. The role of each of these Committees is outlined in section 3 of this Corporate Governance Statement.

(b) Under the heading "Board committees", reference to the Disclosure Committee:

| Disclosure Committee | Responsible for ensuring that CBL complies with its continuous disclosure obligations under the NZX and ASX Listing Rules. | Sir John Wells (Chair) *<br>Peter Harris **<br>Carden Mulholland *** |
|---|---|---|

* Independent as at the date of this 2015 Annual Report.

** Non-independent as at the date of this 2015 Annual Report.

*** CFO.

[193] Mr Mulholland accepted that he knew this was in the annual report. Indeed, on 19 February 2016, Mr Mulholland circulated a proposed announcement on behalf of Mr Harris and the announcement committee (regarding new licences in Mexico). This prompted a reply from Mr Hannon asking, "What Announcement Committee?" Mr Mulholland replied, "We have one that consists of [Mr Harris], [Sir John Wells] and myself ... did you not read the PDS [Product Disclosure Statement]?" Mr Hannon responded, "Nothing in the PDS". Mr Mulholland replied, "It is somewhere ... was done during the IPO". Mr Hannon said, "Let's reset it at the Monday Board so that it is duly resolved etc …". Mr Mulholland then sent him s 3 of the Continuous Disclosure Policy from the website. Mr Mulholland was clearly referring to the Disclosure Committee.

[194] An email from Mr Clements to SFS on 10 November 2016, copied to Mr Mulholland, also outlined the Continuous Disclosure Policy, including:

In summary:

- Section 3.1 - the formal procedure is to inform [Mr Harris] and [Mr Mulholland] if anyone becomes aware of material information, and they in turn call a Disclosure Committee meeting ([Mr Harris], [Mr Mulholland] and [Sir John Wells]) to determine if information should be announced to the market (before making public elsewhere, such as on your roadshow).

[195] Despite this, Mr Mulholland said the Disclosure Committee never met. I accept it never had meetings as such. This is consistent with an email from Sir John Wells to Mr Ray on 17 February 2017 during preparation of the 2016 annual report:[114]

> I've now been through the Draft of the Annual Report ... all 116 pages !!
>
> A few comments/ changes to suggest
>
> 1) Page 91 under Board Committees references the Disclosure Committee which I'm not aware of us ever meeting, hence presumably why it is not referenced in the Directors attendance record, albeit a Statutory requirement?

[196] Mr Ray's reply said "… this committee has not met in person but prior to NZX/ASX announcements agreement is received by all three by email". This is consistent with Mr Mulholland's statement in completed Due Diligence Questionnaires concerning continuous disclosure compliance, albeit referring to the "release committee":

> It is continuously reviewed. If anyone becomes aware of information that they believe would influence a buyer or seller of our shares they are required to notify immediately the release committee who will convene and make a decision. This will result in an immediate announcement release or a unanimous decision that a release is not required.

[197] Mr Mulholland tried to explain this away as shorthand ("a very short paragraph of very few words"), whereas it is quite inconsistent with his account. A further answer in the Due Diligence Questionnaires said he had no reason to believe the Continuous Disclosure Policy was not being followed correctly.

[198] Even so, I accept Mr Mulholland's evidence that, regardless of what was written in the Continuous Disclosure Policy, he always understood that decisions relating to disclosure were to be made, and were made, by the Board, and that the Board had ultimate responsibility for ensuring CBLC complied with its disclosure obligations; so it was only appropriate the Board made decisions about what to disclose and when. Whether or not Mr Mulholland was party to any Board discussions about what to disclose and when given his limited role in Board discussion, I accept

[114] There are no attendance records for this committee in the CBL Group's 2015 Annual Report (released to the market on 29 February 2016), nor in the 2016 annual report (released to the market on 24 February 2017). No annual report was released for 2017.

the Board did not delegate disclosure decisions to the Disclosure Committee. At least in this sense, I agree with Mr Pilkington that CBLC did not follow its own Continuous Disclosure Policy – but he did not suggest the Board should have delegated disclosure decisions to a committee.

[199] It does not follow that the Disclosure Committee had no role. Mr Mulholland also described the role of Sir John Wells, Mr Harris and himself as a conduit for management who came across information. If they deemed that the information should be disclosed, the directors would take it up to the full Board immediately. Such a conduit, triaging or recommending role is consistent with the Charter's reference to the role of committees (at [188] above), and not inconsistent with the Board minutes of a meeting on 6 July 2017, which stated (in relation to Elite's solvent run-off referred to below) that:

> …Media release is being drafted and will be circulated to Board pending any requirement to do so by the Disclosure Committee.

[200] The Disclosure Committee was also mentioned to NZX by Mr Ray during a discussion on 11 October 2017 referred to below at [487]-[488]. In addition, the Disclosure Committee's role in conjunction with the Board was referred to by Mr Harris in an email to the Board on 27 December 2017 regarding a regulatory sanction against SFS in Europe (at [624] below), where Mr Harris said he would "draft an initial draft for Disclosure Committee for a decision on the need for disclosure, and a draft statement for board to view". Mr Harris forwarded this email to Mr Mulholland (and others). Moreover, on 29 December 2017, Mr Harris emailed Sir John Wells and Mr Mulholland asking about disclosure (at [626] below). This was in effect the Disclosure Committee in operation. Despite downplaying it, Mr Mulholland had an important role in the operation of the Disclosure Committee.

[201] Once the Board had decided that disclosure was needed, I accept Mr Mulholland's role was limited. The thrust of Mr Mulholland's evidence was that the Disclosure Committee predominantly approved final drafts of market announcements. In particular, he said that for announcements with the half-year or yearly financial statements, Mr Harris would instruct CBLC's PR consultant, Mr Senescall, to prepare a statement. It would be reviewed by the Board and MERW.

Mr Mulholland, Sir John Wells and Mr Harris would proofread the final announcement. I also accept Mr Pilkington's observation that the Board and officers of CBLC appear to have turned their attention to disclosure primarily when reporting the company's financial results.

[202] Mr Mulholland said that other announcements of information that might negatively affect CBLC's share price were strictly in the domain of the Board. He said the Disclosure Committee did not, and would not, make decisions about what to disclose and when around matters that might negatively affect CBLC's share price. Again, he said that Mr Harris would usually instruct Mr Senescall to draft the announcement, which would be reviewed by Mr Harris and the Board and then come to Mr Mulholland, Mr Harris and Sir John Wells for a final proof check before Mr Ray would load the announcement onto the NZX and ASX platforms.

[203] In each context, this was consistent with another of Mr Mulholland's answers in the Due Diligence Questionnaires regarding verification of announcements:

> They are reviewed by the 3 member announcement committee and the full Board prior to release.

[204] This checking or proofing function does not detract from Mr Mulholland's role, as one of the three members of the Disclosure Committee, of ensuring that material information was taken to the Board immediately in order to address disclosure. Mr Mulholland maintained that the information in issue in this case was with the Board. Indeed, he said that the Board and Mr Harris knew far more information than he ever knew, and that the Board was aware of everything. There is no allegation that Mr Mulholland was solely responsible for not making the Board aware of material information. But it is alleged that the Board was not made fully aware of all the allegedly material information. I will address this in relation to the relevant information below, as well as whether the Board considered the need for disclosure of the relevant information, and Mr Mulholland's role in any failure.

*Media and Public Relations Policy*

[205] On 25 October 2016, the Board adopted a Media and Public Relations Policy. This was not merely a media policy – it included a section on regulatory public disclosures:

> *2.2 Regulatory Public Disclosures*
>
> CBL Group has an obligation to provide continuous disclosure to its shareholders and the investor market (through the Australian Stock Exchange (ASX), and New Zealand Stock Exchange (NZX)), and to fully inform its shareholders and potential investors of any matter which might materially influence an investor to buy or sell shares in CBL Group. This includes the filing and reporting of its annual and half yearly accounts.
>
> The principal Regulatory Public Disclosure Officer is the Group CFO, with responsibility to the Group Managing Director. The Chairman shall be consulted prior to finalising any market disclosure. The Board will be given a copy of each market disclosure document immediately prior to or contemporaneously with its release to the ASX/NZX.

[206] I accept that Mr Mulholland did not control this appointment by the Board or who he reported to, but he nevertheless also downplayed this role, saying he did not recall this title. For example, he was the point of contact for NZX and was the recipient of an NZX continuous disclosure inquiry in March 2017 relating to CBLC's market announcements.

*Mr Harris' management role*

[207] As mentioned, Mr Harris was the Group managing director. He was a very active and hands-on managing director. Mr Mulholland said he was the day-to-day driving force behind the CBL Group. Mr Ray said Mr Harris was always confident in his views, which I accept. Mr Cole, an internal actuary with RBNZ, said that during licensing, RBNZ became aware of characteristics of CBLI that RBNZ considered "classic" red flags. These included that Mr Harris exhibited most of the characteristics of a "dominant CEO", meaning a CEO who exerts extraordinary influence over the board's governance of the insurer, does not delegate much decision-making, involves themselves and dominates in most discussions, and controls what staff and advisers are allowed to say and do. While some of these characteristics were displayed in the subsequent documentary record, the evidence did not indicate that Mr Harris dominated Mr Mulholland in this sense.

*Mr Mulholland*

[208] Mr Mulholland was the CBL Group CFO at all material times. He was more hands-off than Mr Harris and focused more on investor, analyst and banking relationships and communications, plus mergers and acquisitions, leaving the traditional accounting work to Mr Ray and Mr Clements. Mr Mulholland said that from June 2013 when he returned from a sabbatical at Harvard Business School, Mr Ray's role was more reflective of the title of CFO than his role – although he would read draft solvency returns, financial statements and FCRs. He said the focus of his role turned to growth through merger and acquisition opportunities, as well as working with the subsidiaries the CBL Group was acquiring to grow and drive Group efficiencies. According to the IPO roadshow, he was responsible for all the Group's financial operations. Post-IPO, his role was also focused on global banking arrangements, ratings agencies relationships and investor relations. As the Group grew, he spent more time overseas – he said about two weeks every other month.

[209] In his evidence, Mr Mulholland made a number of general points that I keep in mind as I assess the events in 2017 and early 2018:

(a) They occurred more than six years ago, so his recollection of the details of some of these matters is limited.

(b) He has a strong recall of general matters relating to CBL's business, the roles of various directors and staff, and his interactions with others, but generally could not recall the detail of phone conversations or meetings unless there was an email or other documentary reference to refresh his memory. Even where there was an email, there were some matters for which he had no independent memory of receiving the email or being aware of the information in it. The matters in these proceedings related to his usual day-to-day job. There was generally nothing extraordinary about them to make them memorable years after the event.

(c) There were some matters that he had a greater recall of, even without documents. For example, he could quite clearly recall not being supportive of the Castlerock transaction.

(d) He typically received hundreds of emails a day and did not even open, let alone read with any focus, all of them. He had a number of email rules set up for his inbox that would direct emails into folders that sat within his inbox. For example, he might have a rule that would direct emails from a certain email address to a folder in the name of that person. He would periodically go through his emails and mark emails as "read", whether or not he had actually read them. The reason for this was so that they would no longer appear in bold in his inbox as unread. He also said, in the context of being copied on emails from RBNZ, that he did not tend to read emails on matters he was not having to take action on.

(e) He did not generally read emails that he was "cc'd" on. There would be occasions when he did, but as a general rule he did not.

(f) If Mr Harris was involved in an email exchange with someone outside CBL that he was copied in on, he did not typically respond, even if he read the email, unless his input was specifically being sought. Mr Harris was the Group CEO and a director. Ultimately, his decision was final. Mr Mulholland did not want to undercut any negotiation or exchange he was having.

(g) He told the finance team that if they wanted him to be aware of a matter, they should call him or tell him in person to ensure he read the relevant email.

(h) He was not a director of CBLC or CBLI. He did not attend Board meetings unless invited to do so and did not receive the Board pack for meetings.

(i) At times the directors took legal advice on some of the matters that were at issue in this proceeding. He was not able to waive privilege in respect of this advice. He had found this quite limiting as he was sure the Board took legal advice on matters that were relevant to these

> proceedings, but he could not refer to it in any detail in his own defence.[115]

[210] Mr Mulholland said he had previously been put in his place by Mr Harris for raising an issue at a Board meeting rather than with Mr Harris, but that was at least two years prior to listing. He also said that in October 2014 he received a written warning by Mr Harris and Sir John Wells for bullying staff, undermining the CEO and ignoring or being overly dismissive or disrespectful of certain staff and directors. He said nothing further came of this.

[211] I consider Mr Mulholland's evidence downplayed his role within the CBL Group. He was the Group CFO, a senior executive, who had been with the CBL Group since 2007.[116] His assertiveness was evident at times in the documents and in his evidence. Nevertheless, I accept that he was not a Board member nor the CEO, and ultimately company decisions were for the Board (unless appropriately delegated). I also keep in mind that the way this case unfolded, the trial focused on Mr Mulholland as the last remaining defendant, whereas the reality is that he was only one of a number of individuals involved in the relevant events.

*Mr Ray*

[212] As CBL Group financial controller, Mr Ray was responsible for the preparation of financial information that was provided to the Board, including overseeing the production of the monthly finance report and producing the overall CBL Group consolidation and financial commentary. The finance report was sent to Mr Mulholland and Mr Harris for review before being sent to the Board. In addition, Mr Ray oversaw the production of the interim and final financial statements, completion of the audit, and the budgeting and forecasting process across the whole CBL Group. He was also involved in preparing CBLI's solvency returns for RBNZ, assisting, developing and implementing financial and tax work streams, liaising with relevant advisers, and assisting with the reporting process for AM Best (the credit rating agency). He provided any key outputs, such as the financial statements and

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[115] He did not suggest that legal advice was taken about whether particular matters were material. Such advice would depend on the instructions given as to those particular matters.

[116] His interests also held a significant shareholding.

solvency returns, to Mr Mulholland to review before they were finalised. Another key duty was regulatory reporting. This involved all solvency reporting to RBNZ, including working with the Appointed Actuary to complete these reports. Once the month-end financials had been finalised and agreed by Mr Mulholland, Mr Ray prepared the solvency calculation, and this calculation was shared with Mr Mulholland and the Appointed Actuary to review. In addition, he was involved with reporting to the FMA, supplying data to AM Best for ratings, and preparing tax computations for provision to the auditors.

[213] As Group financial controller, one of Mr Ray's primary responsibilities was to oversee the preparation of financial statements and supporting schedules according to the monthly close schedule, as well as Group consolidation. He was also responsible for budgeting and forecasting, the preparation of tax schedules, reports and returns, and reporting to AM Best. He was responsible for assisting with the preparation of statutory, regulatory, month-end close and financial reporting, as well as account analysis and reconciliations, and the preparation of annual budgets.

*Mr Clements*

[214] As Mr Ray had done before September 2015, Mr Clements focused largely on CBLI, but they shared the review of all the New Zealand entities. Mr Clements also took over responsibility for preparing and submitting solvency returns to RBNZ. When the CBL Group acquired a majority stake in SFS, Mr Mulholland allocated this business unit to Mr Clements. He communicated with the SFS team and visited the SFS offices. Mr Ray and Mr Clements worked closely together.

[215] Mr Clements was responsible for running CBLI's "insurance model", which recorded all GWP and calculated how it would be earned over time. This allowed CBLI to determine the unearned portion of each premium. The insurance model brought together source transaction information from the general ledger, and information from the actuaries, to calculate the insurance loss reserves and unearned premiums. In the books, CBLI recognised all written premium – paid or unpaid – whereas Mr Clements understood that Elite only recognised paid premium (cash basis).

*Other senior staff*

[216] Mr Parrott joined CBLC in August 2015 as quality assurance manager, as part of the listing process. He was responsible for risk and compliance, and the RBNZ relationship.

[217] Mr Carl Griffiths was CBLC's corporate finance director from late 2016. He was an investment banker who joined from Bancorp (referred to below at [453]). His role involved market disclosures, capital raising and banking relationships.

[218] In early 2017, Mr Mark Christer started as CEO of CBL Europe. He took over the overall actuarial and reserving process.

*CBLI's Capital Management Plan*

[219] A Capital Management Plan documents an insurer's strategies to maintain adequate capital. As capital is core to an insurer's financial strength and long-term sustainability, capital management is an integral part of an insurer's risk management framework.

[220] In April 2015, the Board resolved to adopt a Capital Management Plan for CBLI to manage and maintain its solvency, having regard to its IPSA responsibilities. This Capital Management Plan stated that:

(a) CBLI's solvency margin (meaning Solvency Ratio) should fall between 135% and 165%;

(b) the Board would review the appropriateness of this range just prior to each six-monthly reporting date, or if a significant internal or external event resulted in the deterioration of the solvency margin by 5% or more; and

(c) directors could agree to hold capital outside of the range of 135% to 165% if it was deemed appropriate; but that at 120% or less, immediate action must be taken.

[221] On 31 May 2016, the Board approved a new Capital Management Policy which stated:

> The Board has set an optimum range of regulatory solvency capital of 140% to 165% and an internal minimum of 140%. If the actual solvency margin is forecast to fall under 140%, management will initiate plans to ensure the solvency margin remains within the Board approved range. By actively managing solvency margin, the actual solvency margin should never fall below 140%.

***The factual chronology***

[222] This next section is in chronological sequence except where topic flow is preferable. I have been conscious of time zone differences on some emails.

*Samoa transaction*

[223] I briefly mention the Samoa transaction, a series of interrelated transactions in October 2014 between CBLI, National Bank of Samoa, Federal Pacific Group (Singapore) PTE Ltd and Alpha, which formed part of the background to the issues in this proceeding, and is central to the related proceeding in which the FMA alleges breaches of the FMCA in relation to offer documents issued by CBLC in connection with its 2015 IPO (IPO proceeding). Following the adjournment of the IPO proceeding, and as part of the FMA's streamlined case against Mr Mulholland, almost all reference to the Samoa transaction was excised from the evidence in this continuous disclosure proceeding. It is unnecessary to say more about this transaction in this proceeding.

*CBLI's Solvency Ratio – 2014*

[224] In mid to late 2014, RBNZ became concerned that CBLI had breached its requirement to maintain a positive Solvency Ratio. These issues were discussed with CBLI and its Appointed Actuary through 2014 and into 2015, without a comprehensive and satisfactory resolution being reached from RBNZ's perspective. RBNZ raised questions about CBLI's Solvency Ratio calculation as at 31 December 2014 (138.8%), including the risk treatment of certain assets. Relevantly, RBNZ

wanted a 40% RCF applied to reinsurance collateral held by CBLI's front insurers, Alpha and Elite, rather than the 0.5% RCF applied by CBLI.[117]

*IPO*

[225] The issues RBNZ had raised with CBLI came to a head in the first half of 2015, when Mr Harris informed Mr Fiennes, then Head of Prudential Supervision at RBNZ, that CBLC intended to dual list on the NZX and the ASX through an IPO. The IPO process took from approximately March to October 2015.

[226] On 15 April 2015, Mr Harris asked RBNZ to address CBLI's last filed regulatory returns with some urgency and bring RBNZ's previous concerns to a close. Mr Harris asked RBNZ to provide a letter to this effect. He said that he had asked CBLI's Appointed Actuary to prepare an additional separate report and was confident this would resolve all issues relating to CBLI's Solvency Margin. Mr Harris assured RBNZ that CBLI took its compliance with obligations very seriously and this would be all the more significant once CBLC was a listed company with continuous disclosure obligations.

[227] Following this, in mid-2015 there were discussions between CBLI and RBNZ to resolve the issues before the IPO was finalised. CBLI agreed to adjust its calculation (going forward) by including the 40% RCF for the reinsurance collateral, proposed a capital injection of $10m to lift solvency before the IPO, and committed to investing another $20m from the proceeds of the IPO. In relation to the collateral RCF, CBLI told RBNZ in a letter from Mr Harris dated 16 July 2015:[118]

> CBL plans to obtain additional documentation to confirm that the funds are unrestricted, and freely available, but given current timelines re the IPO, CBL will take the 40% risk adjustment now, and when we have satisfied RBNZ on the issue, we will make the appropriate adjustment at a future measurement date.

[117] These were reinsurance premiums that belonged to CBLI but were being withheld by its fronting insurers to meet any potential liabilities that CBLI had under the reinsurance arrangements. CBLI had applied a 0.5% Resilience Capital Factor (RCF) on the basis that it was "cash" and so fell into Asset/Exposure Class 1. RBNZ did not consider this appropriate as the funds were not readily available to CBLI and could not be considered cash. RBNZ ultimately agreed that CBLI could use a 40% RCF, on the basis of Asset/Exposure Class 13.

[118] An objection to this document was not pursued.

[228] RBNZ agreed to these changes, which had the net effect of giving CBLI a sufficient capital buffer (calculated to be 144.4%) within the range set out in the Capital Management Plan.

[229] This exchange with RBNZ was addressed in CBLC's PDS for the IPO released on 7 September 2015, in the section on "Key risks affecting this investment":

> … As part of RBNZ's prudential supervision of CBL Insurance, it is in regular dialogue with RBNZ regarding its prudential and reporting and filing responsibilities. Under the IPSA, CBL Insurance is required to have an appointed actuary to review its financial information in accordance with applicable solvency standards ("Appointed Actuary"). RBNZ queried CBL Insurance's and its Appointed Actuary's interpretation of clauses of the applicable IPSA standards and the resulting calculation of CBL Insurance's Regulatory Capital at December 2014. RBNZ accepts that despite it having had some differences with CBL Insurance regarding applications of certain parts of the IPSA standard, CBL Insurance met the minimum solvency condition of its IPSA licence. In addition, on 28 July 2015, CBL Insurance increased its Regulatory Capital by the issue of $10 million of additional equity (sourced intragroup). Further, the Board of CBL Insurance has in place a Capital Management Plan which has been filed with RBNZ and to which the Board remains committed to, where CBL Insurance seeks to operate at a Regulatory Capital surplus of between 135% and 165% ...

[230] RBNZ did not object to this summary for the IPO.

[231] The PDS also set out the risks to the CBL Group's business and plans, including:

(a) under-provision for (i) claims that have been notified but not yet settled; and/or (ii) claims that have been incurred but not notified (low likelihood but moderate impact);

(b) failing to maintain the conditions of CBLI's licence from RBNZ, including the minimum regulatory capital requirements under IPSA (low likelihood but severe impact);

(c) a material proportion of revenue is generated by a select group of brokers and intermediaries not owned by CBL – the loss of one of these, or a material adverse change to the underlying contractual terms of the relationship, may be detrimental to revenue, profitability and business

while CBL takes action to replace revenue generated by these sources (low likelihood but moderate to severe impact in the short to medium term);

(d) the underwriting process not accurately assessing (and pricing) the risks underwritten (low likelihood but low to severe impact); and

(e) regulatory risk, including loss of licence (low likelihood but low to severe impact).

[232] The documents released for the IPO also included "The CBL Group's Prospective Financial Information, and a reconciliation of non-GAAP to GAAP information" (PFI). The PFI's section on claims expenses and reserving included:

> The CBL Group establishes claims reserves (as part of the outstanding claims liability) to cover estimated future claims which have been incurred but not yet reported as at the end of each accounting period. The movement in these reserves forms an integral element of the Group's financial results and, as such, reserving is recognised as a key area of focus for the Group.
>
> …
>
> As paid and incurred claims experience develops over time, the reserves have been, and will be, adjusted depending on how the actual development compares to that expected. This forms part of the regular reserving process, with the adequacy of reserves reviewed on an ongoing basis with the Group's appointed actuaries. If the claims experience is positive relative to expectations, the excess reserve will be released in the profit and loss statement in the period under review or, alternatively, an additional reserve will be charged to the profit and loss account if the claims experience is negative.

[233] KPMG also provided an unqualified independent investigating accountant's report in relation to the reasonableness and supportability of the assumptions used in the PFI for the IPO. This included review of CBLI's actuarial work.

[234] The documents released for the IPO also included "Other material information relating to the initial public offering of ordinary shares in CBL Corporation Limited" (OMI). The OMI set out CBLI's regulatory capital position as follows:

(a) an actual Solvency Margin (Ratio) of 138.8% as at December 2014, which it said had been signed off by the Appointed Actuary and was included in the audited accounts;

(b) a pro forma Solvency Margin (Ratio) of 120.9% as at June 2015, which took into account $10m of new regulatory capital from the CBL Group that was invested in July;

(c) a pro forma Solvency Margin (Ratio) of 147.2% as at June 2015, which took into account the same new $10m regulatory capital in July plus $20m of further regulatory capital from the IPO proceeds; and

(d) a pro forma Solvency Margin (Ratio) of 166.0% as at December 2015, which took into account both the $10m and $20m, and also included a full year of retained earnings.

[235] Mr Mulholland said that during the lead-up to listing, he essentially worked full time on ensuring that they were completing all the tasks that needed to be completed to enable a smooth listing.

[236] The final offer price for the IPO was set on 17 September 2015 at $1.55 per share. On 12 October 2015, 63,677,168 ordinary shares in CBLC were issued. Of these, 58,064,516 were issued under the IPO at $1.55 per share, generating $90m in proceeds. Mr Harris, Mr Hutchison and Mr Mulholland, through their interests, all sold shares in the IPO.

[237] On 13 October 2015, CBLC dual listed ordinary shares on the NZX and the ASX.

[238] On 16 October 2015, PwC finalised its valuation report as at 30 June 2015. As Mr Rhodes summarised, the report noted that outstanding claim estimates for DO and DL business continued to rely on management assumptions of ultimate loss ratios, and recoveries for the DO business. The report recommended that CBLI continue to enhance its monitoring of claims experience for these products in order to improve

comparison of expected versus actual claims. The report stated that net claims experience on DO products was higher than expected due to actual levels of recoveries to date being lower than expected. It strongly recommended that CBLI investigate delays in receiving expected recoveries.

*Solvency return as at 30 June 2015 due 31 October 2015*

[239] On 30 October 2015, CBLI submitted its solvency return as at 30 June 2015 to RBNZ. CBLI's Solvency Ratio was reported as 113.7% as at 30 June 2015. This did not include the extra $10m new regulatory capital that was factored into the June 2015 Solvency Ratios in the OMI, because those funds were not invested until July 2015.[119]

[240] As indicated, on 1 November 2015 Mr Rhodes took over from Mr Mackay as the appointed Actuary.

*SFS receivables and acquisition*

[241] In about November 2015, Mr Ray and Mr Clements began working to investigate discrepancies in the premium receivables due to CBLI from SFS in connection with Elite lines of business (the SFS receivables).[120] This work related to policies that had been written before January 2014, and where CBLI had outstanding balances. The work was called Project Indigo. It continued into 2016.

[242] On 19 May 2016, Mr Mulholland emailed SFS following up on the outstanding premium. He said he would like to have this resolved before CBL's half-year accounts were finalised in June.

[243] On 21 June 2016, RBNZ held an annual prudential consultation meeting with CBLI (Mr Harris, Mr Mulholland and Mr Parrott). This included discussion about the IPO, in which RBNZ asked CBLI "what they see their market disclosure obligations

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[119] The solvency return as at 31 December 2015 submitted in March 2016 included an additional $20m in solvency capital compared with the 30 June 2015 return. This was the $10m regulatory capital added in July 2015 plus $10m from IPO proceeds.

[120] Mr Ray said he recalled raising the issue of the SFS receivables with Mr Mulholland during the due diligence process for the IPO, but he did not want to discuss the progress on the project during this time. If that occurred, I doubt it was because Mr Mulholland deliberately did not want to know about issues relating to the SFS receivables.

as covering with regards to CBL Insurance and its dealings with the Reserve Bank". Mr Mulholland stated that "if it would influence an investor to buy or sell CBL Corp shares then they would disclose it".

[244] In relation to reserving, the minutes record:

> CBL were also asked what was being done to improve the poor quality claims data on the French business as it had been continually identified by the Appointed Actuary as an area that needs to be improved. CBL responded that they have tried many avenues to get market data but it is just not available. They now have over 10 years of loss experience on the DO and DL product themselves and the new SSP IT [claims administration] system should also improve the granularity of claims data.

[245] On 23 June 2016, CBLC announced to the market that it planned to acquire a majority (71%) shareholding in SFS. The announcement noted that the acquisition would "assist in removing the distribution concentration risk that SFS represented to CBL in being such a large client, and would further vertically integrate and consolidate CBL's market position in Europe, particularly in France". The acquisition was expected to complete before the end of October 2016, although this was extended until January 2017.[121]

[246] Following the announcement of the acquisition, CBL followed up in relation to reconciling the outstanding premium. On 29 August 2016, Mr Ray emailed SFS, copying Mr Mulholland and others. This email included:

> Over time there has been a steady build up of premium receivable which as at 31/5/2016 amounts to € 63,517,787.11 (this is the 100% share ie SFS's, CBL's and Elite's combined share)
>
> Over the last few months CBL has implemented a new insurance administration system called SSP which has given us the ability to match the written premium and paid premium at an individual policy level. With this new detailed view we have identified a large amount of this premium receivable relates to older underwriting years.

*Reserving update*

[247] Meanwhile, on 1 August 2016, PwC sent CBLI its valuation report as at 30 June 2016, addressed to Mr Mulholland. It recommended a review of the

[121] CBL conducted a $60m equity raising in September 2016 (at a placement price of $3.45) to fund the acquisition and organic growth initiatives.

methodology underlying the CBLI reserving model (the model used to book net outstanding claims provisions each month) before the next valuation. This recommendation focused on a change to allow release of risk margins when claims were paid. Recommendations from previous valuation reports (that work continue to understand the claims and recovery processes and implementing changes to processes, to explore new valuation models, to work on data reconciliations, claims data/analyses and third-party recoveries) were updated and left open. The October and December 2016 ARC meeting minutes indicate that CBLI and PwC were progressing work with this review and other work to improve understanding of the claims and discovery pipeline, develop alternate valuation models and reconcile data. At the December 2016 ARC meeting, Mr Coulter explained that the ultimate loss ratio method, which previous valuations had used, was best used in younger underwriting years, and that as claims developed, the traditional actuarial approach was to gradually blend in other methodologies and therefore place more reliance on actual experience as claims data developed for older underwriting years.

*SFS receivables continued*

[248] In November 2016, Mr Clements visited SFS in Luxembourg to educate them on the CBL Group reporting processes and timelines. Mr Clements was able to talk with SFS about the extent of the SFS receivables. On 15 November 2016, following Mr Clements' call to Mr Ray, Mr Ray emailed Mr Harris and Mr Mulholland to let them know it had become clear there was a material problem regarding premium cancellations that had not been reported to CBLI by SFS. Mr Ray asked for a get-together on a call to discuss the matter further. Mr Mulholland replied the following day:

> [Mr Harris] and I will discuss this weekend and come back.
>
> Until we catch up let's just leave things where they are currently and not send things around on email at this stage.
>
> We are looking at a number of things in relation to it and will advise once we have had a chance to get responses on them.

[249] In an email exchange between Mr Harris and Mr Mulholland about the issue on 16 November 2016, Mr Mulholland said "We just need to know how we want to

deal with it now and going forward" and "I am reluctant to get on any calls". He said in evidence this reluctance was because he was travelling and cellphone coverage was intermittent. Mr Harris replied:

> …How are you going to handle [Mr Ray] then? He is liable to fire this around to everyone.
>
> We can discuss on the weekend.
>
> I also wonder why [Mr Ray] thinks these figures are reliable.
>
> …

[250] Mr Ray said he was concerned by the statement about not recording these issues in emails as it felt like they wanted to hide the problem. I do not infer that was Mr Mulholland's intention. He was travelling and likely thought discussion of the issue was preferable – with Mr Harris in the first instance. In any event, the issue was apparently discussed on Mr Mulholland's return to New Zealand. Mr Ray also said that when there did not appear to be any movement on the SFS receivables problem, he continued to feel very stressed and concerned, and that he and Mr Clements decided they would discuss the issue with Mr Hannon as chair of the ARC. They did so on 1 December 2016. Mr Hannon's response was to discuss the matter with Mr Harris and Mr Mulholland.

[251] The following day, Mr Harris and Mr Mulholland had a call with Mr Antoine Guiguet, CEO of SFS, and then advised Mr Ray and Mr Clements that Mr Guiguet said their conclusions about the SFS receivables were incorrect. Mr Ray said he felt this completely undermined their credibility. He said that given their work on the project with SFS, Mr Guiguet's view, without any particular supporting detail, was surprising and frustrating. Mr Mulholland said they should focus on the year-end financials, reporting and audit, and let SFS investigate the SFS receivables more at their end.

[252] Mr Clements said that when he returned to New Zealand, he and Mr Ray met with Mr Mulholland, who explained that Mr Harris had sought the view of Mr Guiguet. Mr Guiguet's opinion was that SFS's chief operating officer, Mr Guillaume Bourhis, was new and must have been incorrect, as Mr Guiguet was certain that there was no problem. Mr Clements said he recalled a discussion with

Mr Harris where he was visibly frustrated and explained to Mr Clements that we could not have people "going off half-cocked" like this, meaning Mr Ray and Mr Clements raising concerns about a material issue when, in Mr Harris' view, there was not one. Mr Clements said he was a little embarrassed given SFS senior management were saying there was no issue, and he and Mr Ray could not "prove" that there was an issue as the data they were working with was so messy. The outcome of the conversations was that they would need to provide more certainty on what was going on and what the numbers actually looked like.

[253] Mr Ray said that in January 2017, when Mr Bourhis emailed to draw attention to the additional work that SFS needed to perform to understand the bad debt, he continued to feel very frustrated that this issue was not being given the level of attention he felt it needed from more senior levels within the CBL Group. Whether or not that is correct, the issue was not escalated – or did not develop – until mid-2017, addressed below.

*2016 year-end reports*

[254] On 16 February 2017, PwC sent its valuation report for CBLI as at 31 December 2016 to Mr Mulholland. This report said that overall, the net outstanding claims provision for CBLI had increased by $18.9m to $150.8m in the year to 31 December 2016. The primary reason for the increase was the underlying growth of the business, which was partly offset by a $11.5m reduction in the foreign exchange (FX) rate adjustment. New claims incurred over the year, as a result of business growth and additional premiums being earned, increased provisions by more than the reduction in provisions due to paying claims and receiving recoveries. The impact of this experience was an increase of $34.0m in the gross provision and an increase of $30.8m in the net provision, including risk margin. Due to the long-tail claims notification period of the builders' warranty products, this trend was expected to continue until the full 10+-year claims cycle had been completed for all of the products. The report also stated:

> …Loss ratios have been strengthened in the EISL – Contractor DL – Elite product this year and further strengthening may be required as experience emerges on the recent underwriting years. CBL management is aware of this emerging trend and is monitoring the EISL – Contractor DL – Elite

> development. However, there has only been a partial release of SFS – Craftsmen DL – Elite reserves and, if experience continues as it has been, releases from this product would more than offset any further strengthening required for EISL – Contractor DL – Elite. Thus, at an overall company level, we are satisfied with the level of provisioning.

[255] On 21 February 2017, the ARC met to review various documents for the CBL Group's full-year reporting, including the valuation report and draft financial statements for the year ended 31 December 2016. On 24 February 2017, CBLC made an announcement to the market on its 31 December 2016 results, reporting that it had increased its underlying operating pre-tax profit by 27.2% to $76.2m, well ahead of the $63.6m CBL had forecast ahead of its listing in October 2015. The notes to the financial statements included stating that CBLI's Solvency Ratio as at 31 December 2016 was 188.6%. CBLC's supplementary information for the annual results dated 1 March 2017 stated that the full-year 2017 guidance indicated strong revenue and operating profit growth on a constant currency basis, with underlying operating profit growth of 18-22% on 2016.

[256] On 23 March 2017, the ARC met again. The meeting pack included PwC's draft FCR and draft s 78 report for the year ended 31 December 2016, CBLI's draft solvency return for the year end, a report from Deloitte on its audit of the financial statements of CBLI and its review of the solvency return, Deloitte's draft limited assurance report on the solvency return, draft financial statements, and CBLC's draft annual report. The draft FCR contained "key issues" relating to the long-term financial condition of CBLI, including "Under-estimation of reserves and over-estimation of recoveries".

[257] Mr Ray said he had been told not to include the SFS receivables issue on the ARC agenda – he believed by Mr Hannon. Mr Ray said that nevertheless, Mr Hannon, Mr Harris and Mr Mulholland were aware of the issue as they had been discussing it. He said that while he and Mr Clements continued to work on the reconciliation process, he remained concerned about the potential implications of the SFS receivables for CBLI, and that the issue was not being given sufficient attention by management. Mr Guiguet's view was that the SFS receivables were collectable, but Mr Ray still had doubts over that conclusion.

[258] On 29 March 2017, PwC issued its finalised FCR as at 31 December 2016. This contained the same “key issues” as discussed at the March ARC meeting.

[259] On 10 April 2017, CBLI lodged with RBNZ its solvency return as at 31 December 2016. This return had been reviewed by the Appointed Actuary. It showed a Solvency Ratio of 189%. This was underpinned by a capital injection from the proceeds of the IPO. The SFS receivables had not been subject to an (increased) RCF in this solvency return as they were treated as less than six months past due. Mr Clements said he and Mr Ray felt their work and findings had been undermined by Mr Guiguet, and by Mr Harris’ reaction.

*European regulators’ concerns in early 2017*

[260] Meanwhile, from early 2017, European regulators were raising issues. In January 2017, ACPR in France contacted CBI to share its concerns about the classification and reserving practices of CBLIE and Elite in the sale of French construction business. ACPR was concerned about the abnormally low loss ratios, and thus low pricing being applied by these companies compared with other participants in the French Construction Insurance market. The primary concern was the risk that CBLIE and Elite were under-reserved and would not have sufficient funds to meet policyholder liabilities in the future. CBI approached CBLIE about this in late January 2017 and requested information about its pricing, reserving, governance and other regulatory/compliance processes.

[261] In February 2017, GFSC asked PwC in the United Kingdom (PwC UK) to undertake a “skilled person review” of Elite’s reserves (a third-party expert review ordered under legislation).

[262] On 15 March 2017, CBI requested a business plan from CBLIE. The business plan provided to CBI on 31 March 2017 indicated that CBLIE was anticipating very high growth of 416% in its GWP for 2017 compared with 2016. This was based on the planned transfer of substantial amounts of business from Elite to CBLIE. Following receipt of this plan, CBI requested that CBLIE consider voluntarily pausing the transfer of business from Elite to CBLIE until the issues in relation to governance and reserving had been resolved to the satisfaction of CBI. However, this did not

occur. CBI requested further information from CBLIE throughout April to June 2017. The information provided by CBLIE in response to these requests heightened, rather than allayed, CBI's concerns. For example, information provided to CBI in June 2017 indicated that in the year to May 2017, CBLIE already had GWP of over €52m.

[263] During this period, on 8 May 2017, Elite emailed Mr Harris, Mr Mulholland and Mr Ray saying that the French regulator was being particularly vocal with other European regulators in promoting "the French code", and that Elite's regulator was asking why Elite's incurred loss ratios on DL and DO insurance were so much lower than those of their competitors. Elite sought supporting data because this had become a significant issue from a regulatory standpoint. Elite also said they expected the French regulator would have a conversation with its Irish counterpart once it found out that CBL Europe was writing significant business in DO and DL in France.

[264] Mr Ray prepared material with some market data, noting that CBLI was different from the market and therefore not comparable. In evidence, he said this was not his informed view, but was what he had been told by the underwriters and management, and that he did not recall seeing any scientific analysis or data to support this view. However, there was no such caveat in his records at the time.

*SFS receivables continued*

[265] In April 2017, Mr Mulholland, Mr Donaldson and Mr Clements met with SFS in Luxembourg regarding integration following CBL's acquisition of SFS. Mr Clements said there was no discussion of the receivables at this meeting.

[266] On 26 May 2017, Mr Clements said in an email to Mr Guiguet and Mr Bourhis that there was a gap of €60m between the data of CBLI and that of SFS as at February 2017. Mr Clements said:

> …the CBL share is around 80%. These are obviously very large write-offs we're talking about, so want to be 100% certain this is correct before we propose any of this upwards. Implications would be wide and receive a lot of attention - we'd like to discuss next week before taking this to a wider group.
>
> …

[267] On 31 May 2017, Mr Bourhis replied summarising their call, indicating that €29m of the €60 data gap between the written and paid bordereau for the SFS receivables as at end of February 2017 were terminations not cancellations.

[268] On 8 June 2017, Mr Clements responded to Mr Bourhis. Mr Clements' email included:

> We showed this to [Mr Mulholland] as this aged premium has implications for our solvency calculations (we need to write off premium aged over 1 year for solvency reasons, even if we still consider legally or actually collectable), and [Mr Mulholland] is very sceptical that the €29m is truly going to be converted into cash. The questions put to us, which we'd like your help with, are:
>
> 1. Over what time period will the €29m be collected - for example if it is truly collectable, can we collect in the next 90 days and have the cash passed onto the insurance entity?
>
> 2. Is the amount that will be actually cashed different to the technical/legal collectability – what percentage of the €29m will really be collectable?

[269] Mr Clements said he had significant concerns about the collectability of the debt as if nobody was chasing it, then it was unlikely to be received. He prepared a problem and outcome analysis which he sent to Mr Christer on 16 June 2017. However, the issue was not discussed at the ARC meeting on 13 June 2017.

*PwC UK report on Elite reserving*

[270] Meanwhile, on 6 June 2017, RBNZ had a conference call with GFSC because GFSC had concerns about Elite's reserving. GFSC advised RBNZ it had commissioned a skilled person report by PwC UK into Elite. On 7 June 2017, GFSC shared a summary of the provisional results of PwC UK's (draft) report with RBNZ. PwC UK's concern was directed at CBLI's ability to meet its reinsurance obligations to Elite. GFSC's summary cast doubt on the accuracy of Elite's reserving for its exposure to the French construction business in this context. The results indicated that Elite was under-reserved. RBNZ was concerned that these results strongly implied that CBLI was similarly under-reserved because there was commonality between the books of both insurers (ie the business insured was the same). GFSC was concerned about the possibility that CBLI would not be able to fulfil its reinsurance obligations, and would in turn threaten the solvency of Elite as a ceding insurer.

[271] Mr Harris had received the PwC UK report and sent it to Mr Mulholland on the night of 6 June 2017. The next morning, Mr Harris also sent it to Mr Ray asking Mr Ray "if there is a double-up with the reserving AND the deferral of premium". Mr Ray said his impression was that Mr Harris was trying to discredit the findings by PwC UK and find explanations that showed the reserving numbers identified were too high. In any event, later that day, Mr Ray advised Mr Harris and Mr Mulholland of two areas where CBLI could challenge PwC UK's findings.

[272] On the evening of 7 June 2017, RBNZ emailed Mr Harris, copying Mr Rhodes, asking "[a]s a matter of urgency" for a conference call. Mr Rhodes was overseas with limited connectivity at the time. On 8 June 2017, RBNZ had a conference call meeting with CBLI (including Mr Harris and Mr Mulholland) and Mr Coulter of PwC in New Zealand (PwC NZ where necessary to differentiate from PwC UK) to outline RBNZ's preliminary concerns and get CBLI's cooperation to respond to PwC UK's report. RBNZ did not share its file notes with CBLI – of this call or others.

[273] On 13 June 2017, RBNZ had a further conference call with CBLI to discuss GFSC's concerns with Elite's reserving. Mr Mulholland was not on the call. The RBNZ file note included:

> [RBNZ] discussed the draft S121 notice and said we would send through a draft following the call. It is just an information request but we need to formalise it. [Mr Harris] was concerned about anything that may be disclosable to the market. [RBNZ] added that it is similar to the notice issued for the CAT Risk Survey, in being information gathering to elaborate on the FCR and ILVR figures. (RBNZ gave the impression it would not be disclosable).

[274] On 14 June 2017, RBNZ issued a notice to CBLI under s 121 of IPSA requiring CBLI to supply by the following day information on CBLI's DO and DL insurance and reinsurance business, and a description of any other insurance or reinsurance business for CBLI for which Elite or Alpha was either cedant or reinsurer. This s 121 notice was not subject to any express confidentiality restrictions.

[275] The next day, CBLI sent its response to RBNZ as required. Mr Harris also emailed Mr Ray, Mr Clements, Mr Sam Damoussi (regional manager – France) and Mr Bernie Niehaus (claims manager):

> If anyone gets requests for information from Elite from now on, could [Mr Mulholland] or I know about it and please don't respond until we OK it please?
>
> For the time being anyway.

[276] On 16 June 2017, Mr Cole of RBNZ asked to meet with the Appointed Actuary to give some background on the Elite issue. Mr Rhodes reported this to Mr Harris and said the only thing he would share with RBNZ at that stage was that they had not yet heard or seen anything that gave any cause for concern about reserving levels. Consistent with that, Mr Cole said Mr Rhodes indicated that he was comfortable with CBLI's reserves on the current information.

[277] On or about 22 June 2017, GFSC provided the draft PwC UK report dated 21 June 2017 to RBNZ. GFSC said the report was provided to assist GFSC in assessing the likely risks to Elite's principal asset, the reinsurance programme it had with CBLI, and that the report disclosed a likely shortfall in reserving by Elite of its French construction business that would have a major impact on Elite, and potentially on CBL. CBI received a copy of this draft report too.

[278] A regulator call on the EIOPA Platform was convened on 22 June 2017. RBNZ said they needed time to review the report – should there be a reserve deficit of $170-200m at CBLNZ, this would be very serious for the Group, as they would not have sufficient capital.

[279] The same day, RBNZ advised CBLI that it had received the draft PwC UK report. Mr Harris asked for a copy. The next day, RBNZ sent this draft PwC UK report to Mr Harris and Mr Rhodes. Mr Harris circulated it internally within CBLC. This draft report was marked "Strictly Private and Confidential". The executive summary included:

> ***2.2. Key findings for French construction business***
>
> - The company's systems are not able to provide data triangles and other reports usually required for actuarial review;
> - The data used by management and the external actuaries for reserving makes no use of case estimates and has not distinguished between 1 year and 10 year contractor's liability business, which have fundamentally different characteristics;

- In the approaches to reserving adopted by management and the external actuaries there has been no explicit consideration of the material future exposure period for contracts written with a 10 year term.

- Our estimates suggest a material deficiency in the held reserves net of reinsurance of 27m EUR; and

- Our estimates suggest a deficiency in the held reserves gross of reinsurance of 147m EUR, which highlights the reliance of the company on the performance of its quota share reinsurer.

[280] Mr Ray said the reaction around the office was one of great concern as this was the first actuarial report identifying that CBLI's reserves could be materially understated, since the report provided an expert opinion on Elite's reserves for French Construction Insurance and this business comprised a significant amount of CBLI's business. Also, the loss ratios that had been identified by PwC UK were significantly higher than those identified by CBLI. The report questioned the basis on which Elite had assessed the claims risk on its DO/DL insurance policies and hence the level of reserving that was required. Mr Mulholland did not recall great concern, but acknowledged there would have been surprise about the report. Mr Mulholland said this was a matter that he, and CBLI, took very seriously. He said the conclusions in the draft report did not reflect the reality of CBLI's claims experience. He was concerned that RBNZ did not seem to understand CBLI's business and how it differed from other French insurers. Nor did RBNZ seem to understand that even if there were issues with Elite's reserving, this did not automatically mean there were issues with CBLI's reserving given Elite also wrote a number of insurance products that CBLI did not. He considered that CBLI had to assess its own data and rely on the expertise of its own Appointed Actuary. He believed it did this and reserving was properly addressed.

[281] PwC NZ commenced work to try to understand the reasons for the difference between the PwC UK report to GFSC and CBLI's estimates, including whether GFSC was using the same data as CBLI. Mr Mulholland said there was no suggestion from PwC NZ that CBLI was under-reserved.

[282] Also on 23 June 2017, Mr Harris had a phone call with RBNZ about the draft PwC UK report. RBNZ said it had yet to perform a detailed review of the PwC UK report, but it viewed the report as a credible piece of work that raised some major

issues. RBNZ said it was essential that it obtain the views of CBL and PwC NZ on the report quickly and hence it would send a s 121 notice seeking a response to PwC UK's report. RBNZ said it was proposing a change to CBL's Solvency Margin condition of licence whereby it proposed a Solvency Ratio range of 250%-300% to reflect the emerging risks (i.e. if using CBL's assumptions). RBNZ also said it was conscious that the CBL Group was a listed entity but it did not expect that the issue of a proposal to change CBL's licence would trigger any disclosure obligations for the parent company, and that the s 121 notice and proposed change in licence conditions were confidential.

[283] In evidence, Mr Cole acknowledged that 250%-300% were round numbers, so somewhat arbitrary, and that at that point RBNZ had no particular idea of what the under-reserving or the suspected under-reserving might be. However, he said he was able to do some "back-of-the-envelope" calculations based on the PwC UK report which would have fed into that suggestion.

[284] Following the call, RBNZ sent Mr Harris the further s 121 notice. The covering letter summarised the information required:

- A response to the Elite reserve information as to how it applies to CBL.
- An "as if" solvency calculation for CBL that incorporates the Elite reserve information in a consistent manner.
- A recent solvency position of CBL.
- As a contingency, information on wider resources available to financially support CBL should it be needed.

[285] In relation to confidentiality, the letter said:

> **Confidentiality (refer: s 135-136 of the Act)**
>
> This notice, comprising information relating to the exercise of the Reserve Bank's powers under the Act, is confidential and must not be published, disclosed, or used except for the purposes of the Act or in connection with the exercises of powers conferred by the Act, or to your legal advisors.
>
> **Offences (refer: s 136 (2)**
>
> Failing to comply with s 136 (confidentiality) is an offence punishable, in the case of an individual, by imprisonment for a term not exceeding 3 months or

> a fine not exceeding $50,000, or in the case of a body corporate, a fine not exceeding $500,000.

[286] Mr Fiennes said that RBNZ did not want information relating to RBNZ's possible actions entering the public arena and, to the extent RBNZ could control this, it did not want stakeholders (including current and future policyholders) to lose confidence in the insurer on the basis of incomplete information. He said that it was part of RBNZ's role to protect them, and that RBNZ's responsibility was not to shareholders or investors.

[287] That same afternoon, Mr Harris updated the Board and Mr Mulholland:

> Summary of call:
>
> 1. RBNZ got the PwC UK draft report yesterday noon.
>
> 2. There are some concerning outcomes expressed in it.
>
> 3. RBNZ said it was done on a professional basis and appears to have expertise.
>
> 4. Purpose of the call was to send a S121 notice attaching the PwC UK draft report to CBL, and giving us 7 days to make a response to it.
>
> 5. Depending on what our response was, RBNZ proposed that we would be required to increase the solvency capital in CBL Insurance Ltd to 250% - 300%. That would not be imposed until we had the chance to make the response to the report. And I think we would get a few further days to actually do the increase, if we were not able to pull holes in the draft report.
>
> 6. In RBNZ view, this matter at the moment is an internal regulatory capital issue of a CBL subsidiary, and not a market-notifiable event of CBL Corporation. (I think the RBNZ was talking about even if we have to increase solvency capital, - but possibly not. They may refer to this in the S121 notice.
>
> 7. They have agreed the 7 days to start from Monday and not this afternoon.

[288] Mr Mulholland replied saying:

> I am struggling how the RBNZ can say this based on the information and experience we have.
>
> We will work this through from our side but I hope they have not taken a position already given their history with CBL.

[289] Management, including Mr Mulholland, then sought to document CBLI's reserves approach, why they believed it was adequate, that they had data to support all

the key assumptions, and to add any information that undermined the draft PwC UK report.

[290] On 28 June 2017, following a meeting with PwC NZ, Mr Damoussi sent Mr Coulter at PwC NZ (copied to the CBL team) a list of points that found fault with the draft PwC UK report. Mr Coulter responded proposing a meeting at 11:00 am. Mr Mulholland replied to Mr Coulter:

> Having read your email below I would just make a minor observation that everyone seems to be missing.
>
> Industry loss ratios at 120% for this business then comparing it to our book is like saying Industry loss ratios for motor would apply to a company that only insured female [drivers] between the [ages] of 40-45 who only drove on Sundays. There is no correlation.
>
> There seems to be this desire by others to say because CBL writes these classes of business they should be modelled against other insurers who write the entire market for large amounts of premium as opposed to our book which is a small niche of profitable business in a large market. This macro versus micro review misses the entire premise of how CBL does its business on all lines of business we do.

[291] This is consistent with Mr Mulholland's evidence about his understanding of CBLI's niche business (at [128] and [165] above). Although Mr Ray suggested he did not understand why CBLI and Elite's loss ratios were much lower than those of the French insurers operating under the relevant French Code, there is no record indicating he raised this at the time.

[292] The Appointed Actuary/PwC NZ prepared a response to RBNZ's s 121 notice. The response was dated 30 June 2017 but finalised on 3 July 2017. PwC NZ's covering letter addressed to CBLI concluded:

> We have confidence in the information that we have been provided by CBL Insurance. In our view, nothing has come to light from the Elite Reserve Information that suggests reserves held by CBL Insurance were materially deficient as at 31 December 2016. A full reassessment of the reserves of CBL Insurance will be done as at 30 June 2017 in the normal course of business.

[293] Also on 3 July 2017, Mr Harris responded to RBNZ's 23 June 2017 letter and s 121 notice. This included:

> We take assurance from our Appointed Actuary, and our external Auditors and their qualified actuary who have all expressed confidence in our processes, our data and the adequacy of our reserves and solvency. PwC NZ have gained an excellent understanding of CBL in the three years they have acted as our Appointed Actuary. It is their knowledge and certainty of the adequacy of our processes and reserving that we believe should provide the comfort that the RBNZ are seeking in light of the draft PwC UK report.

[294] After setting out deficiencies with the PwC UK report, the response concluded:

> In summary, CBL and PwC NZ have seen nothing in the draft PwC UK report to change our views on the adequacy of CBL's reserving and solvency as at 31 December 2016. Reserves will be updated as at 30 June 2017 with the assistance and input of PwC NZ as our Appointed Actuary in the normal course of half year-end reporting.
>
> We note your advice that the Bank's Notice is confidential. We expect that this confidentiality requirement will apply equally to this response letter, and the attached Report by our Appointed Actuary, PwC NZ in response to your Section 121 Notice dated 23 June 2017.

[295] On 5 July 2017, PwC UK issued its final report in which it confirmed that the conclusions reached in the draft report were unchanged. The same day, Elite went into solvent run-off, which meant it no longer issued new products or renewed products, and therefore could no longer operate as a main ceding insurer for CBLI.

[296] On 7 July 2017, RBNZ requested a meeting with PwC NZ the following week, without CBL present. Mr Harris' email of 9 July 2017 to PwC NZ said it was "essential we are all very staunch on what has been done and signed off on every 6 months, and your recent response to RBNZ questions". PwC NZ met with RBNZ on 10 July 2017. Mr Cole gave a heads-up on the actuarial aspects of RBNZ's feedback following the response to the s 121 notice. Mr Rhodes understood the next step would be to carry out the 30 June 2017 valuation and to take the points raised by RBNZ into account during that exercise.

[297] On 13 July 2017, RBNZ sent the final PwC UK report to CBLI and the Appointed Actuary at PwC NZ. The same day, RBNZ met with CBLI (Mr Harris and Mr Parrott) and Mr Rhodes. The minutes of the meeting record:

> [RBNZ] asked [Mr Harris] if he is confident the issues are manageable, whether there is a need to raise capital or make market disclosures? [Mr Harris] responded that there is only a possibility of a small amount of security for CBI's comfort, and if solvency needs to be higher than CBL's own

> target 140-165% then the Board would see [this as] requiring disclosure to the market. [Mr Harris] added that capital raising is not only a bad look but it is inconceivable as a possibility.

[298] On 14 July 2017, Mr Cole emailed Mr Rhodes and Mr Harris, providing high-level feedback on the submissions made by CBL and the Appointed Actuary on the 23 June 2017 notice of proposed variation to conditions of licence to increase CBLI's required Solvency Ratio. No decisions had been made, but RBNZ considered the reasons for the proposed variation remained valid.

*First CBI direction*

[299] In parallel, on 23 June 2017 in Ireland, CBI was concerned about the level of reinsurance business that CBLIE conducted with CBLI. Any material financial difficulties experienced by CBLI were likely to threaten the payment of reinsurance claims due to CBLIE. If this were to occur, it would impair CBLIE's ability to meet its obligations to its customers (policyholder claims as they fell due), and potentially the solvency of CBLIE. Therefore, CBI issued a direction to CBLIE (first CBI direction). The first CBI direction stated that:

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

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

[300] The letter containing the first CBI direction sent by courier was not marked or stated to be confidential. However, the covering email from CBI to Mr Larry Sherin (CEO of Allied Risk Management Ltd (Allied), CBLIE's consultant actuaries, and proposed CEO of CBLIE as part of CBLC's acquisition of Allied) attaching the letter contained a header stating "Central Bank of Ireland - CONFIDENTIAL".

[301] Ms O'Mahony said the purpose of the header was to indicate to CBI personnel what restrictions there were, if any, on the dissemination of the contents of the letter

by CBI to third parties – not to restrict the dissemination of the letter, or the first CBI direction, by CBLIE to third parties. She said the use of the header was based on an information classification scheme introduced to CBI between April and August 2017, based on European System of Central Banks policies around information classification. During and after that period, when a letter, such as the correspondence with CBLIE, was created in CBI's system, there was a prompt to select a classification, and "confidential" was one of the default settings. CBI uses five levels of classification: 'Secret', 'Confidential', 'Restricted', 'Unrestricted' and 'Public'. She said the information classification scheme is an internal system designed to ensure CBI and its personnel adequately protect third-party information regarding regulated entities (much of which is confidential). Its purpose was not to impose confidentiality restrictions on those third parties – they are free to use their own information as they see fit. As far as Ms O'Mahony was aware, no one at CBLIE ever discussed the meaning of the confidentiality header with CBI at any stage.

[302] I accept Ms O'Mahony's evidence as to the purpose of the header.[122] Given the FMA's narrowed claims, it is unnecessary to address its effect – but I accept that the header on the email sent to Allied did not impose confidentiality restrictions on CBLIE over the first CBI direction, which was not itself marked "confidential".[123]

[303] On the same day, in a separate letter, CBI also advised CBLIE that it intended to impose a condition of authorisation with respect to the conduct of CBLIE's business and sought submissions from CBLIE on this proposal. The condition would require CBLIE to collateralise all obligations due from CBLI in a trust account for the exclusive benefit of CBLIE. This letter advising CBLIE of CBI's intention to impose a condition of authorisation was not marked or stated to be confidential. However, this letter was sent with the same covering email that attached the letter containing the first CBI direction, which contained the header stating "Central Bank of Ireland - CONFIDENTIAL".

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[122] There was no consistent difference in the application of the "confidential" header between CBI's formal direction letters and other correspondence. Some correspondence included information that was confidential to CBLIE – for example, minutes of the meeting between CBI and the CBL Group on 20 December 2017.

[123] Mr Borrie said he would have expected disclosure of the first CBI direction in CBLC's interim financial statements. However, it is unnecessary to address this further given the FMA's narrowed claims.

[304] On 3 July 2017 in Ireland, CBI sought a waiver of confidentiality from CBLIE to enable CBI to have detailed discussions with RBNZ (a non-European Economic Area supervisory authority without the normal permissions regarding exchange of information under Solvency II). The waiver was subsequently signed and given to CBI on 20 July 2017. This waiver related to CBLIE's confidential information.

[305] On 4 July 2017 in Dublin, EIOPA and CBI met with CBLIE to discuss CBLI's French business. Mr Rhodes attended. Following the meeting, PwC NZ assisted in collating data requested by CBI.

[306] On 6 July 2017, the Board reviewed a summary of the meeting with CBI and EIOPA, although Mr Mulholland did not attend the relevant part of the Board meeting.

[307] On 7 July 2017 in Ireland, CBLIE provided its detailed response to CBI's letter of 23 June 2017 signed by Mr Harris as chairman, noting it was authorised by the directors of CBLIE.[124] A draft had been sent to the CBLC directors for review. The response included:

> The Boards of CBL Corporation, CBLNZ and CBLIE (and their advisers) are absolutely satisfied with the current levels of capital and solvency in each regulated insurance entity across the CBL Group which significantly exceed all regulatory requirements, including, in particular, CBLIE.
>
> …
>
> We are very concerned to receive your Direction, and proposed Condition. This is a drastic premature measure that our board considers warrants due process and consultation. We therefore ask you to lift the Direction and to re-consider the Condition, pending discussion and agreement on the way forward, and whilst RBNZ considers CBLNZ's response to the RBNZ re the "draft report" from PwC UK. This will allow us to effect proper and reasoned responses to any questions you might have. We are particularly concerned that you would act without providing any basis for doing so, other than some unsubstantiated material apparently provided to you by ACPR, and the "draft" caveated report on Elite by PwC UK.
>
> …
>
> The Board of CBLIE do not accept that CBLIE is exposed to increased prudential risks, and further, CBLNZ and CBLIE continue to manage their business and operational processes in a conservative, prudent, and diligent manner.

[124] The other directors were Mr Mulholland, Mr Donaldson, Mr Sherin, Mr Kevin O'Brien and Mr Christer.

*SFS receivables update – July 2017*

[308] On 20 July 2017, Mr Clements emailed Mr Mulholland and Mr Christer (who were both in Ireland [125]) about the SFS premium issue requesting a call, saying they were "really now at the decision point on this topic for half-year" with only four weeks until accounts were due to the ARC, suggesting options and preferring to adjust the financial statements on the basis of a "best estimate" of doubtful debts as an interim step.

[309] Mr Mulholland replied on 21 July 2017:

> This has been a topic of discussion at the SFS Board meeting this week.
>
> We are thinking through the response but we need the numbers ... without those we run a risk of over shooting or under shooting the reality of this. We are also looking at other options that we may be able to use to ensure CBL gets its money.
>
> We understand the time frames are getting impossible on this so will be back to you shortly.

[310] Mr Harris agreed.

[311] In evidence, Mr Clements said that he and Mr Ray were concerned about whether this approach was consistent with the relevant accounting standard – New Zealand Equivalent to International Accounting Standard 39 Financial Instruments: Recognition and Measurement (NZ IAS 39) – and were becoming frustrated with the lack of direction they were getting from the decision-maker on this – ultimately, Mr Harris. He said that essentially they needed a decision to "trust" the imperfect data they had, as it was the only data. He said they were indicating they would put this into the solvency calculation with or without a decision, as they felt obligated to do so.

[312] On 22 July 2017, Mr Clements sent a reply to Mr Harris and Mr Mulholland which included:

> Our main concern is that at June 30 we have NZD$100m of GWP receivable from a company pushed into run-off (SFS business only) – how late in the day will the aging (and recoverability) be brought into question? We risk losing

[125] Mr Mulholland was overseas from 17-28 July 2017.

> control of the message. We have the data to age the receivable in CBL Insurance's financial statements from SSP – this is not what we're waiting for, and there's no question around the availability of that data – PwC has it already, and so will Deloitte.
>
> The accounting standard (IAS 39) requires we make a 'best estimate' for doubtful debts, and if we have no experience to estimate this we should use peer group analysis and information such as past-due status (conceptually similar to IBNR - estimate the outcomes that will be determined in future).
>
> To the extent the financial statements are not adjusted, the solvency standard is punishing for aged premium. The capital resilience factors (risk charges) below add to the minimum capital. For every $100 this adds to the minimum capital we'll need $140-$165 of actual capital to maintain the solvency range of 140%-165%. It's better to actually write it off in the financial statements to avoid that multiplier effect, and to take the reduction in future expected losses and the positive tax effect.
>
> If there are offsetting positive outcomes, then we should argue to record these too, but again time is against us.

[313] Mr Borrie considered that Mr Clements' advice was in accordance with the requirements of the relevant financial reporting standard NZ IAS 39. Mr Mulholland did not accept that he read this email.

[314] Mr Greyling from Deloitte said he was told sometime in July 2017 that the SFS insurance data reconciliation and SSP processes had revealed a potential material issue with aged premium receivables due to CBLI from Elite on business produced by SFS, at a meeting with Mr Ray and Mr Clements that Mr Mulholland and Mr Harris joined for a period. He understood the issue was identified because the SSP system systematically analysed the premium and claims data at a policy level. This resulted in the premiums being aged from the date the policy was written, whereas SFS's processes were not as clear. Once the premium written date was extracted from the SFS insurance data and used, the system showed that there was potentially circa $35m in reinsurance premium aged over 12 months to be collected by CBLI from Elite.

*Reserving update – July 2017*

[315] On 23 July 2017, Mr Clements sent Mr Harris an email, copied to Mr Mulholland, in relation to Elite's 20% retention run-off. This email said that:

> [Mr Coulter] has hinted at strengthening required for 30 June (although we haven't seen a draft report yet) – would hope €21m + €2m should cover this.

[316] Mr Harris replied, copying Mr Mulholland:

> We have to resist strongly any strengthening at 30 June, unless there is a line that we agree there is no choice.
>
> PwC have been "spooked" by RBNZ, and until recently there was talk of releasing some reserves at 30 June or 31 Dec.
>
> [In] the past we have just accepted their views, this time we might not do so if we have different views.

*First RBNZ direction – 25 July 2017*

[317] On 25 July 2017, RBNZ wrote to CBLI and issued a direction under s 143 of IPSA which provided that CBLI:

(a) must not without the prior written permission of RBNZ enter into any transaction or series of transactions that had the effect of increasing its exposure to the business of Elite, providing new or increased levels of financial support to any insurer or reinsurer not currently owned by CBLC, obtaining or increasing an ownership interest in any insurer or reinsurer, purchasing from another insurer a portfolio of insurance or reinsurance polices, or purchasing any other business; and

(b) must maintain a Solvency Ratio of at least 170% (and Actual Solvency Capital of at least $3m);

(first RBNZ direction).[126]

[318] The covering letter acknowledged CBLI's different view of the data used by the European regulators and that it would "take time to work through the different data sets and opinions to come closer to a definitive view", but RBNZ was not convinced that CBLI was likely to be able to demonstrate its approach to reserving was prudent. The letter noted that CBLI's calculated Solvency Ratio as at 31 May 2017 was 179%.

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[126] In *R v Harris* [2023] NZHC 2635, Robinson J held that RBNZ was not empowered under s 143 of IPSA to issue this 25 July 2017 direction, nor the later directions of 22 November 2017, 29 January 2018 and 12 February 2018. The finding of invalidity in relation to the direction of 12 February 2018 is subject to appeal: *R v Harris* [2024] NZCA 176.

The first RBNZ direction was to ensure that CBLI's then-current solvency levels were not eroded by capital outflows.

[319] In relation to confidentiality, the first RBNZ direction included:

> Section 150 of the Act provides it is an offence for any person to disclose that this direction has been given to CBL Insurance Limited. Exceptions are provided in section 150(2) and include where the Reserve Bank consents in writing to disclosure of the direction.
>
> The maximum penalty in the case of a breach by CBL Insurance [Limited] of either section is a fine of up to $500,000.

[320] Mr Clements received this RBNZ direction from PwC and forwarded it to Mr Mulholland, saying "FYI – the premium issue is not going to hold up to this scrutiny." Mr Mulholland – who was overseas – replied:

> Let's not get [too] worried at this time.
>
> I am meeting [Mr Harris] shortly and in discussions with the board and will let you know when I have more.
>
> We still don't have a number so that is making it slightly more difficult as well.

[321] Mr Clements replied:

> We don't have CBL and SFS data lined up, that sounds like it will take months. But there are two issues that need two different data inputs (one we don't have, and one we do have):
>
> 1. Financial statements – the issue is about **recoverability**, and making an estimate of that. [Mr Guiguet] keeps saying everything in their data is recoverable and they are chasing it; we don't have data reconciliations to tie CBL and SFS, so can we assume once we reconcile the data there will be a significant amount recovered? The board needs to estimate the recoverability (apply judgement), and from what I'm hearing they are effectively estimating it's all recoverable. There is plausibility, albeit it may appear aggressive when aging is taken into account and compared to peers that likely have conservative bad debt policies based on aging.
>
> 2. Solvency – this is recoverability with the judgement taken out, it's simply the **mathematical age of debt** on the financial statements. There's no need to reconcile CBL data back to the data [Mr Guiguet] says is collectable and being chased. We have the data to mathematically age the debt in the CBL Insurance financial statements – we've done it (attached). PwC and Deloitte have this data, and so will the RBNZ investigator, as it's the premium inputs used for actuarial reserving. It's not plausible to say we didn't have this data, it's in SSP, in emails, in various spreadsheets. The only reason it hasn't been

> factored into solvency previously is because the Navision aged report was used, which is unreliable as it is on bordereau summary level and just uses first-in-first-out. Per the solvency standard (extracts below) adding the real aging now we have it should just be a business as usual improvement.
>
> Summary would be:
>
> | **Issue** | **Decision Type** | **Data Required** | **Data available** |
> |---|---|---|---|
> | Financial statements | Judgement/estimate of recoverability | CBL and SFS data reconciled | No |
> | Solvency | Mathematical aging of debt | List of aged receivables | Yes |
>
> So the problem is we are now obliged to use the aging data we have for the solvency. Which brings the aging into the [spotlight]. Which means the recoverability estimate in the financials has to stand up to scrutiny.
>
> I'm not in a position to say "I didn't have the data, so I prepared the solvency calculation this way" – I simply don't have that defence as too many people have received this data directly from me already. So how can I not add it to the June solvency?

[322] They then exchanged further emails as Mr Mulholland asked about the solvency impact. Mr Clements said writing off the premium net of commissions it would be 130%, and only writing off the premium it would be 113%. Mr Mulholland then said:

> Also we would need to add back in the money back from Elites claim account at cash v 40% risk charge plus the other amount they are paying is to take on the risk … at some stage

[323] Mr Clements replied:

> If 130% is the base to compare against, then I think writing off $38.4m of net debtors would bring it back to 149%. This includes wiping out the current year tax expense of $6.2m.
>
> Then bringing the Elite cash back to 0.5% would bring us back up to 179%. If we action that we should send it to BNZ so that we don't add to our asset concentration risk charge with ANZ.

[324] Mr Mulholland said he was confused and asked that they discuss it when he was back in the office. Mr Clements then sent him a simplified example indicating that a big part was that the write-off in financials meant they would reduce the tax

expense, but even without that it was still worse to hit the denominator (minimum solvency) with the $38m than it was to hit the numerator (actual capital).

[325] The next day, 26 July 2017, RBNZ wrote again to CBLI issuing another s 121 notice seeking further information, including monthly solvency reporting, and proposing variation to CBLI's conditions of licence, including bringing forward the half-year and year-end reporting timeframes.

[326] On 26/27 July 2017, RBNZ learned via CBI that DFSA required Alpha to increase its total claim provision (reserves) by kr407m (approximately $86m at the time).[127] The majority of this related to French DO policies.

*CBI conditions*

[327] On 28 July 2017, CBI imposed a range of conditions on CBLIE requiring, among other things, that CBLIE collateralise any obligations due to it from CBLI in a trust for the benefit of CBLIE (CBI conditions). This restricted the funds from being used for any other purpose. The letter containing the CBI conditions was addressed to Mr Harris as chairman of CBLIE. The letter was sent by email and courier. The letter was not marked "confidential". However, the email attaching the letter, sent to Mr Sherin, was headed "Central Bank of Ireland – CONFIDENTIAL".[128]

*Work on 2017 half-year accounts*

[328] Around this time, CBLC/CBLI management were working on the half-year financial statements for the period ended 30 June 2017 in preparation for the Board meeting on 17 August 2017 and ARC meeting on 22 August 2017.

[329] On 28 July 2017, Mr Ray prepared a CBL Group Finance Report on the impact of the PwC claims reassessment (total net claims excluding risk margin quantified as $21.2m, totalling $33.8m with risk margin and fees) and the SFS receivables aged over

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127 Mr Nissen's expert Danish translation evidence was received by consent.

128 Given the FMA's narrowed claims, it is unnecessary to address the effect of the header on the email version of the CBI conditions.

one year (quantified as $38.4m). This Finance Report calculated CBLI's Solvency Ratio according to four different scenarios:

(a) a base Solvency Ratio of 180.9% not taking into account either the PwC claims reassessment or the possible impact of the SFS receivables;

(b) taking into account the PwC claims reassessment, the Solvency Ratio decreased to 149.3%;

(c) taking into account the PwC claims reassessment and aging of the SFS receivables, the Solvency Ratio decreased to 109.7%; and

(d) taking into account the PwC claims reassessment and writing off the SFS receivables, the Solvency Ratio decreased to 110.1%.

[330] Mr Ray sent this Finance Report to Mr Harris together with the 30 June 2017 profit and loss, and the CEO charts.

[331] Also on 28 July 2017, Mr Ray and Mr Clements had a meeting with PwC to look at their first review of the CBLI reserves. Mr Ray emailed Mr Mulholland after the meeting, reporting "unfortunately a very large unfavourable increase to reserve of circa $30m. They are still working on this." Mr Mulholland replied asking, "How can the reserves go up 30m when they just did a review and said they are fine!"

[332] Mr Ray's response to Mr Mulholland included:

> PWC Report from meeting : Attached is the summary page totalling $21.2m
>
> - This excludes risk margin – potentially circa +$4m
> - PWC stated:
>   - not a reaction to the PWC UK report
>   - impact largely due to recent developments and historical triangles changing

[333] This reference to triangles was to the recalculation of the claims data triangles. These triangles take the claims data by each underwriting year from the start to the current period. The Appointed Actuary used these data triangles to project out to the end of the life of each underwriting year. This was part of a project that was being managed by Mr Christer (CBL's CEO, Europe) that had initially been triggered by CBI's investigation into CBLIE.

[334] Also on 28/29 July 2017, Mr Harris (in Europe) emailed Mr Rhodes, copying Mr Mulholland and Mr Hannon, saying:

> I have just had a phone call from [Mr Mulholland] to say that "[Mr Ray] and [Mr Clements] have just come out of the meeting with PwC, and PwC have told them they are intending to recommend strengthening of French Reserves by NZ$31 million as a one-off adjustment. With no discounting for the future PV."
>
> I don't know who it was from PwC that attended the meeting.
>
> I don't understand this, or the meetings between PwC and RBNZ that management have been excluded from.
>
> Or how this can be when a month ago, after questioning, and notably before the meetings with the RBNZ, PwC reported to CBL that our reserving at 31 December was adequate, and that it saw nothing from the material supplied from Europe to suggest any differently.
>
> Would you and [Mr Coulter] be available for an urgent teleconference later this pm?
>
> I will see who else I can get on the call, and advise some dial-in numbers

[335] This appears to have been the first reference to the adjustment as being "one-off". Mr Mulholland said that would have been portrayed to him by Mr Ray and Mr Clements. Mr Rhodes said he thought this meeting was with Mr Coulter rather than him. Mr Rhodes said he would not use the language of "one-off adjustment" because reserving is a continuous process and you are always reviewing it in six months' time, with changes likely to happen again, whereas "one-off" implies that you are not going to do it again. However, this was not advice he gave at the time. It is unclear who first used the term "one-off". It might have been Mr Coulter.

[336] Some hours later, Mr Harris sent a further email:

> Let's leave the tele-conference until we get a bit more understanding internally around this.
>
> Any comments you have in the meantime are always gratefully received. Naturally this has all come as a shock, and is going to raise issues if the total amount has to [be] handled in figures in the next week or so without a lot more analysis and debate.

[337] Mr Rhodes replied:

> Agree we need to discuss this properly.
>
> Just a couple of points;
>
> 1. The most recent discussion with Robert Cole of RBNZ was simply him alerting us to the fact that the PwC documents from the Elite court case may become public. We have briefed you fully on all other conversations
>
> 2. The process has not changed, we have always maintained that the December 2016 reserves were not understated but that the position will be fully reviewed for 30 June 2017 and the nature of a large long term insurance liability is that there will be volatility.
>
> 3. The new data that we have only just received is showing some unfavourable trends and it was important to discuss this and give an early indication to you as soon as possible. We stress that the conclusion is still very preliminary
>
> 4. We have undertaken to do more work over the weekend to give you an indicative range of likely impact

[338] Mr Harris replied:

> Thank you Paul [Rhodes], that puts it in some better perspective.
>
> We would also definitely like to understand the rationale for a sudden change in policy over applying a discount on these claims out into the future.
>
> Some other points that we are considering is the fact that we cannot and should not be employing knee jerk reactions here, and things need to be done promptly and properly, but without any haste. Some of these can continue to be monitored, some things can be strengthened or released over time, as we get more and better actual vs expectation.
>
> But we are very conscious we are about to report, our results, and have not informed the market of these potential figures or outcomes, so we cannot just dump this on the market a couple of weeks ahead of reporting results. That gives an entirely wrong impression of how we prudently manage our business.

[339] On 29 July 2017, Mr Mulholland told Mr Clements he had a call scheduled with the Board to go through everything. Mr Clements said in an email to him "if it's all out of the bag we should call in PwC to talk solvency, then Deloitte to talk financials, see if they can see any better outcomes than what we've looked at".

[340] On 30 July 2017, the Board held a teleconference. Mr Mulholland attended. In relation to reserving, the minutes included:

> The Board discussed the recent preliminary advice from PwC that CBL need to strengthen French reserves by $21m, and also remove the PV $10m discount on the reserves. [Mr Harris] advised that figures had not yet been explained by PwC, and were still being worked through, to see where savings could be made.
>
> The Board agreed that the rationale behind the surprising change of view from PwC was needed, especially considering it was only a month ago that PwC re-confirmed CBL's reserving for 31st December. [Mr Harris] and [Mr Mulholland] would meet with PwC Tuesday 1st August and report back to the Board.

[341] In relation to the SFS receivables, the Board minutes included:

> The Board discussed the issue of the written vs paid income and receivables figures coming through from SFS and how it may affect both the ability to maintain solvency above 170%, and the reconciliation of accounting numbers. [Mr Mulholland] to provide detail on the collectability and [aging] of any debt, and [Mr Hannon] to consider options.

[342] The minutes also referred to market disclosure:

> The Board agreed that there should not be a market disclosure at this stage, given the lack of certainty and that regulator actions are not based on fact. [Legal advice redacted] [129]

[343] The action column alongside this item noted the initials of Sir John Wells, Mr Harris and Mr Mulholland (the three members of the Disclosure Committee).

[344] On 31 July 2017, Mr Coulter emailed Mr Clements about valuation impacts. This included reference to market guidance:

> If you were updating the market for half year guidance, you could go with $15-20m range from higher than expected experience and due to negative

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[129] It is unclear from this brief reference what legal advice was received in relation to disclosure or whether it related to reserving, the SFS receivables, regulator action or otherwise.

> yields in Europe meaning that there is much less discounting than previously assumed. However, I think these estimates are still draft and are moving around too much to disclose to the NZX - ideally we need to look at SFS DO Alpha at least before any guidance is given.

[345] Mr Clements also emailed Mr Coulter asking if he was available for a meeting the next day on the latest actuarial position, including Mr Hannon, Mr Harris, Mr Mulholland and Mr Ray.

[346] Also on 31 July 2017, following a meeting with Mr Mulholland, Mr Ray emailed SFS asking for information urgently regarding the recoverability of the SFS receivables in the books of CBLI to help with reporting to the Board.

[347] The next day, Mr Clements emailed SFS and CBL recipients, copying Mr Mulholland, on the SFS premium issue:

> This matter has now been escalated to the CBL Corp board, as the aging of this debtor will be impacting the CBL Insurance 30 June solvency.
>
> Separate to solvency, we need to determine how this will/should impact the financial statements at 30 June, and we have a call with the board on Thursday morning NZ time to present this. We will also need to present the plan to resolve the data issues.
>
> …
>
> For the financial statements – which is the more immediate concern given we announce results on 24 August – we need to know that the €77m in the attached (being inception-to-date production [bordereaux], less inception-to-date paid [bordereaux]) will be followed-up by SFS for collectability…

[348] On 2 August 2017, Mr Clements emailed SFS again on bad debt scenarios for the Board, copying Mr Mulholland, and seeking input on the proposal to present three scenarios to the Board:

> 1. Conservative – assumes none of the 2010-2015 UW year receivables are collected.
>
> 2. Neutral – assumes a reasonably successful recovery is made.
>
> 3. Aggressive – assumes a more successful recovery is made.

[349] Mr Clements did not recall a response from SFS, but in an email on 4 August 2017 Mr Bourhis said he thought that Mr Guiguet spoke directly to Mr Harris about

this. Mr Clements replied that "We ended up giving them just two scenarios - write off nothing, or write off everything over one year."

[350] On 3 August 2017, Mr Clements sent Mr Mulholland a "heat map" spreadsheet setting out the considerations relevant to determining whether to treat the SFS receivables that were older than one year as a doubtful debt and write it off, or not to treat any of the SFS receivables as bad debt. Mr Mulholland replied that this should be sent to Mr Harris and the Board prior to the meeting that night. It was then sent to Mr Harris and the Board that afternoon.

[351] The same day, Mr Ray sent the Board, copying Mr Mulholland, an updated version of the Finance Report he and Mr Clements had prepared on 28 July 2017 on the PwC claims reassessment and the impact of the SFS receivables on CBLI's 30 June 2017 financial statements. This report made some adjustment from the previous report. It quantified total net claims excluding risk margin as $11.8m (totalling $17.1 with risk margin and fees) and an SFS receivables bad debt write-off of $38.5m. The report also outlined CBLI's Solvency Ratio in various scenarios. These each built on the previous step so the final scenario was the cumulative impact:

(a) previous solvency calculation (before any changes) – 182.8%;

(b) Elite collateral being treated as cash (risk charge reduction from 40% to 0.5%) – 218.7%;

(c) PwC impacts – 212.0%;

(d) PwC impacts with SFS receivables aged in the solvency calculation (i.e. no write-off for bad debtors) – 146.2%; and

(e) write-off SFS receivables of $38.5m in the financials – 165.8%.

[352] I note that treating the Elite collateral as cash was foreshadowed in the exchange with RBNZ back in 2015, but only once CBLI had satisfied RBNZ on the issue (see [227] above).

[353] Also on 3 August 2017, Mr Coulter emailed Mr Harris, copying Mr Mulholland, in response to Mr Harris' comments on the treatment of French DL large loss claims, which went on to address reserving more generally:

> Overall we would not be comfortable recommending any less than the $12m increase in central estimate. There are many assumptions made within this number and we have been [poring] over them for some time now as data has been provided to us. Small changes in assumptions can have big financial impacts and there is a lot of judgement around what to do in the tail where we don't have experience yet (for Elite business, in particular). With risk margin and the latest allowance for claims handling expenses, the total strengthening is around $17-18m (before tax).
>
> There are a number of other factors here that we cannot ignore: higher than expected claim numbers, including an additional delay in the recording of claim; data concerns around RCP underwriting years and inconsistent formats; both Elite and Alpha recent strengthening in their reserves (as reported by the RBNZ); and considerations of incurred triangles, which are still in development but suggesting even greater strengthening.
>
> We would be keen to understand the Board's view on whether they would accept this level of strengthening or not. Potentially they may not want to. However, they also may want to consider additional prudence on top - perhaps through adjustments to risk margins - to take a bigger hit now and make it easier, strategically, to resolve the serious issues that the group is facing.

[354] Mr Harris replied:

> I will make your views known to the board. I imagine they will have problems with agreeing to strengthening claims reserves when actual claims are going down and you are saying that otherwise to work off the actual claims, would come out too light otherwise [sic].
>
> We were all expecting that claims this half year might indicate a potential release of reserves, which for conservatism we might have left until the end of the year, to
>
> 1. Get additional corroboration with another two close quarterly reviews, and
>
> 2. To make a release now at half year would have a greater impact on profit [than] it might have at year end, and therefore it is better to do these things in H2, to avoid some of the volatility that you speak of below.
>
> Until we have a credible report which states that we are under-reserved I do not believe that we should be acting on situations other than the facts, and other than the PWC UK report which is seriously disclaimed and not written by an expert, - and which differs from [PwC NZ's] own views, then to strengthen reserves simply for strategic reasons and because the tail is looking too light seems quite strange.

> We note that Alpha has increased its reserves, but they have made it clear that actuarily they do not agree. It completely cuts across their data and loss triangles, but they decided that their regulator said that RBNZ had serious concerns about it, and Alpha decided the path of least resistance made it just as easy to put the reserves up, until CBL can show what the position should be.
>
> I will ask the board what they want to do,

[355] Mr Harris forwarded this email exchange with PwC NZ's view to the Board.

[356] Mr Mulholland said he did not recall reading and understanding Mr Coulter's email. He said the CEO and the Board were dealing with it, and he did not accept that he needed to be dealing with it too, saying that Mr Ray and Mr Clements were responsible for it. This was an example of downplaying his role, and appears inconsistent with the Board discussion (at [357] below), Mr Harris' email to Mr Mulholland two days later (at [358] below) and his involvement with PwC's draft CBLI valuation report received on 8 August 2017 (at [362]-[365] below).

[357] At 6:00 pm that evening, 3 August 2017, the Board met by videoconference. Mr Mulholland attended, as did Mr Ray and Mr Clements. The minutes included:

> **3. Initial view on disclosure**
>
> The Board reviewed MinterEllisonRuddWatts (MERW) and QC's advice on directions imposed on the company by the RBNZ and whether this was a matter for continuous disclosure under stock exchange rules and regulations. The advice received confirmed this was a matter between the company and the RBNZ and remained confidential as between the parties, and also accordingly was not subject to disclosure to the NZX.
>
> [Mr Harris] advised that RBNZ had also indicated it wanted to keep the matter confidential.
>
> …
>
> **6. Financials**
>
> [Mr Harris] and [Mr Mulholland] spoke to CBL Group's Finance Report on 30 June 2017 Financials with the impact from both CBL Insurance PwC Claims Reassessment and CBL Insurance SFS Premium Receivable write-off, previously circulated to the Board by email. CCL's operating profit was at $36.6 million, with analysts expecting around $40 million. On a positive note, the revenue was up on a constant currency basis.
>
> The Board discussed PwC's recent recommendation to strengthen reserves by $11.8 million, and how it would impact on the upcoming half-year

> announcement, market disclosures and solvency. It was agreed that going forward, internal actuarial reporting should be carried out quarterly, with external actuarial reporting carried out six-monthly.
>
> [Mr Mulholland] would meet with PwC as soon as possible to discuss the various issues, and report back to the Board. Accounting figures would also be updated to reflect recent movements.

[358] On 5 August 2017, Mr Harris emailed Mr Mulholland about the half-year results, announcements etc:

> I have been thinking about how we put all these recent things into perspective, and an action plan going forward.
>
> PwC NZ have done their reviews on things, several times now, - 2 months ago when they said we were adequately reserved at that point, and the draft PwC UK report did nothing to change that.
>
> [Mr Coulter] has started to say recently that he has thought for some time that our reserving model for RCD/DL for small craftsmen / micro builders has been showing signs of being too low, and he and [Mr Rhodes] are pretty firm on that now.
>
> We have been modelling claims and future [IBNR] claims at a bare claims ratio of 24% for this class. [That was news to me yesterday, - I had thought it was 28% - 30%.]
>
> If that is what claims are coming through at, then this is reality. I think that the good thing about our database and claims oversight, is that we can rely on it, and we can't really "shoot the messenger".
>
> My take on PwC NZ is that they have been "spooked" by what is happening overseas, - with Elite (as a result of PwC UK, and now Mazars), Alpha (taking the quick way out by increasing reserves to a 100% combined loss ratio), and CBI, and RBNZ (particularly).
>
> Notwithstanding this, PwC NZ have been pretty good at sticking to their guns, and our data and claims insight means they have a reality position that they (a) can rely on, but (b) have to stick to.
>
> And that really needs to go for us as well. If we look at it in context, the NZ$ 11m is a modest strengthening adjustment in our total reserves, notwithstanding it is a material adjustment when expensed through the P&L for a 6 month period.
>
> Especially when compared to PwC UK and even Mazars, saying that Elite should adjust reserves by €15m - €25m - for the 20%. Our adjustment for the 80% pales against those adjustments.
>
> We were quite tough on PwC NZ in terms of wanting them to reduce or smooth through the half year adjustment, and in their own way, I detect that they are really at their lowest, even though they might agree on Monday to a small reduction now but knowing that there will be another strengthening adjustment in H2. (And if so, I think they will say that in their 30 June report).

[359] Meanwhile, on 2 August 2017, RBNZ issued a further s 121 notice to CBLI requiring it to supply information on 14 issues that RBNZ had identified as being potentially significant to CBLI's reserves for its French Construction Insurance business. This related to issues in connection with the Appointed Actuary's reports, including the 30 June 2017 response. This required information was due on 23 August 2017.

[360] On 7 August 2017, Mr Clements sent Mr Mulholland a draft solvency position taking into account the PwC valuation report changes (presumably seen in draft before the 8 August email below) and aging of the SFS receivables, offset by the change in Elite collateral treatment. The Solvency Ratio was 155.3%. Mr Mulholland replied:

> Okay, we need to look at the charges and see if and how we get it closer to 170% ... If we can

[361] On 8 August 2017, RBNZ issued a further s 121 notice to CBLI, amending the 26 July 2017 notice and licence conditions to extend the timeframes following CBLI's feedback.

[362] Also on 8 August 2017, Mr Coulter sent Mr Ray and Mr Clements the draft CBLI valuation report as at 30 June 2017 (draft dated 7 August 2017). The results summary included:

> Overall the **net outstanding claims provision** for CBL Insurance Ltd (CBL Insurance) **has increased by $46.3 million to $197.1 million** in the half-year to 30 June 2017. The main reasons for the increase was the underlying growth of the business, some strengthening in loss ratios for the French construction business and a movement in the foreign exchange (FX) rate adjustment.

[363] The executive summary's update on French construction business included:

> The DO and DL French construction business continues to make up a significant portion of the reserves as at 30 June 2017. Since the previous valuation at 31 December 2016, experience has been higher than expected in terms of claim numbers. This appears to be a mix of both genuinely higher than expected development combined with the discovery of an additional delay between the reporting of a claim and when that claim appears in the data we rely on. Partly offsetting this impact was a reduction in the number of reported large claims after it appears that reviews have been carried out by third-party administrators on EISL claims to close reserves that were no longer necessary.

> Given the long-tail nature of these liabilities, our response to this experience has been measured. We have strengthened gross loss ratios for prior underwriting years based on the emerging experience and increased the gross loss ratios applying to the 2017 underwriting years to add additional prudence to the reserves being brought on to the balance sheet until we have more claims experience. We have made improvements to our reserving models to better adjust for any delays in the recording of claims. However, we note that if claims experience continues to track higher than expected, further strengthening in reserves may be required at 31 December 2017. Monitoring processes are being put in place to track and monitor claim experience, which will allow management oversight and potential mitigation of any adverse trends emerging.

[364] In relation to uncertainty and sensitivities, the executive summary also said:

> It is important to note that the estimate of the net outstanding claims provision is subject to a significant amount of uncertainty due to the long tail claims risk for some of the products written by CBL Insurance, particularly the French business. Profits are generally earned within one year, , but the reserves remain on the balance sheet for ten or more years. The ultimate claims costs of the claims outstanding at any particular date may be materially higher or lower than the current estimates, which can add significant volatility to the profit of CBL Insurance.
>
> The valuation results are most sensitive to the gross loss ratios, particularly for DL products, and the recovery rates on the DO products. At 31 December 2016, a 10% increase in the gross ultimate loss ratios for the modelled products will increase the net provision by $20.8 million while a 10% decrease in the assumed recovery rates will increase the net provision by $7.8 million. Note that the current risk margin is $30.6 million, which is well in excess of the outcomes from these sensitivity tests.

[365] CBLI's feedback on PwC's draft report was collated and provided by Mr Clements to Mr Coulter the next day. Among Mr Mulholland's marked up comments were:

> [CM1]: The Executive summary needs to have a comment that states PWC believe CBL is adequately reserved across its book and is managing the business prudently.
> The ongoing vagueness from the RBNZ needs to be addressed in a strong statement.
>
> …
>
> [CM3 – inserted as a comment to the sentence quoted in [363] above stating: However, we note that if claims experience continues to track higher than expected, further strengthening in reserves may be required at 31 December 2017.]: Everyone knows this to be the case, you may as well add if the experience improves then a release to reserves may be required. This sentence adds no value.

[366] Mr Coulter responded later that day. In relation to these comments, he said:

> In terms of a statement around reserves being adequate and the business being managed prudently, we don't think it's appropriate to make this statement in a valuation report. You wouldn't see these kinds of statements in any actuarial valuation report either. Reserves are estimates from a theoretical distribution and there is a good chance of them being under-stated or over-stated, perhaps materially, as new information comes to light. This is particularly true for long-tailed classes of business, which has a higher level of potential volatility. If you made these sorts of statements in a valuation report, we think this would actually make the position with the RBNZ even worse as it looks highly suspicious.
>
> We can remove the sentence around potential strengthening at December, but would like to put, in writing, to CBL's directors some background around our recent discussions and signal that further strengthening may be required in the second half of this year if there is a continuation, or even just stabilisation, of recent experience. Can you advise the best way to do this - ie is it a letter to Tony Hannon as chair of [the ARC] or did you want it to go to the entire Board?

[367] Mr Clements agreed to these wording changes and to sending this version of the draft report to Deloitte. He said that it was a question for Mr Harris or Mr Mulholland to whom the letter about strengthening reserves should be addressed. In the event, PwC spoke to this at the next ARC meeting (see [409]-[410] below).

[368] I accept that Mr Mulholland's comments on this draft report reflected his perspective at the time. But they show that he was aware of, and engaged with, PwC's reserving position, including that claims experience was tracking higher than expected and that further strengthening may be required.

[369] On 11 August 2017, following a discussion that day, Mr Ray sent a draft Finance Report on CBL Insurance SFS Premium Receivable (SFS Receivable Finance Report) to Mr Hannon, Mr Harris and Mr Mulholland (copying Mr Clements). This report identified the SFS receivables balances subject to solvency charge including $35.641m over one year (noting the 100% risk charge). This report included waterfall charts showing the commissions and fees connected to the aged receivables and showing a breakeven scenario given this – if 51% were collected, the overall impact to the CBL profit and loss would be nil (breakeven scenario). This SFS Receivable Finance Report was sent to Board members on 16 August 2017 in advance of the Board teleconference on 17 August 2017 (discussed below).

[370] On 14 August 2017, Mr Ray sent Mr Hannon, Mr Harris and Mr Mulholland (copying Mr Clements) an updated draft of this report. Mr Hannon requested amendments to the breakeven analysis and the report was resent. Emails between Mr Hannon and Mr Harris indicate the Board was going to consider (on 17 August 2017) both the aged receivables and reserve strengthening in relation to a proposed announcement/profit warning.

[371] The same day, Mr Clements sent Mr Coulter a draft solvency calculation as at 30 June 2017. This incorporated "SFS receivables > 12 months" of $35.641m and indicated a Solvency Ratio of 150%.

[372] On 15 August 2017, PwC provided a further draft valuation report. This did not involve any changes to the net outstanding claims provision figures. Mr Harris asked Mr Mulholland to send this draft, the paper on receivables and the half-year SOPL, consolidated P&L and balance sheet to the Board. Mr Mulholland obtained these documents from Mr Ray and sent them to Mr Harris who forwarded them to the Board, organising a Board meeting for 17 August 2017.

[373] Also on 15 August 2017, Sir John Wells met with RBNZ about the reserving concerns with the French construction business. He referred to reporting the following week and said PwC would increase the reserves for the French construction business by $18m. This would be announced ahead of the main half-year announcement. The file note of the meeting records that RBNZ asked if they would be announcing anything else and Sir John Wells referred to the SFS receivables, indicating that there would be a "one off write off" (to the tune of $20m-$30m, but he did not want to be held to that).

[374] There was also a covering memorandum attaching the SFS Receivable Finance Report, which stated it was from Mr Mulholland to the Board dated 17 August 2017. Both Mr Ray and Mr Clements described this document in their briefs as the "Mulholland Memorandum", but they accepted in evidence that they prepared it for Mr Mulholland to send to the Board. As discussed below at [381], it is unclear whether this covering memorandum went to the Board before or during the 17 August 2017 Board meeting.

[375] This covering memorandum explained management's views on whether the receivables were collectable and the options for dealing with them. Mr Mulholland said it recorded the cumulative belief of Mr Hannon, Mr Harris, Mr Ray, Mr Clements and himself, amongst others. The memorandum indicated that the aged debt over one year of SFS receivables amounted to $35.6m. Of this, approximately one third related to current customers. Given the inclusion of SFS commission in the aged debt, if 51% was collected, the overall impact to the CBL profit and loss would be nil (that is, the breakeven scenario). Commercial options identified were: investigating selling the debt to a third-party factoring organisation; and discussing with the vendor using the Vendor Loan Note of €15m to purchase part of the debt. The memorandum's conclusion indicated that:

> CBL Management are comfortable that the aged receivable presented in the CBL Insurance financial statements will not ultimately result in a material adverse impact to the net profit after tax of the CBL Group. There are a number of reasons for this, particularly:
>
> - there is an expectation, and some evidence, that some of the receivables have already been collected by SFS and with administrative and data support these amounts can be identified and appropriate cash passed to insurers;
>
> - SFS has indicated that there is potential under French law to invoke the personal liability of directors of client companies that have not paid premium for the compulsory insurance that the aged balances relate to;
>
> - Due to the SFS aged debt accounting policy that 'writes off' their share of the collectable when aged over 1 year (i.e. the SFS commission and fees on the 100% premium amount), there is scope to generate profits when collecting any receivable aged over 1 year. This provides a significant balancing effect for any future amount that is deemed uncollectable. The break even suggests only around 50% needs to be collected in order for NPAT to not be impacted.
>
> - There are commercial options available, including significant amounts withheld from the SFS vendors, that can mitigate any adverse impact, should there be one.

[376] Deloitte also had input on the receivables issue before the 17 August 2017 Board meeting. Mr Hannon indicated to Deloitte on 16 August 2017 that he thought there was sufficient uncertainty that they should continue to leave receivables as a "WIP" for the next reporting period. In an internal Deloitte email to Mr Wilkes the same day, Mr Greyling did not disagree with management's judgement that no provision was required. However, Mr Greyling said:

> I strongly believe this matter should be disclosed in the Market announcement and the financials – even if the provision is $nil or immaterial – this information is relevant to the understanding of the financials.

[377] Mr Greyling also recalled saying on a conference call with Mr Harris, Mr Hannon, Mr Mulholland and Mr Ray (at 11:00 am on 17 August 2017) ahead of the Board meeting that they needed to have something in the accounts to alert people to the potential SFS receivables issue and had to make a similar disclosure in the market announcement accompanying the results release. Mr Greyling remembered discussing the language that might be used and using the word "material". Mr Mulholland said he did not recall this but that based on the amendments to Note 6 (to the consolidated interim financial statements – final version below at [400]) it seems clear Mr Greyling suggested further disclosure in the interim financial statements. I accept that note 6 was amended following this discussion.

[378] On 17 August 2017 from 6:00 pm to 7:15 pm, the Board met by teleconference. In relation to the half-year results, the minutes indicate that Mr Harris reported that:

> The operating profit of $22.4m was an $18m "miss" on the $40m expectation, which was mostly due to the one-off reserve adjustment of $11.7m plus 25% risk margin and a reduction in claims handling expense.

[379] In relation to the draft PwC valuation report, Mr Harris reported that:

> PwC had completed the detailed report on a further six months of data, and had asked for an $11.7m strengthening of reserves. Provided this adjustment was made, they were satisfied CBL were adequately reserved. After a robust discussion with PwC, management had decided to heed the recommendation, noting that it was very late in the piece to rework the financial statements if there were ongoing discussions with the actuaries.

[380] In relation to the SFS receivables, the minutes indicate that:

> The paper showed the total amount of the receivables balance that CBL would need to collect in order to avoid a write-down on the receivables in the balance sheet. The receivables in the balance sheet were 80% reinsurance share of 75% (net of commission) of the premium. Added to the "grossed up" collective gross figure arising from those calculations, was the estimated common level of SFS fees it charged (15%) to the Policyholder.
>
> The Board agreed that this reconciliation project needed to be a priority, involving a fully-resourced plan and regular Board reporting.

> Deloitte had decided today that this half-year's earnings did not require an adjustment provided CBL decided on suitable wording in respect to the matter for the market disclosure notes.
>
> An agenda for ARC meeting next week would be circulated following tonight's meeting. Further, wording in respect to the matter for the upcoming announcement would also be circulated and discussed at the Audit and Risk Committee meeting, to be finalised.

[381] It is unclear from the minutes whether the Board had the covering memorandum referred to at [374]-[375] above. Emails between Mr Mulholland, Mr Ray and Mr Clements suggest it was only created around the time of the meeting. A version was likely provided to Mr Mulholland during the Board meeting, but it seems unlikely it was before the Board. Mr Mulholland said that if it was, Mr Harris would have spoken to it. In any event, the Board had the attached SFS Receivable Finance Report, and it is not disputed that the Board's briefing was to the same effect as the covering memorandum's conclusion; namely that the aged receivables presented in the CBLI financial statements would not ultimately result in a material adverse impact to the net profit after tax of the CBL Group.

[382] Mr Greyling did not attend the Board meeting, but said that to the extent the statement in the minutes that "Deloitte had decided today that this half-year's earnings did not require an adjustment" was directed at capturing the discussion earlier that day, it was an inaccurate record. Mr Mulholland said his understanding of Deloitte's position was that they did not require CBLI to make a doubtful or bad debt provision for the SFS aged receivables as the data they had reviewed supported Mr Clements and Mr Ray's analysis in the SFS Receivable Finance Report. However, as Mr Greyling said, only the Board could decide, and did decide (on 22 August 2017), not to make an adjustment to the half-year earnings because it was satisfied management's judgement around the collectability of the receivables from Elite was appropriate. Mr Mulholland should have known that Deloitte's position was dependent on management's view.

[383] In relation to market disclosure, the minutes said:

> [Mr Harris] spoke to the two draft versions of the market disclosure notes, circulated by email prior to the meeting as follows.

> The Board discussed the wording of the disclosure note. It was acknowledged there was both a negative and positive aspect of the results which needed to be communicated; firstly that there was a profit warning, secondly, that in terms of revenue there had been a very good first half-year. Once words were finalised, [Mr Mulholland] or [Mr Harris] would communicate the embargoed disclosure to analysts tomorrow morning, and answer their questions before releasing to market.

[384] Later that evening, Mr Mulholland emailed Mr Ray and Mr Clements a question from the Board:

> 1. If we have to take the hit to solvency for writing off the debtor over a year old and we know that our claims reserves would drop on the back of a write off can we reduce the claim provision for solvency as well?

[385] Mr Clements responded:

> No, it [is] just an asset risk charge based on the premium.
>
> We'd have to write [it] off in the accounts as by not doing so we're still saying we're liable for the claims.

[386] Mr Ray said he was not confident the covering memorandum was a realistic characterisation of the likelihood of recoverability of the SFS receivables, particularly given the time, effort and cost involved in pursuing recovery. He said the scenarios presented in this memorandum relied on a very significant amount of recoveries on policies at an individual level, and his experience of SFS's systems and resources was that such a material undertaking would be difficult and slow. Given his role in preparing the memorandum and the absence of any contemporaneous record of such reservations, this evidence seemed to downplay his involvement and indicate a degree of hindsight. In any event, despite what Sir John Wells had told RBNZ on 15 August 2017, the evidence does not indicate that the Board or Mr Mulholland rejected the recoverability conclusions summarised in the 17 August 2017 covering memorandum, or that they otherwise decided to write off or make a provision for the SFS receivables in the interim financial statements.

[387] Mr Borrie gave detailed evidence on this recoverability/doubtful debt issue and the resulting profit impact of the aged receivables, which he considered was very likely

material. He said that, applying the relevant accounting standard,[130] he would have expected some impairment (doubtful debts) to have been recorded by CBLI and, on consolidation, in CBLC's interim financial statements, a provision for doubtful debts. He considered there was a marked risk in terms of the collectability of the SFS receivables given their nature and age. Mr Pigou also considered there was a material risk that the market needed to be informed about. Mr Borrie did not believe it was reasonable for the Board or Mr Mulholland to rely solely on the views expressed in the covering memorandum of 17 August 2017 when other internal correspondence within the CBL Group acknowledged significant collection risk associated with the SFS receivables, and particularly the aged receivables.[131] Mr Borrie also noted that some of the numerical analysis in the covering memorandum provided a reason to record a doubtful debt provision. He considered the non-standard representation letter to be a flag to those signing it as to what they need to be careful about and what they need to consider most, but he did acknowledge that how the individuals who signed the representation letter came to that position was more a line of questioning than anything else. However, it is unnecessary to consider disclosure of the profit impact further given the FMA's narrowed focus on disclosure of the solvency impact rather than the profit impact of the aged receivables.

*CBLC market announcement – 18 August 2017*

[388] On 18 August 2017, CBLC issued a market announcement with a profit warning ahead of the release of its June 2017 financial statements. This was the first updated guidance to the market since 1 March 2017.[132] The announcement said:

> **CBL RECORDS STRONG GROWTH BUT PROFIT IMPACTED BY STRENGTHEN**
>
> 18/8/2017, 9:22 am MKTUPDTE
>
> CBL Corporation expects to miss its 1H17 internal operating profit expectations by $17.5m largely due to a $16.5m strengthening of CBL Insurance reserves.
>
> CEO Peter Harris, said "The decision by the Board to strengthen reserves in certain lines is seen as a prudential and appropriate approach and takes into

130 New Zealand Equivalent to International Accounting Standard 39 Financial Instruments: Recognition and Measurement (NZ IAS 39).
131 Mr Pigou also took issue with the covering memorandum.
132 At [255] above.

account advice from CBL's external actuarial consultants". In providing their advice, they looked back at policies issued up to 10 years ago, and forecast forward for the next 10 years, however the full amount of that strengthening adjustment will be taken through current period earnings."

1H17 expected operating profit is now expected to be $22.5m. This compares to $35.1 m in 1H16.

Peter Harris emphasised that this is not a restatement of existing reported and open claims, - it is an adjustment that our independent actuaries consider is prudent to make to our future claim forecasts. To put this into perspective, the $16.5m adjustment to CBL Insurance reserves represents a strengthening of 7.2% of CBL's total net claims reserves of $229m.

…

[389] CBLC also held an investor/analyst call that afternoon, describing the strengthening as conservative. The following question and answer was also noted:[133]

Q CBL insurer for decades or more. Have losses increased leading to the adjustment or was provisioning too low?

A Change is lack of discounting, monitor performance, actuarial advisers tell us the amount to catch up for looking back and looking forward, reserving takes into account all of this, plus risk margin on top. Underlying earnings for HY have been good, only a one-off adjustment. Even with higher reserving will meet numbers going forward.

[390] Also on 18 August 2017, Sir John Wells wrote to RBNZ following their meeting on 15 August 2017. In relation to reserving, his letter included:

We will be strengthening our reserves by a one-off adjustment of circa $18m in relation to the French business, following advice from PwC NZ, after their six-monthly review, and upwards-adjusted appropriately ongoing loss modelling of this business…

[391] In relation to SFS receivables, the letter said that CBL was:

…working through with our auditors, Deloitte, reconciliations between receivables generated between SFS and CBL, via Elite. This may result in adjustments to some degree in CBL's accounts, which the Board will address promptly.

[392] The same day, Deloitte provided its half-year report in advance of the ARC meeting on 22 August 2017. In relation to the SFS receivables, this report included:

133 In RBNZ's notes. Notes by Accident Compensation Corporation (ACC) also referred to the "one-off adjustment".

> Based on our analysis and discussions, we have no information that suggests management's [judgement] in this regard around the ability to collect these amounts is unreasonable.
>
> We also reviewed the disclosure of this matter in the interim financial statements and consider it sufficient for the purpose of the interim financial statements.
>
> The Board should satisfy itself that management's [judgement] in this regard is sound and it remains appropriate that no provision is held for these amounts as well as the adequacy of disclosure that has been made in the financial statements.

[393] Mr Mulholland said that as he did not prepare the analysis of the collectability of the receivables himself, he took significant comfort from these statements. Accepting that he did not prepare the analysis himself, he was at least aware of it, and would have been aware that it involved management's judgement. He also knew that Deloitte sought specific, non-standard representations in their proposed representation letter:

> In relation to the amount owed to CBL Insurance Limited from Elite Insurance Company, we confirm the following:
>
> - We have disclosed to you and provided you with all information relevant to the recoverability of any amounts due for which no impairment has been recognised.
> - We are satisfied that we have investigated and sought sufficient appropriate information to enable us to adequately assess the ability of the Group to collect the amounts due.
> - We are not aware of any other facts or circumstances that may impact on the recoverability of the outstanding amounts.
> - The amounts due represent valid amounts due from customers under insurance policies placed with Elite Insurance Company and reinsured with CBL Insurance.
> - We confirm that we have appropriately considered the requirements of NZ IAS 39 *Financial Instruments - Recognition and Measurement* in determining whether an impairment provision is required for any of the outstanding amounts.
> - The disclosures in the condensed consolidated interim financial statements is adequate and accurately reflects the facts and circumstances surrounding the receivables.

[394] As Mr Borrie said, and Mr Mulholland should have known, these non-standard representations indicated that Deloitte considered that a higher level of judgement on

the part of the Board was necessary with respect to the SFS receivables. It was the responsibility of the company and its directors and officers, not the auditor, to accurately prepare the financial statements. Each set of financial statements contained a positive assertion from directors that the financial statements complied with accounting standards and presented fairly the financial position and performance of the Group. In the context of interim financial statements, Deloitte as auditor only needed to be satisfied that management's judgement was not "unreasonable" (a so-called negative assurance). This is not the same as the auditor saying that it agrees with the assessment of management. Even so, I accept that Mr Mulholland was comfortable signing the representation letter (see below at [408]).

[395] On 21 August 2017, Mr Christer met with Mr Clements, Mr Damoussi and Mr Coulter to review PwC's half-year reserve (valuation) report. Mr Mulholland did not attend, but was sent a copy of Mr Christer's email after the meeting which identified as a threat "[f]urther strengthening of the reserving [patterns]".

[396] Also on 21 August 2017, RBNZ advised CBLI that under s 130 of IPSA, it had appointed McGrathNicol to investigate the affairs of CBLI. This followed a lengthy internal RBNZ memorandum dated 17 August 2017 prepared by Mr Cole, in which he said:

> It is my current view that there is a material likelihood that CBL group has insufficient resources to meet the costs of suspected under-reserving of its French business…

[397] The purpose of RBNZ's McGrathNicol engagement was to determine the likely impact on the solvency of CBLI of its French business, in the expectation that this would provide either an indication of CBLI's overall solvency (allowing a basis for possible regulatory action), or highlight other aspects of CBLI's business where further investigation was desirable. RBNZ acknowledged that CBLI had advised it would commission Milliman (European actuaries) to review the reserves of its French construction business, but RBNZ had decided to proceed with its own investigation (envisaging that McGrathNicol would engage Milliman to assist). The scope of the review included the adequacy of CBLI's reserves for its French construction business, and advising on the appropriate level of reserves as at 31 December 2016 and 30 June 2017 (under the Solvency Standard). RBNZ confirmed that the notice of investigation

was confidential and must not be published or disclosed other than to CBL's legal advisers, Appointed Actuary or with the consent of RBNZ. At that time, RBNZ did not consent to a market announcement as it considered the purposes of IPSA were best served by allowing the investigation to proceed in confidence. The investigation was initially expected to take a few months – but it took considerably longer.

*ARC meeting – 22 August 2017*

[398] On 22 August 2017 at 9:00 am, the ARC met to review the half-year interim consolidated financial statements and Appointed Actuary's valuation report. Invited attendees included Mr Mulholland and representatives from PwC and Deloitte. The ARC meeting pack (circulated on 19 August 2017) included PwC's draft valuation report of 15 August and Deloitte's draft report for 30 June 2017 (referred to above at [372] and [392] respectively).

[399] In relation to the review of the interim consolidated financial statements, the ARC meeting minutes record that:

> [Mr Hannon] noted that the reconciliation between the insurance administration systems of SFS (PAS) and CBL (SSP) was mentioned in note 6 to the accounts, noting that the reconciliation was incomplete. [Mr Harris], [Mr Mulholland] and the committee members noted they were comfortable with the note wording given the reconciliation work was likely to take a number of months, and that having recently been identified as a reconciliation project it was too early to draw any conclusions. Noted that this was an important project that needs to be given appropriate focus.

[400] Note 6 to the consolidated interim financial statements included the following:

> As at 30 June 2017 the fair values of the assets and liabilities acquired in acquisition of the SFS Group are still provisional and pending final valuations. At 30 June 2017 there are a number of SFS records and data-capture systems still under review, including reconciliations to data historically provided to CBL by SFS in accordance with the historic MGA- reinsurer relationship. A material reconciliation under review is the policy level reconciliation between the insurer receivable and insurer payable balances, and at 30 June 2017 that reconciliation is incomplete. On completion of the final valuations and reconciliations the balances for the acquisition may be revised, which could, but won't necessarily, result in material favourable or unfavourable impacts to goodwill or the SOPL.

[401] Mr Ray said he was instructed to include this Note, but he "did not consider that this was sufficient disclosure given what we knew at this stage about the SFS

Receivables". He said he and Mr Clements had suggested to Mr Mulholland "a number of times that a provision of some sort should be made, but ultimately this was not our decision". He said he "was surprised that there was ultimately no reference to it in the interim financial statements". However, there was no contemporaneous record of any such reservation about provisioning, and Mr Mulholland said this was not raised with him or the ARC.

[402] Mr Greyling said Deloitte had reviewed the wording of this Note as part of their interim review and concluded it was sufficient to meet the requirements of the interim financial statements reporting.

[403] Mr Borrie said that the disclosure of the SFS receivables in Note 6 of the interim financial statements indicates that the Board considered that the information relating to the SFS receivables would be information that could influence the economic decisions of users of the financial statements. He considered that, while Note 6 was adequate if it was intended to be for the purpose of acquisition accounting, it did not alert users to the following issues, all of which were known to CBLC:

(a) the potential age profile of the receivables;

(b) the potential collectability issues associated with the receivables (which in turn could impact revenue and profit); and

(c) that significant judgement had been exercised in provisioning (or not provisioning).

[404] Mr Borrie's view was that more detail as to the circumstances associated with the SFS receivables should have been disclosed in the interim financial statements, either as part of an expanded Note 6, or (if Note 6 was confined to the acquisition accounting issue) in an additional note.

[405] The minutes also record the input of Mr Greyling from Deloitte in relation to the SFS receivables. He noted a key matter was that there was a total of $23m receivable aged over one year that appeared to be due from non-current customers of

SFS. When asked if Deloitte was comfortable that no adjustment was necessary in the financial statements:

> [Mr Greyling] confirmed that there was comfort in that the actual receivable amount for the group is larger than the amount on the balance sheet, but that it was a significant judgement made by the company given the quantum.

[406] Mr Mulholland said he took significant comfort from Deloitte's findings that they had no information to suggest management's judgement regarding the ability to collect the receivables was unreasonable, and Deloitte's opinion that disclosure in Note 6 of the interim financial statements was sufficient for the purposes of the interim financial statements.

[407] The minutes also record that the ARC addressed Deloitte's letter of representation:

> [Mr Wilkes] explained that the letter of representation was similar to one that management has signed before, but with specific representations on the receivables balances given the quantum of the judgement.

[408] Mr Harris signed the representation letter for and on behalf of the Board, and Mr Mulholland signed it for and on behalf of management on 23 August 2017 (letter dated 24 August 2017).

[409] In relation to reserving, the minutes indicate that Mr Coulter spoke to PwC's draft valuation report:

> [Mr Coulter] noted that overall a measured response has been taken to the additional number of claims being reported (and claims delays being identified) and that there are still uncertainties that could result in further strengthening at the full year.

[410] These minutes are consistent with Mr Coulter's note of his talking points for the meeting (but only sent to CBL on the evening of 24 August 2017), which included:

> We took a measured approach in our valuation and we did not respond fully to the recent claims experience. Accurate and timely data has been a concern that affects the estimated number of large claims. There is also uncertainty on how claims develop in the tail. Further strengthening at year-end may be required depending on claims experience and outcomes of any case reserve review.

[411] Deloitte's internal actuaries had also reviewed the outstanding claims reserve. Deloitte's draft report for 30 June 2017 recorded that:

> The reserve has increased significantly over the period, primarily as a result in the strengthening of reserves following a higher level of claims and some unexpected claims which [led] to an increase in ultimate loss ratios…

[412] The report stated that Deloitte's "review did not highlight any significant matter that warrants communication to the Board".

[413] After the ARC meeting, Mr Coulter sent PwC's latest valuation report as at 30 June 2017 with some further changes (largely to the recommendations section).

[414] The same day at 6:30 pm, the Board met to approve the interim financial statements, and consider PwC's 15 August 2017 draft valuation report and the SFS receivables. In relation to the SFS receivables, the minutes indicate that:

> [Mr Mulholland] advised he would be meeting with Mark Christer, Head of CCL Europe, who would be overseeing the project "on the ground" in Europe, and identifying specialist collection companies. PwC were allowing CBL to use specialist data software, and Deloitte analytics would feed into the SFS bank statement.
>
> The Chair requested a progress report to the Board, to ensure visibility over the project.

[415] On 23 August 2017, PwC issued the final version of the valuation report as at 30 June 2017. So far as relevant, this version reflected the earlier drafts.

[416] At 6:50 pm, Mr Senescall emailed a draft announcement to Mr Harris, Mr Mulholland and Mr Griffiths. This referred to the strengthening of reserves as being "one-off", consistent with the earlier references. At 7:15 pm, Mr Mulholland emailed Mr Harris some comments and mark-ups. At 7:21 pm, Mr Griffiths also did so. None of these concerned the reference to "one-off". Mr Harris also emailed the Board. At 11:10 pm, Mr Harris emailed Mr Mulholland, Mr Griffiths and Mr Senescall, advising that all of the Board (other than Mr Hannon whom he had not heard from yet) were happy with the draft, and therefore it was close to final subject to further comments. Mr Harris also noted he would send it to Ms Schenone at MERW

for her views, which he did at 11:12 pm. At 11:43 pm, Mr Hannon emailed Mr Harris with his comment.

[417] At 7:21 am the next morning, 24 August 2017, Mr Mulholland emailed Mr Harris and Mr Griffiths saying:

> I think we should remove the words one off. Strengthening can and may happen again so it is hard to say it is a one off.
>
> take a one-off $16.5m increase to its reserves
>
> Also the second to last paragraph around the expectations, are we not just opening ourselves up here to more questions? I understand the first part but to say a strong resurgence is expected in 2018 will just get questions like how strong.

[418] At 7:28 am, Mr Harris replied, copying Mr Griffiths and Mr Senescall, noting:

> I thought I had taken the "strong resurgence[''] out of it.
>
> One-off is definitely criticised where there are regular one-off adjustments. I agree we should either take out, or better still think up some better words for both of these items.
>
> I will be in just after 8:15am.

[419] Mr Mulholland replied less than a minute later saying "Okay let's finalise it when you get in. Thanks".

[420] At 8:08 am, Mr Griffiths forwarded Mr Harris and Mr Mulholland an email from Ms Schenone that included some redacted advice about the announcement and an amended announcement. Mr Mulholland said he was not able to waive privilege in that advice as the privilege does not belong to him. He noted, however, that the words "one-off" remained in the draft MERW sent to Mr Griffiths and Mr Harris.[134]

[421] Mr Mulholland referred to a further email from Mr Senescall to Mr Mulholland, Mr Harris and Mr Griffiths at 8:38 am, replying to Mr Harris' email; however, this email does not appear to be in evidence.

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[134] The FMA objected to the admissibility of this last sentence on the basis that implicitly, it partially relies on privileged advice. Mr Jones submitted that Mr Mulholland must be permitted to give evidence of the fact that the draft went to MERW and came back with "one-off" remaining in. In the event, the FMA did not pursue the objection.

[422] At 8:43 am, Mr Mulholland emailed Mr Harris a final draft of the announcement.[135] He said this draft was after referral to MERW and reflected the changes he understood were recommended by MERW, but did not reflect his query about whether they should take out the reference to "one-off". The "strong resurgence" reference had been removed.

*CBLC market announcement – 24 August 2017*

[423] At 10:19 am that morning, CBLC made a market announcement:

> **CBL REPORTS STRONG HALF-YEAR REVENUE GROWTH**
>
> 24/8/2017,10:19 am GENERAL
>
> CBL REPORTS STRONG HALF-YEAR REVENUE GROWTH
>
> Strong organic growth from operations saw specialist insurer CBL Insurance lift underlying profit in the first six months of the year by 2% to $23.6m. This was off the back of a 35% jump in revenue to $206.2m.
>
> However, as already signalled last week operating profit was impacted by the decision to take a one-off $16.5m increase to its reserves against future claim forecasts. This led to operating profit of $22.4m, down 36% on the same period last year and reported profit of $12.6m, down 32%.
>
> CBL Managing Director Peter Harris said, "Strategies to drive growth both at home [and] abroad performed, evidenced by the operating result recorded by the group. Whilst it was disappointing that our performance was tainted by the requirement to take an adjustment covering up to a 20-year span all in the half year, the board took the prudent decision to do so and based on independent actuarial advice. Moreover, it strengthens the company against unexpected claim activity."
>
> Mr Harris also noted that of the $16.5m, $10m 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.
>
> Mr Harris further noted that cash flow was again up significantly at $64.5m for the period and that total cash and cash equivalents now stood at $444,9m
>
> "A feature of the first half was our product expansion programme such as the launch of builders warranties in Victoria, Australia, the growth from our strategic partnership with DUAL in Spain, and our NAFTA US/Mexico border crossing program heavy motor."

[135] Mr Mulholland said that at 8:40 am Mr Griffiths sent him a further email from Ms Schenone with a further amendment to the announcement. However, this document was not in evidence. Again, Mr Mulholland said he cannot waive privilege in this advice.

> CBL completed on the acquisition of a 71% share in SFS in January - a €94m enterprise value transaction, and increased its senior leadership team in Europe.
>
> CBL Chairman Sir John Wells said the strong revenue growth to the 2017 financial year was encouraging.
>
> "The half year was also positively marked by CBL joining the S&P NZX50 and the reconfirmation of our A- credit rating by AM Best.

[424] CBLC also held an investor/analyst call by Mr Harris and Mr Mulholland that gave an overview of the financial results. Further, CBLC released a slide presentation which Mr Mulholland said was prepared by Mr Griffiths, with input from Mr Clements and Mr Ray. The slide run-through explained the claims strengthening. The concluding results outlook included:

> - Operating profit is below expectations for the half year following prior year and current period reserve strengthening that reduced operating profit
> - CBL expects 2H17 to result in continued strong growth in total revenue and maintains its guidance previously provided, but operating profit will remain below guidance by the amount of the prior period adjustments, although a resurgence is targeted for FY18

[425] A note of the call by Argo Investments Ltd (Argo) included:

> Reaffirmed FY17 guidance - <u>FY17 total revenue growth +12-15% (c/currency), underlying operating (EBIT) profit +18-22%</u> (excl 1H17 one-off reserving adj)

[426] A note of the call by Accident Compensation Corporation (ACC) referred to the outlook, including "…Claims strengthening. [Notwithstanding] the strengthening of claims reserves – will meet the numbers".

[427] Mr Cole's internal RBNZ email later that day indicates that he considered some aspects of the announcement and call were misleading, but he did not refer to the one-off increase in reserves. His note of the call included this reference to strengthening:

> CBL Insurance profit down due to reserve strengthening. Combined ratio 93% or 82% without prior year effects, expect lower in H2. Solvency ratio 150%.

[428] His email also queried Mr Mulholland's reference to reserving on the same basis as Europe. In addition, the email said:

> There was also a flavour of being a normal reserve review with the actuaries being conservative rather than correcting for prior under-reserving.

[429] While Mr Mulholland said he did not make any decision to retain the reference to "one-off" in the final version of the announcement, he also said he did not remember why it was left in, nor whether it was the subject of legal advice. "One-off" had been used on the 18 August 2017 call with analysts, and was used again on the 24 August 2017 call following the announcement. Given this, and the fact that Mr Mulholland and Mr Harris agreed to address the matter that very morning, it seems unlikely that leaving "one-off" in the announcement was an oversight.

[430] I also consider the reference to legal advice is a distraction. There is no evidence that lawyers had been involved in the discussions with PwC about reserving, nor that they knew about the issue. No comfort should have been taken from the fact that MERW did not edit "one-off" out of the draft.

*Solvency*

[431] Also on 24 August 2017, CBLC also released its interim financial statements. Note 3 stated that CBLI's Solvency Ratio as at 30 June 2017 was 150.2%. No explanation was given for the drop in solvency (from 188.6%) since the latest complete set of annual financial statements for the period to 31 December 2016. The drop was largely attributable to the 100% RCF applicable to the SFS aged receivables.

[432] The same day, Mr Coulter emailed Mr Harris, copying Mr Rhodes, Mr Mulholland and Mr Clements, agreeing with Mr Harris that RBNZ's 170% solvency requirement applied from 26 July 2017 (not retrospectively), but that they should notify RBNZ of the drop to 150%:

> …asap regardless and explain the reasons for the change along with the plan for remediation. Being proactive with our communication should help the relationship.
>
> Note that the solvency requirement should be interpreted as a forward looking requirement. Unless you write off some of the SFS aged debt, I can't see how we'll improve the solvency ratio by 20% and meet the requirement by 31 July. Section 24 of IPSA requires us to notify the RBNZ as soon as practically possible if we think it is likely that we will fall below the minimum requirement at any point during the next 3 years.

[433] The same day, after Mr Harris had tried to call RBNZ, Mr Parrott sent RBNZ an email saying that CBLI's solvency position as at 30 June 2017 was 150% and that CBLI was putting a plan together about what had driven the adjustment, and the plan to get the Solvency Ratio back to over 170%.

[434] The next day, 25 August 2017, RBNZ wrote to Mr Harris. The letter included:

> Failure to comply with the direction is a serious matter. We expect CBL to actively take steps to comply with the direction in a reasonable timeframe. We do not consider a few months to be reasonable. Please advise by 31 August 2017 your intended plan for how CBL proposes to restore compliance with the direction including the timeframe for doing so.

*CBI update – August 2017*

[435] On 24 August 2017 in Ireland, CBLIE responded to CBI's letter dated 28 July 2017. Mr Mulholland saw the draft and had nothing to add. CBLIE sought some flexibility as to the application of the new condition and requested that CBI allow CBLIE and CBLNZ the opportunity to put a proposal to CBI as to how it would comply with a condition that provided collateral or guarantee support in respect of CBLNZ reinsurance obligations to CBLIE.

*SFS receivables / solvency continued*

[436] On 25 August 2017, Mr Christer circulated an email, including to Mr Mulholland, about the SFS receivables. This email stated that the CBLC audit would have a financial cut-off of mid-October and Deloitte would be looking at potentially charging any resulting balance to the 2017 profit and loss statement, which would be "very unwelcome news given our bottom line miss at H1". In relation to proposed next steps, Mr Christer noted that he had not had a chance to speak with Mr Mulholland to agree this.

[437] On 28 August 2017, Mr Coulter sent an email, copying Mr Mulholland, summarising discussion with others on the remediation plan for CBLI solvency. This included:

> • Overall the drop in solvency ratio from 170% to 150% has occurred based on events post 30 June so there was little opportunity to mitigate prior to the balance date or the additional RBNZ direction. Presumably the same would

> now apply to 31 July management accounts and potentially 31 August management accounts.
>
> • The key driver for the deterioration in solvency position has been due to the SFS aged debt. A steering committee, which includes [Mr Mulholland], [Mr Christer] and [Mr Damoussi], has been established. They will meet weekly to work through progress made and options to recover & remediate (including debt factoring).

[438] The same day, Mr Harris emailed Mr Hannon saying that RBNZ were not happy about the prospect of solvency dropping below 170%, and had warned they were "taking it seriously". He asked about discounting of reserves. Their subsequent email exchange copied Mr Mulholland. In one email, Mr Harris said:

> Yes solvency will eventually get back up to 170% solvency on results, but the RBNZ are not prepared for it to take a couple of months.
>
> They consider it is a serious breach of the condition of our licence that this has occurred.

[439] Mr Mulholland replied to a subsequent email saying:

> The problems we have with all of this is that getting a claw back on the discount rate would be offset by the add back on other areas that we got a favourable movement due to the lower interest rate…

[440] On 29 August 2017, RBNZ met with PwC and Mr Parrott of CBL to discuss reserving work. Discussion included the SFS receivables:

> [Mr Coulter] stated the key reason for the reduction in solvency position from May 2017 was $35.6m of premium debt with SFS was discovered to be more than a year old. CBL is attempting to recover the debt. They have discussed with the auditors and decided to not impair the asset because "most" are policyholders with subsequent renewals of cover. The impact on solvency ratio is larger than if the impairment had been taken (150% vs 189%). Under French legislation the cover could be voided for non-payment of premiums. CBL could have taken the impairment to get a better solvency ratio and continue to comply with the direction, but chose to do the right thing and be conservative.

[441] They also discussed the solvency treatment of collateral, as the latest solvency calculations prepared by CBLI had reclassified reinsurance collateral held by Elite and Alpha as "cash", which had resulted in those assets having a 0.5% RCF applied rather than 40%:

> [RBNZ] noted that there have been many discussions with CBL and their appointed actuary on the solvency treatment of collateral. The 40% risk charge was agreed as a compromise in mid-2015, and there are arguments 100% should apply since the funds are not freely available to meet any losses. [Mr Rhodes] stated CBL has new information from Elite and Alpha that CBL can draw down the collateral at any time. [RBNZ] noted letters from cedants were supplied previously and were not accepted by RBNZ as sufficient to justify treating the collateral as cash at bank.
>
> …
>
> [Mr Rhodes] said he vaguely recalls a previous discussion but that CBL and PWC never agreed to it. The 40% factor was just applied to keep RBNZ happy. He will look at the new information which justifies treating it as cash.

[442] Also on 29 August 2017, Mr Harris responded to RBNZ's letter of 25 August. His response indicated that CBLI wanted to be fully transparent and give RBNZ the "heads up" of the temporary change in Solvency Ratio, that CBLI fully understood the requirement imposed by RBNZ to keep solvency from 25 July onwards at a 170% level and that it remained committed to comply with that directive and would monitor the situation closely and if required put a plan in place, once the relevant information was available, to increase solvency to 170% promptly.

[443] On 30 August 2017, the CBL Group's lawyers had a call with RBNZ. This included raising concern that overseas authorities protect confidentiality of the investigation and other actions that may be taken by RBNZ. RBNZ agreed that the importance of confidentiality would be stressed in the next contacts with overseas authorities.

[444] On 31 August 2017, Mr Harris sent a further letter to RBNZ proposing a bond issue and bank syndicated loan as part of its remediation plan. He said this would "require cleansing and appropriate disclosure steps, and working with the RBNZ to navigate through the issues of confidentiality and disclosure". It would also require removal of the first RBNZ direction.

[445] On 4 September 2017, RBNZ responded to this plan, stating it considered that it was necessary to maintain the direction while the considerable uncertainty over reserves was being resolved through the investigation that was then underway. RBNZ's letter also addressed the fact that:

> … CBL's solvency calculations for 30 June 2017 incorporate a Resilience Capital Factor of 0.5% for $39 million of reinsurance collateral held by ceding insurers.
>
> Following lengthy discussions on the solvency treatment of collateral, in 2015 it was accepted by the Reserve Bank and CBL that a Resilience Capital Factor of 40% is correct under the Standard, even though there are some arguments supporting the use of a Resilience Capital Factor of 100%. Solvency returns from June 2015 to December 2016 used the 40% Resilience Capital Factor. We are disappointed that CBL has unilaterally changed its solvency treatment of collateral as at 30 June 2017.
>
> The Reserve Bank remains of the view that use of a Resilience Capital Factor of 0.5% for reinsurance collateral when reporting solvency is in breach of section 57 of the Act. Accordingly, the solvency calculations, for the 30 June 2017 reporting and on an ongoing basis, must be corrected to use the correct 40% for Resilience Capital Factor applied to the collateral. Solvency disclosures must also be corrected.

[446] As PwC noted internally, CBLI missed the opportunity to be open and front-foot this with RBNZ.

[447] On 12 September 2017, Mr Clements prepared a report on the SFS receivables, which said:

> The CBL Group needs to develop a single group view of the SFS aged receivable balances.
>
> …
>
> There are a number of reasons this is critical, beyond being needed for management purposes:
>
> 1. CBLIE regulators are questioning how CBLIE is monitoring this risk, as they have become aware of the issues with the Elite aged premium
>
> 2. CBL regulators will soon be asking the same question
>
> 3. Deloitte has expressed concern with the lack of visibility in this area
>
> 4. Should the Elite premium review lead to any write-downs in the premium receivable in CBL, then CBL group will very quickly need to prove that the CBLIE business has appropriate monitoring and has been immunised from the risk of large 'catch-up' write-offs (auditors, regulators, investors, analysts, etc)
>
> 5. Aged premium directly and significantly impacts the required capital of CBLIE and CBL. Aged premium on business written by CBLIE and reinsured by CBL has the ability to create a double-impact to the CBL group, as it independently increases the capital requirement of both insurers.

[448] On 14 September 2017, the Board met by teleconference and received an update on the SFS reconciliations and collections. Mr Mulholland attended part of the Board meeting – it is unclear whether he attended this part. He was overseas from 10-15 September 2017. The minutes record that Mr Christer advised that the premium amounts had been divided into three segments, including that items in PAS (Policy Administration System) totalled €42m of which €20m was greater than 360 days, and the numbers were constantly shifting and fluid but were unlikely to change by a huge amount. He further noted the project was now time-critical, and next steps needed to be completed urgently.

[449] On 21 September 2017, Mr Harris emailed Mr Niehaus and Mr Damoussi advising that Finity had been engaged by Milliman to undertake a review of the sufficiency of CBLI's reserving for French Construction Insurance. He copied several others including Mr Mulholland and Mr Warren, the Finity investigator, by way of introduction. Mr Mulholland replied to all saying that if Finity asked any questions about the PwC UK report to ignore them and say that they had not seen the report or that it was flawed. Mr Harris agreed and noted it was a report written by a person with no experience of the industry. In evidence, Mr Mulholland said he did not want Finity and Milliman's review being tainted by what was in the PwC UK report before they had formed their own conclusions. He noted that by this stage Milliman and Finity had been engaged by RBNZ to investigate CBLI's reserving, and if RBNZ wanted them to have the PwC UK report, RBNZ would have provided it to them. He said this was not an attempt to hide any information from Milliman or Finity; rather to ensure that their investigation and conclusions were independent and not tainted by the PwC UK report. If nothing else, Mr Mulholland's email reflects his perspective that he knew best.

[450] In mid-September 2017, Mr Mackay (who had been CBLI's Appointed Actuary from September 2014 to November 2015) commenced as the CBL Group's internal actuary. On 26 September 2017, Mr Mackay provided his initial observations to Mr Harris and Mr Mulholland, which included:

**Elite Issue and its Fallout:**

- [Mr Parrott] has provided me summary notes, as well as the PWC UK and PwC NZ reports

- I think I am close to being up-to-speed here.

  - The PwC NZ report is very good, and provides a lot of pushback

  - However "reading between the lines" there [is] still an element of actuarial judgement in the actuarial reserving for CBL Insurance NZ - that may result in pressure being applied to strengthen some of our assumptions for this year-end. In particular:

    - Even with some programs now having been going for 10 years, there is still inadequate historic data to fully calibrate the actuarial models

- From the time of policy being underwritten, until the date the final payment is settled, can extend well beyond 10 years

- Credible historic data for most programs only goes back 6 to 10 years for most programs

- Therefore some key actuarial reserving judgement is still needed, usually it takes the form of ultimate loss ratios and average claim sizes.

- Large claims not only distort actual reserving, but also impact the data triangles used in the reserve calculations

- If the review of large claims highlights conservatism in the data, then that may help.

…

**Year - end Reserving:**

- As already mentioned, the multi-regulatory scrutiny of our reserving may put us under pressure to strengthen reserves at year end.

- I have gone through with PwC ([Mr Coulter], but not with [Mr Rhodes]) their models and methodology and their suggested changes for year-end

- He is hinting that the average claim size assumptions may need to be revised upwards, based on their latest analyses. However:

  - There are still judgements involved, and so there are a range of outcomes (for the projected reserve)

  - The work with Dermot may also serve as another challenge/peer review of PwC's work. There is some good that may come from the CBI work.

> ○ The large claims review may be an offset for upward revisions elsewhere in the valuation models
>
> • I haven't agreed to any changes.
>
> • To aid future discussion I have requested sensitivities of the reserves to key assumptions.
>
> • Next steps:
>
> ○ …

[451] Mr Mulholland's reply included:

> [Mr Harris] and I have spoken today [off] the back of your email and have a few comments.
>
> Can we please ensure that we are not going to PWC with anything until it has been completed and reviewed internally. There will be a number of requests for work from various staff and this should be completed and reviewed internally and then if we need external [verification] we can request it.
>
> Anything that goes external must be signed off by [Mr Harris] or myself please.

*Castlerock transaction*

[452] In about September 2017, CBLI explored the sale of the SFS receivables to a third party (an option identified in the August covering memorandum). The proposal was that Castlerock would purchase the receivables (€65,543,281 gross receivables from between 2010 and 2016 that SFS had failed to collect) for €32,771,868, being 50% of the gross receivables. The effective date of the transaction would be 31 July 2017. The pitch document identified that the structure had "the potential to negate the need for any writedown of the value of the receivables on CBL's balance sheet in FY17". One option involved deferred settlement; a second option included an upfront payment.

[453] Castlerock was a subsidiary of the Bancorp merchant banking group. Bancorp had worked with the CBL Group since 2011. Sir John Wells was a founding director and shareholder of Bancorp, and had been its chairman until 2016. Mr Hannon was a consultant at Bancorp. Bancorp had worked with the CBL Group on the acquisition of SFS in 2016.

[454] On 15 September 2017, Mr Harris circulated to the Board, and others including Mr Mulholland, what he described as Mr Hannon's proposal for Castlerock to purchase the receivables. Mr Mulholland replied to Mr Harris, indicating his initial thought was "if we don't get money up front and simply move from one receivable to another will we be able to achieve the desired result[?]" In evidence, Mr Mulholland said that he did not think the transaction was a good idea as he did not believe it would achieve what the Board hoped it would achieve for CBLI's solvency and profit.

[455] On 18 September 2017, Mr Harris emailed Mr Hannon and Mr Craig Brownie of Bancorp, saying:

> The thinking is that this proposal has merit, subject to the auditors being comfortable that the swapping of the overdue receivables with a current one for payments over 5 years will be given full recognition, and not aged for solvency.
>
> For CBL to get the value it would like, it would require the agreement to be in place either before 30 September, (the date for filing the 30 June Solvency return), or before 11th October, (the date for filing 31st July management accounts and solvency calculation).
>
> It would also make a material difference if there was a cash payment at the outset. If there is no cash payment up front, then that may affect the [auditors'] view. It would also be unfair to ask for a cash payment up front from CBL if there was none from Castlerock, so maybe they could both be deferred.

[456] Mr Brownie prepared a proposed structure involving Castlerock, and a draft term sheet. The draft term sheet involved the deferred settlement option.

*CBI update – September 2017*

[457] On 20 September 2017 in Ireland, CBI responded to CBLIE's letter of 24 August 2017 by email. CBI sought clarification as to the collateral arrangements that CBLIE considered might be put in place instead of a trust. CBI sought a response by 29 September 2017, and said it would intend to respond promptly and would require a collateral mechanism, determined by CBI, to be in place by 27 October 2017. CBI acknowledged a €5m capital injection into CBLIE and a €10m reinsurance prepayment. This CBI email contained the header "Central Bank of Ireland - UNRESTRICTED".

*Castlerock / solvency / reserving continued*

[458] Deloitte was asked to address the accounting treatment of the Castlerock transaction. On 21 September 2017, Mr Wilkes of Deloitte emailed Mr Mulholland following calls from Mr Hannon and Mr Brownie regarding Castlerock's proposal. Mr Wilkes said that to reach a position on the accounting treatment would require some discussion with, and input from, Mr Mulholland's finance team. Mr Mulholland emailed Mr Harris asking if he was aware of this, as Mr Mulholland was not. Mr Harris replied that Mr Hannon and Bancorp needed to get the auditors to sign off on the structure in principle before they did anything on it.

[459] On 23 September 2017, Mr Clements sent Mr Harris and Mr Mulholland a draft of the 30 June 2017 solvency return. This showed that CBLI's Solvency Ratio was 159%. Mr Clements noted this compared with 150% in the half year accounts. The 159% involved treating the Elite collateral as cash with no risk charge – if the risk charge was 40%, the result would be 131%. Mr Clements said he understood that Mr Rhodes was not comfortable with the Elite treatment.

[460] On 25 September 2017, Mr Clements emailed Mr Mulholland, copying Mr Ray, saying that Deloitte had asked them to prepare a management paper on the Castlerock transaction. Mr Mulholland told them this was Mr Hannon's project so he would have to put this information together for Deloitte – and they were discussing it that week. Mr Brownie said he began drafting a management paper and sent the draft to Mr Griffiths.

[461] On 27 September 2017, the Board met in France. Mr Mulholland attended in part to present his CFO report. The minutes indicate that in other parts of the meeting:

(a) Mr Harris updated the Board on an investor roadshow:

> The Roadshow had gone well and there was little issue with the reserve strengthening as recommended by PWC which had impacted on profit margin. There were a couple of investors who expressed dissatisfaction about the level of reserving and bringing the SFS earnings into 2016. Overall, most were happy but CBL will be closely watched in coming months.

PWC had indicated at the ARC meeting and again afterwards that further strengthening was expected. The Board agreed that a more robust position on reserve strengthening by CBL needed to be formulated rather than solely relying on PwC's advice.

(b) The Board considered regulatory solvency:

As from 25th July RBNZ instructed for CBL Insurance to maintain a solvency of 170% or more.

The two major drivers of CBL solvency were:

- Aged debtors – any receivables over 12 months old carry a 100% risk charge.

- Elite Cash Loss Reinsurance Security Reserve – €25m carries a 40% risk charge for 30 June purposes, PwC recommended treating it as cash at bank with 0.5% risk [charge] which was adopted. However RBNZ have asked for it to be changed back to 40% and solvency at 30 June to be re-calculated.

The Board examined various methodologies to move the lower solvency ratio to a higher solvency ratio, and agreed to restructure the Elite premium cash reserve so that the 40% charge will no longer be applicable. This treatment will apply to solvency returns from 31 July 2017 onwards.

The solvency return at 30 June 2017 would apply the Resilience Capital Factor of 40% as instructed by the RBNZ, with the resulting solvency ratio of 132%. [Mr Harris] would prepare a one-pager to accompany the 30 June 2017 solvency return to indicate future returns would be treated differently.

(c) The Board considered the Castlerock proposal to purchase receivables:

The Board discussed the Paper provided by Castlerock to CBL, as circulated with the Board Papers.

[Mr Hannon] talked to the paper and fielded a number of questions.

**Resolved:** That CBL Corporation would engage with Castlerock to execute the Term Sheet provided and move the proposed transaction to a position that can be ratified by the Board under a Sale Purchase Agreement. *([Mr Hutchison]/[Mr Donaldson], Carried) ([Sir John Wells], Abstained)*

[462] Mr Mulholland acknowledged that from late September 2017 he was aware that PwC considered further strengthening of reserves was likely at year end, but said this was a preliminary analysis that needed to be completed and considered by the

Board. He said it was up to the Board whether they accepted the advice from PwC or not, and it was also a matter for the Board what to disclose about this.

[463] Also on 27 September 2017, Mr Mulholland emailed PwC including about the Elite cash loss reserve (collateral) for solvency return purposes:

> We note that RBNZ want the risk charge applied to the Elite cash loss reserve to move back to 40%, and PwC agree. We think this is a back down from a position we believe was recommended and discussed with PWC at the half year.
>
> We understand the RBNZ has since given its thoughts as well, however with respect they do not have the latest facts about the position.
>
> Elite and CBL reached an agreement whereby the Cash Loss Reserve would be repaid to CBL in full. This would make it a receivable, and payments have been made.
>
> Elite [remains] solvent and liquid, and is solvently running off their business.
>
> We consider that the appropriate charge for the 30 June solvency charge for this asset should be as a receivable.

[464] Mr Rhodes replied:

> Our problem is that the Reserve Bank have given us a directive to use the 40% and we have no recourse to disagree. They have backed up their views with an explicit requirement that we have to follow.
>
> PwC agrees with you that the 40% is not reasonable, but we have no option to include this unless we want to be in breach of the standard now that we have a directive saying this **must** be corrected.
>
> The following is an excerpt from the letter 4 September attached.
>
> The Reserve Bank remains of the view that use of a Resilience Capital Factor of 0.5% for reinsurance collateral when reporting solvency is in breach of section 57 of the Act.
>
> Accordingly, the solvency calculations, for the 30 June 2017 reporting and on an ongoing basis, must be corrected to use the correct 40% for Resilience Capital Factor applied to the collateral. Solvency disclosures must also be corrected.
>
> If we breach this directive we will get an immediate response from them which could be particularly nasty.
>
> Maybe we should have a call on this first [thing] tomorrow NZ time.

[465] On 28 September 2017, Mr Harris emailed Mr Rhodes about the Elite cash loss reserve. He explained that the Board had reconsidered the situation. The Board's view was that the treatment of the asset should be a reduction of cash by €25m, and a reduction of Outstanding Liabilities of €25m, and the solvency return should reflect this.

[466] Mr Rhodes replied to Mr Harris, copying Mr Mulholland, agreeing this was the way forward, but saying:

> … you can't change the balance sheet after the fact because the cash balances were what they were at 30 June and you can't change that.
>
> …
>
> I absolutely understand your and [Mr Mulholland's] frustration with the RBNZ imposing unreasonable requirements but there is not a lot we can do about it and they can do a lot worse.
>
> In our view there are only two options;
>
> 1. Bite the bullet and comply with the direction from the RBNZ and report a solvency ratio of 131 %. You will then have the release of capital available for 31 December 2017 return. As we flagged to you at half year there is likely to be further reserve strengthening required particularly now that the new data is showing some unfavourable trends. The release of the Elite capital will help fund the strain of any reserve increases.
>
> 2. If you wish to allow for the commutation arrangement retrospectively then we will need to submit a draft return today with the proposed treatment fully explained. In our view this has a very low chance of success, and will only serve to annoy Rupert [Barber of RBNZ] in particular.
>
> For option 1 you will need to change the solvency on your website and anyone that asks you can explain the difference as a technical interpretation from the RBNZ which is being fixed for the next solvency return.

[467] Mr Harris responded:

> It is CBL's solvency statement and I don't wish to file an incorrect solvency statement.
>
> The way I read this is that on the one hand you are saying that the solvency % was wrong at 30 June but can be changed in the solvency filing tomorrow.
>
> But you are also effectively saying we cannot file it accurately, - because instead, we are going to have to revert back to using a RBNZ ruling (which is now out of date, and doesn't take into account the current situation).

> Having considered all the information we have seen, then my view is that we should file it correctly,
>
> I will try to ring in the morning France time.

[468] Mr Harris forwarded this email to the Board, and said to Mr Mulholland that he would try to speak with Mr Rhodes in the morning.

[469] Mr Clements circulated (not to Mr Mulholland) a version of the solvency return showing 132%, with the cash collateral at 40% risk charge. Mr Coulter replied:

> I'll check the finer details tonight, but this would be our preferred solvency return.
>
> I'm sure you are aware that [Mr Rhodes] is in touch with [Mr Harris] over this - they plan to speak by phone over the next hour or so. We will not support / sign off on the higher solvency ratios as they take account of deals done after 30 June (and we have yet to see all the documentation on this in accordance with Deloitte's requirements anyway). Our view is that we would just be in breach of a direction from the RBNZ if we did this with pretty hefty fines / penalties applicable.

[470] On 29 September 2017, Mr Clements circulated (not to Mr Mulholland) the final solvency return as at 30 June 2017 that was submitted to RBNZ. CBLI's Solvency Ratio was recorded as 132%. This applied a 40% RCF to the Elite collateral as RBNZ had required. Also, the SFS receivables were factored into this solvency return, with $35,641,000 recorded with a 100% RCF as aged greater than one year and $8,306,000 recorded as premium debt aged six months to one year with a 15% RCF.

[471] I accept Mr Brown's expert actuarial evidence that it was correct to treat the $35.64m of aged receivables over 12 months as an asset incurring an RCF of 100% under the Solvency Standard.

[472] On 2 October 2017, Mr Clements emailed Mr Harris, copying Mr Mulholland:

> Attached is the CBL Insurance half-year website solvency disclosure. We are required to publish the result of our solvency return on the CBL Insurance website by the 13th of October (10 working days from the submission date).
>
> Shall we go ahead and publish (we usually just go ahead as soon as we file), or do you want us to hold-off until the 13th to give you a chance to speak to the RBNZ?

> Did the board consider/conclude as to whether the change required any NZX disclosures?

[473] Mr Harris replied:

> We will hold off, but make a diary note to check on 11th October.
>
> No plan to disclose to the market, because we do not consider it is correct.

[474] Also on 2 October 2017, Mr Rhodes replied to an email from Mr Harris, copying Mr Hannon, Mr Mulholland (who Mr Harris said was off air all week) and others, about the discount rate for reserves, but also stating:

> A more important consideration for the monthly management accounts in our view, is providing for any likely strengthening of reserves at the year end.
>
> This could be done by adding an explicit amount to the management reserve each month.

[475] Mr Harris replied indicating that he was not happy at all to think that there might be a continued strengthening of reserves at year end.

[476] In the meantime, on 28 September 2017, Mr Ray and Mr Clements sent a draft letter they had prepared to Deloitte. Applying the relevant accounting standards, they indicated that CBLI's opinion was that:

(a) CBLI had transferred its rights to Castlerock, who had the sole right to receive the cash for the receivables.

(b) All risk associated with the non-payment of the receivables would be transferred to Castlerock.

(c) CBLI had no control over the receivables once they were sold to Castlerock.

[477] On 6 October 2017, Mr Harris emailed Mr Brownie stressing how important it was to CBLI to have the transaction concluded with effect from 31 July 2017, and for it to be incorporated into their management accounts that were to be filed on

11 October 2017, saying this was in order for CBLI to get a "solvency capital relief/uplift" on the transaction.

[478] On 10 October 2017, Mr Brownie sent Mr Ray, copying Mr Hannon, a revised letter from CBLI to Deloitte and an accompanying term sheet. Mr Brownie said:

> I will be signing the clean copy of the terms sheet this morning and sending to you so as [Mr Harris] is able to counter sign and we are then able to meet the 31 July solvency period.

[479] At 6:38 pm, Mr Harris emailed the Board, copying Mr Mulholland, attaching a memorandum prepared by Mr Ray, the term sheet signed by Mr Brownie and the accounting letter. Mr Harris' email included:

> …the best outcome for solvency is to sell the debts over 12 months (ie not current debtors), and swap a 100% risk charge for a 40% risk charged asset
>
> …
>
> Management is asking the Board to sign off on this Term Sheet, and authorising me to sign it, which means that we would then move to implementation and satisfying Deloitte etc etc.
>
> We are also asking that given this agreement takes effect from July 31st we would propose to account for this transaction in the July 31st Solvency Return, (and August).

[480] Mr Harris signed the term sheet but with some amendments, which Mr Brownie counter-signed on 11 October 2017. Mr Brownie counter-signed a further version with an additional amendment later that day. Mr Mulholland said he did not recall being aware of the signed term sheet at the time.

[481] The Castlerock transaction then entered the due diligence phase. Drafts of a Receivables Purchase Agreement and a Receivables Services Agreement were also prepared.

*Monthly solvency returns prepared in October 2017*

[482] CBLI's additional solvency reporting for July 2017 and August 2017 was due to be provided to RBNZ on 11 October 2017. On 3 October 2017, Mr Clements sent the draft July 2017 return to Mr Harris and Mr Mulholland, saying:

> At present this simply rolls forward the treatment used at 30 June 2017 for the filed solvency return. Did the board meetings resolve to take any actions or have we entered into agreements effective 31 July that should change this reporting (besides the discounting change)?

[483] Mr Clements said he did not receive a response. Mr Mulholland was on holiday overseas until 11 October 2017.

[484] On 5 October 2017, Mr Clements sent Mr Harris and Mr Mulholland the draft July and August 2017 solvency reporting. The July Solvency Ratio was 133% and the August Solvency Ratio was 132%. This was below the range in CBLI's Capital Management Plan and well below the 170% Solvency Ratio imposed by RBNZ on 25 July 2017.

[485] On 10 October 2017, Mr Ray sent Mr Harris the solvency disclosure as at 30 June 2017 (with the Solvency Ratio of 132%) which was required to be published on CBLI's website within 10 working days of being submitted to RBNZ (on 17 September 2017). Mr Ray said he would get the website updated the next day. He noted that the 132% differed from the 150% in the June 2017 interim financial statements.

[486] Early the next morning, 11 October 2017, Mr Ray arranged for this solvency disclosure to be updated on the CBLI website to show a Solvency Ratio of 132%.

[487] This prompted an urgent issue. Mr Mulholland was on a flight back to New Zealand on 11 October 2017, having been on holiday in Hawaii following his time in Europe.[136] NZXR contacted Mr Ray that morning saying that the FMA had provided it with information that had been provided by RBNZ, and which RBNZ had consented to being shared with NZX for the purposes of NZX's regulatory functions. NZXR outlined:

> - That the RBNZ had specific concerns about the treatment of balances for the 30 June 2017 calculation, and that following a review, CBL was in the process of recalculating its solvency margins and ratios.
> - That during the course of providing a valuation report for June 2017, CBL's actuaries PwC had identified that two quarters' of claim data had

[136] He was overseas from 20 September to 11 October 2017.

been omitted and that this was considered by the RBNZ as [potentially] having a significant effect on CBL's numbers for 31 December 2017.

[488] Mr Ray advised NZX that the change was due to a change in the risk rating of certain CBL assets. He said he "would engage with the CBL CFO and CEO, who are members of the CBL disclosure committee, to discuss next steps".

[489] Soon after, Mr Harris, Mr Ray and Mr Griffiths contacted NZX and said that CBL had taken legal advice and did not consider the information was required to be disclosed as material information, but would issue an announcement because it was being required to do so, reflecting a technical adjustment.

[490] That morning, CBLC made a market announcement:

> **CBL adjusts Minimum Solvency Capital of CBL Insurance Ltd**
>
> 11 October 2017
>
> A technical adjustment has been made to the Minimum Solvency Capital of CBL Insurance Ltd at 30 June 2017 from $106.8m to $121.2m. The Actual Solvency Capital of CBL insurance Ltd at 30 June 2017 remains unchanged at $160.44m, and the Financial Statements of both CBL Insurance Ltd and CBL Corporation Ltd as at 30 June 2017 remain unchanged by this adjustment. Regulatory Solvency disclosures are made on the CBL Insurance Ltd website.

[491] At 12:09 pm, Mr Ray sent Mr Harris (copying Mr Mulholland and others) draft solvency calculations as at 31 July and 31 August 2017, before and after adjustments:

> As agreed the CBL Insurance Solvency includes adjustments for:
>
> - Sale of the Elite debt aged greater than 12 months only ie $35.6m - effectively swaps the asset risk [charge] from 100% to 40%
> - Change the Elite Collateral 40% risk charge to current premium receivable from Elite 4% risk charge

[492] The result was these showed Solvency Ratios as at 31 July 2017 and 31 August 2017 of 186.6% and 183.6% respectively.

[493] At 2:58 pm, Mr Harris said he was happy with these solvency calculations. At 3:02 pm, Mr Ray then sent them to Mr Coulter at PwC as Mr Harris had asked, and requested a call later that week. Mr Coulter replied agreeing to a call with Mr Harris.

Later that same afternoon, 11 October 2017, these solvency returns were uploaded to RBNZ.[137]

[494] In evidence, Mr Clements said he remembered speaking to Mr Harris about putting the Castlerock transaction into the July/August 2017 solvency returns, and Mr Harris was adamant that it was a finalised deal effective from 31 July, that these numbers were to be based off management accounts, and that as management, he would determine what was reflected in the management accounts.

[495] CBLC's market announcement prompted questions from investors and analysts. At 2:40 pm, Mr Ray emailed Mr Harris:

> We have today received questions from investors in [Mr Mulholland's] absence and also [Mr Griffiths] received a call from James Bascand subsequent to his call through to you this morning. He was seeking further clarification around the temporary changes. He also expressed his view that CBL should be communicating better with investors to allow them to fully understand the impact of such market announcements.
>
> We have drafted a response to the institutional investor by way of a draft market announcement that also addresses James' queries. Making a further announcement will also hopefully reduce further queries from investors instead of separately responding to each query that might come in. Please let me know what you think. The draft wording has been agreed between myself, [Mr Griffiths] and [Mr Parrott].

[496] CBLC sent responses to investors but did not make a further announcement to NZX. As an example of the responses to investors, at 4:24 pm, Mr Harris responded to questions from ACC:

> Thank you for your questions and interest,
>
> 1. It arose from [a] different interpretation of a risk charge to be applied to a reinsurance security asset between 30 June financials, and 30 June Solvency Capital return just filed. The asset is in the process of being re-classified as a different asset class, because the reinsurance security is being reduced and re-classified, - a process which is taking place over the next couple of months. It is expected to result in a lower risk charge and a corresponding increase in solvency capital, well before year end.
>
> 2. Getting the solvency capital back into the target range of 135% -165% will look after itself, and at July and August is already within that range.
>
> 3. No, - no implications for rating, - we have let AM Best know.

[137] Mr Harris informed the Board of these solvency returns and why they had been made.

> In my opinion it was a technical adjustment that possibly did not need to be disclosed, but we chose to err on the side of over-disclosing than under-disclosing.

[497] Meanwhile, at 4:12 pm, Mr Mulholland emailed Mr Harris:

> I don't know what has exploded today (I can kind of guess from your email!). I have got a whole lot of missed calls and emails from investors, I am not sure who has been responded to or if you have had an investor call.
>
> I have just landed.

[498] At 4:23 pm, Mr Mulholland emailed Mr Ray and Mr Harris:

> You need to call AM Best and get on the front foot with them on this and explain we have already got it up over 150%.
>
> It will need to happen today with a clear explanation. We can't afford a negative downgrade now ...

[499] Mr Mulholland said he did not recall but, even though he had been travelling, he must have known that the reason "we have already got it up over 150%" (meaning the Solvency Ratio) was because CBLI was treating the Castlerock transaction as a done deal for solvency purposes and changing the treatment of the aged receivables from 100% to 40%.[138] Although Mr Mulholland said he did not believe the Castlerock transaction would achieve what the Board hoped it would achieve for CBLI's solvency and profit, he knew its purpose was changing the solvency treatment of the aged receivables.

[500] On the evening of 11 October 2017, Mr Coulter reported to Mr Ray that Mr Rhodes had had a call from Mr Cole at RBNZ regarding the solvency return and the parts that had changed since the financial statements. Mr Coulter and Mr Cole spoke the next morning. RBNZ did not know why there had been a large increase in Solvency Margin/Ratio from June 2017 and why this was not mentioned by CBL. Also on 12 October 2017, RBNZ asked Mr Parrott at CBLI to explain the main changes by 16 October 2017.

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[138] Mr Mulholland's email to Milson Capital on 13 October 2017 said the change in solvency arose from a different interpretation of a risk charge to be applied to a reinsurance security asset. However, the Elite collateral change was only one of the two adjustments, as indicated at [491]. Mr Mulholland's email also said "Getting the solvency capital back into the target range of 140% -165% will look after itself, and at July and August is already within that range", which also reflected treating the Castlerock transaction as a done deal for solvency purposes.

[501] On 11 and 12 October 2017, Mr Ray also emailed Mr Harris and Mr Mulholland about an enquiry from an analyst at UBS who rang about the market announcement:

> He wanted to know a lot more detail eg what was the risk charge at Dec-16 vs Jun-17 and what now. I don't think we should get into this much detail.
>
> He brought up the RBNZ and the risk charge issue that was discussed at the IPO time – I was surprised he knew such detail, I remained silent on this matter.

[502] On 13 October 2017, Mr Mulholland sent a response to Blue Ocean Equities in similar terms to Mr Harris' earlier response to ACC (at [496] above).

[503] On 16 October 2017, Mr Parrott's response to RBNZ, copied to Mr Mulholland (although he said he did not recall reading it), attributed the change to the resolution of the SFS receivables issue and agreement to repay the insurance collateral held by Elite:

> 1. **Resolution of the Elite aged premium receivables greater than 12 months (subject to a 100% risk charge).**
>
> The Board has authorised the company entering into a transaction to sell the Elite aged debt greater than 12 months old, [totalling] $35.6m. Agreement has been reached, effective 31 July 2017, to sell this debt on a deferred settlement basis with [Castlerock] ... Such receivable will be settled by way of five equal annual cash payments to CBL commencing 30 September 2018. SFS will continue to be responsible for collection and SFS management are overseeing a separate project to oversee and manage the collection process. As Castlerock is unrated, the receivable is subjected to a 40% risk charge. This transaction provides an immediate $21.3m reduction to the risk charge.
>
> 2. **Repayment of the Reinsurance Collateral currently held by Elite**
>
> As noted above, agreement was reached with Elite to pay the withheld reinsurance premiums on agreed equal quarterly payments over 36 months. Accordingly, the Elite collateral, which previously attracted a 40% risk charge, has been reclassified as a reinsurance premium receivable which attracts a 4% risk charge. Repayments have commenced and the premium receivable does not require any aged debt risk charge adjustment since they will be repaid in accordance with the new agreed repayment schedule. This agreement provides an immediate $14m reduction to the risk charge.

[504] For the purposes of the solvency calculations as at 31 July and 31 August 2017, I accept Mr Brown's evidence that the Castlerock transaction did not have the effect

of reducing the RCF for the aged receivables from 100% to 40%. I consider that for the purposes of these solvency calculations, the Castlerock term sheet dated 11 October 2017 did not enable CBLI to apply a 40% RCF to the aged SFS receivables retrospectively, or at all before the proposed transaction was unconditional. The minutes of the 27 September 2017 Board meeting distinguished between the term sheet and a sale and purchase agreement (at [461](c) above). Despite Mr Harris' subsequent description of the formal documentation as "just engrossing the term sheet and adding boiler-plate" (which was not executed), the proposed transaction was at least conditional on Deloitte's approval of the accounting treatment. Mr Harris said this later when he gave notice of termination. It is also revealing that Bancorp's fee mandate was never signed. Even if the proposed transaction had been unconditional from 11 October 2017, the effect of the transaction for solvency purposes was debatable.

[505] As Mr Brown said, if the aged receivables were treated correctly, then all other things being equal, as at 31 July 2017, the correct Solvency Ratio was 150.3% (as opposed to 186.6%) and, as at 31 August 2017, the correct Solvency Ratio was 148.8% (as opposed to 183.6%). Both corrected figures were below CBLI's minimum Solvency Ratio of 170% applicable from 25 July 2017.

*Reserving update – October 2017*

[506] Meanwhile, on 13 October 2017, Mr Christer sent Mr Ray an email regarding Milliman's work on French reserving for RBNZ. Milliman had requested some documents to confirm the quality of the CBLI financial data. Mr Christer's email included a comment to Mr Mackay:

> Grant - I realise you are not back in until [F]riday but when in I need you to link with Dermot and review the latest paid and incurred work that has happened. We agreed some actions at last [Monday's] meeting that we need to complete before we get sign off on the incurred triangles from [Mr Harris]/ [Mr Mulholland]. We managed to convince Milliman to hold off and wait for these triangles as we release them…

[507] On 16 October 2017, Mr Mulholland, Mr Ray and Mr Mackay met with PwC to discuss PwC's update on reserving for the French construction business. The update

tested five hypotheses on French construction reserving and considered that four were not correct or no longer correct, and one was inconclusive. The update concluded that:

> New information suggests further strengthening is required: >$33m before risk margin for DL products with less significant impacts for DO products

[508] Mr Ray sent the PwC update to Mr Harris and others including Mr Mulholland. Mr Mulholland replied saying:

> We need to look at the key levers PWC are now pulling on the claims side of things and understand how/why the numbers they are seeing are not what we have been shown. The large claims and average claim size is materially different and when extracted out is driving some serious upward provisions.
>
> They are talking circa $45m-$50m of strengthening at the year-end on the basis of these things including a 25% risk margin.
>
> It doesn't make sense to me.

[509] Mr Mulholland acknowledged this advice from PwC. He said he was shocked by this, coming so soon after the half-year strengthening of reserves. He said he would not have been surprised if further minor strengthening of reserves might have been necessary as CBLI had in fact strengthened reserves every year since 2012, but he did not expect that this would be a significant amount. His email at the time indicates he was aware PwC was signalling a significant amount, but he did not accept it made sense. I acknowledge his view that CBLI needed (some reasonable) time to digest PwC's analysis, cross-check it against its own data and discuss the underlying premises on which it was based with PwC. He said this report was also provided to Sir John Wells.

[510] Overnight, Mr Coulter emailed Mr Clements (who was in Luxembourg with Mr Greyling) about the meeting he had with Mr Mulholland, Mr Ray and Mr Mackay that day about the reserving update:

> … which was basically a continuation of our conversation last time. Other than [Mr Mulholland] making it very clear at the start that the Board did not want to accept any reserve strengthening this half, we had a pretty good discussion and the general agreement was that [Mr Mulholland] and team would digest the information presented then work through next steps. Full pack attached if you're interested.
>
> There have been a few more debates on the July / August solvency returns too that no doubt [Mr Ray] or [Mr Parrott] will fill you in when you're back ...

[511] On 17 October 2017, Mr Coulter emailed Mr Christer in response to a question after Mr Mulholland and Mr Ray had shared with him PwC's "observatory" report on the French reserves. Accepting that Mr Mulholland only received this when Mr Christer emailed him the next day, Mr Coulter's email included:[139]

> It is worth noting that at the half year, we had a number of discussions around reserve strengthening with [Mr Harris] and [Mr Mulholland]. In the end, we agreed to a "measured approach" and reduced the level of strengthening by circa $5m as they were of the view that it would be better for them to take a bigger hit in the second half where they have higher revenue. It is noted in the minutes of the ARC meeting that further strengthening is likely in the second half.

[512] On 18 October 2017, Mr Mulholland gave a general operational update at Macquarie Equities in Sydney, attended by Mr Frost of Argo. Mr Mulholland did not refer to any review of reserving or risk of reserve strengthening, nor to the SFS receivables issue.

*CBI update – October 2017*

[513] On 20 October 2017, CBLIE responded (belatedly) to CBI's email of 20 September 2017 advising CBI of its proposal to reduce its exposure to CBLI through a commutation arrangement and one-off payment of €12.4m from CBLI to CBLIE. Thereafter, CBLI and CBLIE would settle their exposures to each other in full in cash every quarter.

[514] On 23 October 2017, CBI informed CBLIE of its intention to undertake an on-site governance inspection of CBLIE in November 2017. This was not a routine inspection, but a direct response to the escalating concerns that CBI had with the strength of CBLIE's governance arrangements and its oversight of its MGAs regarding claims data and underwriting decisions.

[515] On 27 October 2017, CBI advised CBLIE that it rejected CBLIE's proposal of 20 October 2017 and required CBLIE to demonstrate compliance with the CBI conditions within five working days. A reinsurance trust was subsequently set up in November 2017 and as at 17 November 2017 it contained around €21m, which

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139 Mr Coulter referred to the "measured approach" in his talking points in August 2017 (see [410] above).

reflected the reinsurance liability that CBLI had to CBLIE on its balance sheet at that time.

[516] Also on 27 October 2017, CBI informed CBLIE that it was minded to impose a direction requiring CBLIE to recalculate its technical provisions.[140] In particular, CBI did not consider that CBLIE had demonstrated its technical provisions were being calculated in a reliable manner, and they were an outlier in comparison to the generally accepted reserving practice for this type of business in the French Construction Insurance market. CBI had engaged with the CBLIE actuarial team over the course of July to October 2017. According to CBI, during this time CBLIE had failed to provide evidence to CBI to demonstrate that CBLIE's technical provisions were being calculated in a reliable manner, based on reliable data.

*Notice of resignation*

[517] On 30 or 31 October 2017, Mr Mulholland gave six months' notice of resignation from his role at the CBL Group for family reasons.

*Further regulatory developments – October / November 2017*

[518] On 31 October 2017, RBNZ wrote to Sir John Wells at CBLI, issuing a further s 121 notice requesting information about the Castlerock transaction and CBLI's July and August 2017 solvency returns. RBNZ's letter said the responses to its questions had raised new areas of concern, which had serious implications for the prudent management of CBL and its financial and solvency positions. RBNZ said it did not accept that either the change recognising the Castlerock transaction or Elite's commitment to return collateral (at [503] above) was correct. In conclusion, RBNZ said it was disappointed that "CBL does not appear to have been proactive or open with [RBNZ] in communicating issues relating to its premium debt, the associated Castlerock transaction, and recent reporting of its financial and solvency position".

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[140] Required under the European Union (Insurance and Reinsurance) Regulations and the Solvency II Directive. "Technical provisions" represent the amount that an insurer requires to fulfil its insurance obligations and settle all expected commitments to policyholders and other beneficiaries arising over the lifetime of the insurer's portfolio of insurance contracts. Technical provisions comprise two components: the best estimate of the liabilities (i.e. the central actuarial estimate) plus a risk margin.

The required information was due by 7 November 2017. Mr Mulholland said he was not aware of this notice at the time.

[519] On 7 November 2017, CBLI provided to RBNZ amended solvency reporting as at 31 July 2017 and 31 August 2017 showing Solvency Ratios of 133% and 132% respectively. Mr Mulholland believed he had no involvement in this.

[520] At 6:30 pm on 7 November 2017, the Board met. Mr Mulholland did not attend. Mr Harris' update included that "CBI was unhappy with CBL as reinsurer and required CBLIE to set up a reinsurance trust with a bank account for the securing of the exposure".

[521] On 8 November 2017, Mr Harris wrote to RBNZ answering the s 121 notice of 31 October 2017. This described the proposed Castlerock transaction, saying it was subject to a CBLI due diligence review, including accounting and auditing sign-off. Mr Harris noted the transaction was in response to the first RBNZ direction and the Bank's expectation that CBLI have a plan to restore its solvency to the required level.

[522] On 8 or 9 November 2017, CBI sent Mr Sherin at CBLIE a letter (dated 8 November 2017) revoking the first CBI direction and issuing a new direction to CBLIE (second CBI direction). Reflecting CBI's concern about adequate reserving and noting that CBI was aware that RBNZ had concerns regarding the solvency and financial condition of CBLNZ following an investigation of the financial position of CBLNZ, this direction was more restrictive than the first CBI direction, providing that:

(a) CBLIE may not dispose of any assets (excluding claim payments to third parties, office expenses, 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.

[523] This CBI letter was headed "Central Bank of Ireland - CONFIDENTIAL" (unlike the first CBI direction and the CBI conditions). The covering email to Mr Sherin (on 9 November 2017) attaching the second CBI direction was also marked "Central Bank of Ireland - CONFIDENTIAL".[141]

[524] On 9 November 2017, Mr Harris updated the Board on this and the earlier CBI correspondence of 23 and 27 October 2017.

[525] On 9 November 2017, Mr Clements sent Mr Harris and Mr Mulholland the draft solvency reporting for September 2017, due to RBNZ the next day. This showed a Solvency Ratio of 176.1%. Mr Clements noted the receivables as at June-August 2017 were $35.6m, but this draft factored in receivables of $42.9m which had been calculated based on information up to July 2017. This was an extra $5m (which attracted a 40% RCF) and $2m (which attracted a 100% RCF). Mr Clements also explained that if RBNZ required CBLI to provide a 100% risk charge on Castlerock receivables and required CBLI to provide a 40% risk charge on the Elite premium, solvency would be 128% (and the result if RBNZ required one or the other).

[526] Mr Harris replied the next day:

> The Castlerock receivables do not change, - they are locked in and deal done - as at 30 June with effect 31st July. That figure will be paid over the next 5 years.
>
> Any amounts not collected - that credit risk is for the account of Castlerock…

[527] Mr Clements replied:

> Agree the Castlerock amounts [get] locked in - but there's no reference in the documents to 30 June numbers, it all refers to 31 July numbers so that's why it is updated this one time (it is a favourable impact to solvency to update it to July numbers as it means more debt at 40% instead of 100%).
>
> Castlerock covers premium that was aged 12 months as at 31 July 2017, so premium that was due on or before 31 July 2016 that had not yet been received. So the next issue to consider will be premium that was due after 31 July 2016 (and therefore not sold to Castlerock) that is becoming aged over 1-year now as the months tick by.

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[141] Given the FMA's narrowed claims, it is unnecessary to address the effect of the headers on the second CBI direction.

[528] On 10 November 2017, Mr Harris said he was happy for this solvency return to be filed if Mr Mulholland was, and Mr Mulholland said he was happy (from overseas).[142] Mr Clements arranged for this solvency report showing a Solvency Ratio of 176.1% for September 2017 to be uploaded to RBNZ. Mr Mulholland said in evidence his agreement that this solvency return (and those for October and November 2017) could be filed was on the basis the Board had agreed to the Castlerock transaction and Mr Harris had directed that it be taken into account. He said he had made his personal views on the transaction clear to Mr Harris, but it was not his decision to make. Accepting that entering the transaction was not Mr Mulholland's decision or one he favoured, he should have known that it did not justify these solvency returns for the reasons given above at [504]. As he acknowledged, Deloitte's concerns were the same as those he had identified when Mr Harris first advised him of the proposed transaction. He should also have been made aware of RBNZ's position as conveyed in the letter to Sir John Wells (at [518] above) although I accept it is unclear whether he was made aware of this at the time. In relation to the equivalent solvency returns due in October 2017, I accept that Mr Harris had approved filing in Mr Mulholland's absence without his input.

[529] Also on 10 November 2017, RBNZ had a call with Mr Harris and Mr Parrott to raise the seriousness of the potential regulatory actions RBNZ was considering and may take very soon.

[530] On 13 November 2017 in Ireland, CBLIE responded to CBI's letter of 27 October 2017, stating that CBLIE considered it was inappropriate for CBI to impose a condition requiring CBLIE to reserve according to the methodology specified. CBLIE also provided a draft actuarial report.

[531] The same day, CBI wrote a letter to CBLIE advising CBLIE that it continued to have a number of serious concerns and was minded to direct CBLIE to cease writing all new contracts of insurance and to refrain from renewing any existing contracts of

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[142] Mr Mulholland was overseas from 9-25 November 2017 (including attending a CBLIE board meeting in London on 23 November 2017).

insurance (Minded to Direct Letter). The letter was headed "Central Bank of Ireland – CONFIDENTIAL".[143]

[532] In response, and following up on a meeting of 14 November 2017 and a letter of 17 November 2017, CBLIE wrote to CBI on 20 November 2017 setting out why it believed it had addressed CBI's concerns, requesting that CBI withdraw the Minded to Direct Letter and continuing:

> In this regard, the Central Bank will be aware of the catastrophic implications that the issuance of a direction along the lines outlined in the Central Bank's letter of 13 November would have for CBLIE (and the wider CBL Group) as well as the unnecessary concern that it would create for policyholders and other stakeholders.

*PwC reserving update – November 2017*

[533] Meanwhile, on 14 November 2017, Mr Clements emailed Mr Parrott, Mr Ray, Mr Griffiths and Mr Mackay about continuous disclosure, referring to the last paragraph of s 3.3 of the Guidance Note (in fact the last paragraph of s 3.6 set out above at [54]), which Mr Clements stated:

> … could be helpful as we don't yet have a recommendation from PwC to consider adopting (that I'm aware of), let alone have adopted, and the work is ongoing.

[534] The same afternoon, Mr Parrott emailed Mr Harris and Mr Mulholland in relation to the Solvency Ratio with a further PwC update:

> As a result of the recent work performed on CBL data and the production of new claims triangles, PwC (Paul Rhodes and Ben Coulter) have raised with us the likelihood of reserve strengthening being required on the French construction business at the full year. They believe, and [Mr Mackay] agrees, that it is likely that any such increased reserving is likely to reduce the CBL solvency ratio certainly below the new minimum of 170%. There is a distinct possibility that it could be worse than that and potentially impact on the Board approved policy band of 140-165% or worse.
>
> Therefore, [Mr Rhodes] and [Mr Coulter] would like to discuss this further with us when you return on Thursday (meeting scheduled for 2pm Friday – the only gap in your diary). This email is to give you a heads up that CBL may have to inform the RBNZ of this likelihood, in accordance with section 24 of IPSA…

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[143] Given the FMA's narrowed claims, it is unnecessary to address the effect of the header on this Minded to Direct Letter.

[535] That evening, Mr Rhodes emailed Mr Harris directly given the need to update RBNZ as soon as reasonably practical. Mr Harris asked for the calculations and Mr Rhodes replied:

> Absolutely agree about the status of the report and the need to fully work through the issues, which we can discuss more on Friday.
>
> Consequently I am reluctant to quantify numbers yet…
>
> …
>
> Even a $10m reserve increase will reduce the 176% September ratio below 170%.
>
> By flagging a likely drop of below 170% we are only signalling a reserve increase of $10m, this will buy us more time to resolve the matter.
>
> Conversely by not doing so we are effectively saying that the impact is almost certainly less than $10m, which is just not realistic.

[536] On 15 November 2017, Mr Harris asked Mr Mackay whether it was correct that he and PwC considered there might have to be some reserve strengthening at year end. Mr Mackay confirmed this but said there was still a lot of work to be done. He also said:

> Please note that this was first flagged by PwC on the 16th October (see attached). But hasn't been followed up, pending completion of the data triangle work for the CBI and Milliman. Even so, my draft ppt of this work has also flagged increases. (2nd attachment for latest draft version) but even that is an internal discussion draft – certainly not a final analyses of results.
>
> As a caveat, a full valuation is not yet completed. Likewise for a full solvency balance sheet. The business has moved a lot since 30 June and there may be up-sides in other parts of the financials.

[537] Mr Mackay also set out his view in a further version of Mr Harris' email following a request from Mr Hannon. It appears that Mr Mulholland did not receive these although Mr Mackay forwarded the latter exchange to Mr Ray and Mr Clements (asking them not to send on) before he went on leave.

[538] Mr Harris advised the Board that the data suggested a strengthening would be required and that PwC was required that day to advise RBNZ that CBLI would not maintain the directed level of solvency.

[539] The same day, Mr Harris emailed the Board, copying Mr Mulholland, reporting on a meeting with CBI in Dublin regarding CBI's reserving and reinsurance security concerns. This included:

> **Suggested Action**
> CBL Finance to do a paper on what the accounting, cash flow and P&L, and Balance Sheet regulatory solvency issues were for CBL. CBLIE, and CBL Corp around the placing of sufficient cash into the CBLIE Trust Agreement. [Mr Clements] is already doing this. **Ready for Thursday NZ time**. [Mr Mulholland], could you make sure this happens? It will need PwC and Deloitte input eventually, but not until CBL has come to a landing on it.

[540] Mr Mulholland forwarded Mr Harris' email to Mr Clements and Mr Ray, asking them to provide this.

[541] Also on 15 November 2017, Mr Parrott and Mr Rhodes each emailed RBNZ about CBLI's reserving (at 5:11 pm and 5:12 pm respectively). Mr Parrott's email included:

> Over the past month, a significant amount of work has been performed by our Appointed Actuary, PwC, and our in-house Actuary, Grant Mackay, on collating the latest historical claims data in order to produce run-off triangles for the French construction lines of business. This data has been analysed in detail with a number of issues discovered and resolved successfully. In conjunction with the actuary for CBL Insurance Europe, PwC has considered a range of actuarial methods to project ultimate loss ratios using these new, cleansed triangles.
>
> Based on initial assumptions and advice from PwC, CBL may need to strengthen reserves on this line of business at year-end, 31 December 2017. However, data is still draft and is currently being worked on and discussed with our actuaries. There has been no final recommendation made to the Board in respect of reserve strengthening, and it is currently too early to finalise the expected likely impact on our numbers. However, if reserve strengthening is required, and it looks like the required solvency requirement of 170% is likely to be breached, this will be elevated to executive management and the Board to consider and take action pursuant to our capital management plan.
>
> Therefore, as per our obligations under section 24 of IPSA, we wish to notify you that it is likely or possible that CBL's solvency margin could drop to below 170% at year-end, notwithstanding any action that may be taken to mitigate this under our capital management plan.

[542] Mr Rhodes' email included:

> Over the past month, a significant amount of work has been done on collating historical claims data in order to produce run-off triangles for the French

> construction lines of business. The data has been analysed in detail with a number of issues discovered and resolved successfully. In conjunction with the actuary from CBL Insurance Europe, we have considered a range of actuarial methods to project ultimate loss ratios using these new, cleansed triangles.
>
> Based on our initial assumptions, CBL will require reserve strengthening on this line of business at the full year (31 December). As per our obligations under sections 24, 127 and 128 of IPSA, we wish to therefore notify you that it is likely that CBL will be unable to maintain the solvency margin imposed under license conditions of 170% continuously over the next three years.
>
> We do not have any firm numbers at this stage as we are still discussing a number of questions on the data and claims processes with CBL management. The company is also working on the capital management plan with the aim of improving the solvency margin.

[543] While Mr Parrott's email was expressed in slightly more equivocal terms, there existed, as Mr Pigou said, a material risk that both a material increase in reserves was needed and that CBLI was likely to breach the solvency capital condition of its licence to operate as an insurance company.

[544] Mr Mulholland acknowledged that he received a draft of Mr Parrott's email to RBNZ advising that CBLI may require reserve strengthening at year end, but said his understanding was that PwC was still working through the data to work out how much strengthening would be required, and that information did not need to be disclosed until it was final.

[545] On 17 November 2017, PwC had a conference call with Mr Harris, Mr Ray, Mr Clements, Mr Christer, and possibly Mr Niehaus, to go through PwC's draft actuarial update for the upcoming ARC meeting, providing initial views for the outstanding claims reserving exercise leading up to the 31 December 2017 balance date. The slide pack update explained that there was more historical data, claims appeared to be developing for a longer period compared to previous expectations and the scale of development was much higher than anticipated. Results for the three largest programmes of French business indicated significant strengthening (with comparison made to the report submitted by CBLIE to CBI). PwC indicated reserve increases of $86m (including risk margin) would be required for the French programmes covered by the update based on data as at May 2017. Further work was to be done. Other considerations included reference to market expectations – "if there

is consistent strengthening on prior years, investors will lose confidence and this will have a bigger impact on the share price over the [long term]".

[546] On 23 November 2017, Mr Coulter sent Mr Ray, Mr Clements and Mr Niehaus an updated draft actuarial update for review before including it in the ARC pack for the ARC meeting on 28 November 2017. This update set out initial views for the outstanding claims reserving exercise leading up to the 31 December 2017 balance date. This draft identified a total "prior year impact" in respect of DO and DL lines of between $67m and $115m. This meant that reserving for risks already written needed to be strengthened. It also indicated the strengthening implied by the CBLIE report submitted to CBI was $124m. The report noted that reserve strengthening was likely due to new additional historical data, which suggested claims were developing for longer than previously anticipated. Further work was to be done.[144]

[547] A third updated version from PwC later that day identified a total prior year impact of between $67m and $120m.

[548] Mr Ray sent the update to Mr Hannon, copying Mr Clements, saying, "We would like to get your view on whether this should be included in the ARC Pack in light of the magnitude of the numbers…".

[549] Mr Hannon replied:

> Has this been sent to [Mr Harris] and [Mr Niehaus].
>
> [Have Mr Niehaus'] observations been taken into account?
>
> I need to understand where we are as management in terms of the accuracy of the attached and does management agree with this?

[550] Mr Ray then forwarded the email to Mr Niehaus and Mr Harris. Mr Hannon replied, asking, "Where are Grant Mackay and [Mr Mulholland] on this also please?"

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[144] Work on cleansing historical data and incorporating the September 2017 data when it became available, which might have impacted the final strengthening figure, continued into December 2017/January 2018.

[551] Mr Ray replied that Mr Mackay was out of the office but had been working closely with Mr Coulter and the PwC report was a consensus view between Mr Mackay and PwC. He did not refer to Mr Mulholland.

[552] After Mr Hannon expressed scepticism that Mr Mackay agreed with "the analysis that shows that RCD business written by EISL has a Loss Ratio of more than 100%", Mr Ray said:

> Overall the report is still draft and there is still work in progress (see below) and this leads to there being ranges on page 21.

[553] Mr Harris replied to Mr Ray's initial email to him asking for his and Mr Niehaus' review to determine whether PwC had "taken into account the recent observations":

> No it is not cleared off, the report is a working draft document, with additional work still being done in a number of areas.
>
> It is a process that management is working through with the actuaries, - it is not part of the audit at all at the moment.
>
> I think it should be taken off the agenda.

[554] Soon after, Mr Harris sent a further email to Mr Ray, copying others in management including Mr Mulholland:

> How does the ARC have any involvement or oversight in this?
>
> Does it have any effect on getting the audit done, or meeting audit process or time-lines?
>
> The ARC does not manage any part of the company. Instead it ensures the audit process gets done and within tight timelines.
>
> Processes such as these claims reports, FCR, Liability Valuations, Actuarial process and workstreams, - are all under management's control, and their reporting to the board.
>
> So a lot of material that you are reporting and providing to the ARC should be reported to [Mr Mulholland] and I. And we will report to the board.
>
> Every year this process of you and [Mr Clements] etc reporting to the ARC effectively takes [Mr Mulholland] and I out of the oversight and management process.

> Could you send me the ARC agenda again, and I will speak with [Mr Mulholland] this am and decide what will come off the Agenda. It might also reduce the invitee list.

[555] In evidence, Mr Clements said this was incorrect. He said Mr Harris (along with Mr Hannon) was involved in and made a lot of the decisions around what the ARC did and the information it received.

[556] Mr Harris also replied to Mr Hannon's question about Mr Mackay and Mr Mulholland:

> There is a lot of work to be done here on remaining parts of the data, - and is scheduled to be done over the next few weeks.
>
> This Draft report is exactly that and is designed to give some initial indications to management and the board on where things are headed, from work done to date. Not completely sure where it impacts or fits into the audit process.

[557] Mr Ray replied:

> Historically the PWC Reserving reports have been discussed at the ARC meeting but with this report being draft…

[558] In evidence, Mr Ray said that he and Mr Clements would usually report the status of PwC recommendations to the ARC, and the Appointed Actuary had been intending to present this report at the upcoming meeting. He said he was concerned that Mr Harris and Mr Hannon did not want to address the report at the ARC meeting.

[559] In the meantime, Mr Hannon also forwarded Mr Ray's initial email to Mr Harris, saying:

> I do not get this at all.
>
> Does this mean that we should discontinue DL (I do not know the splits RCP/RCD).
>
> How can this actually occur?
>
> Does [Mr Niehaus] agree with this?
>
> If received by the [ARC] then we will have a Disclosure issue.
>
> What next?

[560] This reference to a disclosure issue was misconceived. Whether there was a disclosure issue depended on the information already known to Mr Hannon, Mr Harris and other management including Mr Mulholland, not whether that information was received by the ARC. As Mr Pigou said, Mr Hannon's comment highlights a fundamental misunderstanding of the continuous disclosure obligations.

[561] Mr Harris replied:

> These are all things being worked through by management with the auditors. When we have some answers we will make some recommendations to the board.
>
> The report itself will go to the board for the next board meeting. These people have been working nights and weekends over the past 12 weeks to get to the stage things are - working with 10 years of data, and getting 4 years of developing triangles - incurred and paid, by producer and by the 7 classes of business.
>
> Is this something we should take off the ARC agenda, - or leave it completely to them.

[562] Mr Hannon replied:

> I was not aware that DEL were involved at this juncture ?
>
> It is not on the ARC Agenda other than a verbal update as to progress

[563] Mr Harris replied, copying Mr Ray:

> No, it is nothing to do with Deloitte or the audit process.

[564] Shortly after, Mr Ray replied to this email from Mr Harris (also to Mr Hannon):

> To confirm the ARC Pack will not include the PWC Report.
>
> Per the agenda – there is our usual item "PWC Actuarial update", maybe PWC can discuss / communicate progress and achievements over the last few weeks with regards to improvements on data and modelling and assumptions ... (rather than specific reserving findings which are draft)

[565] Soon after, Mr Ray sent the ARC agenda to Mr Harris, copying others including Mr Mulholland. Mr Harris emailed Mr Mulholland, saying that "Items 5, 7, 8, and 10 should come off in my view, - what are your thoughts?" These items were respectively the PwC actuarial update, Castlerock, Regulatory update and Risk and Policies.

[566] Later that night, Mr Mulholland responded to Mr Harris saying:

> I think the auditors are going to want to discuss Castlerock given the transaction size.
>
> In regards to the PWC numbers they look ridiculous! I think they need to bring their models in to be reviewed by us. I can't believe that the strengthening is going to be that much. Listening to [Mr Christer] talking about the errors they have already corrected in the data must mean that what PWC are looking at is wrong.
> I want to see what are the variables in their model where they have made assumptions that we should be challenging. The outputs are the outputs but if the assumptions are wrong then the outputs are as well.
> I think they are using a very high average claim size and also a lower recovery perhaps. I think we should go through each item though and understand the lever effect it is having and challenge them all.

[567] Mr Mulholland also responded to Mr Ray's earlier email (at [552]), saying:

> My personal feeling is that this has to be wrong. I have asked for some things to be looked at that I am still waiting on answers from around average claim size and how does that develop over time. I asked [Mr Mackay] to look at for example is the average claim size in year 2 and 3 say 4000 but in years 4-10 it is 500. If so if we don't get a claim in the early years why would we apply (if we do ... waiting on this answer) a higher average claim size to all years.
>
> I also don't understand why cash flow doesn't follow these expected claim developments. Net outflows would be huge if this was actually reality and I would be seeing adverse outflows in our cash.
>
> The claims data continues to be cleansed up here and there is still work being done daily.
>
> I want to look at the model PWC are using and what inputs are driving these constant up movements. I want to understand what levers move this so far all the time. I am not going to look at a written report and just accept it without being able to interrogate their model and question every input that is driving these huge movements.

[568] I accept this reflected Mr Mulholland's view at the time even though he was no expert in relation to actuarial reserving.[145] He acknowledged that the conclusions in this draft report were very serious for CBLI and said he wanted to ensure that CBLI understood how the conclusions were reached and had an opportunity to discuss data and modelling mistakes with PwC before the report was finalised. Even so, Mr Mulholland should have corrected Mr Hannon's misunderstanding about

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145 Mr Hannon forwarded Mr Mulholland's email to Sir John Wells on 24 November 2017. Sir John Wells replied to Mr Hannon on 25 November 2017 saying that Mr Mulholland made "some very good points and around cash flow as well".

disclosure; for example, by referring him to the Continuous Disclosure Policy as he had the year before (at [193] above). He should have advised Mr Hannon and Mr Harris that the Board and Disclosure Committee needed to consider whether continuous disclosure of the information was required.

[569] The next morning, 24 November 2017, Mr Coulter told Mr Rhodes in an email that the ARC pack had not yet gone out – Mr Hannon "didn't want the numbers circulated until CBL management debated / challenged them more".

[570] At 1:49 pm, Mr Ray emailed Mr Hannon again:

> Following up on yesterday's emails.
>
> Deloitte as soon to email over their Report > We are then ready to consolidate the ARC Pack.
> I want to double check with you to exclude the PWC Reserving Update Report and the next knock-on communicate with PWC to discuss whether they are to attend / what they are to cover at the meeting?

[571] At 2:27 pm, Mr Ray also asked Mr Niehaus to attend the ARC meeting to cover discussions regarding progress and work in progress with regard to claims and reserving assumptions. Mr Ray told him that Mr Hannon had said the ARC was not the right forum for discussing the PwC reserving update report but instead wanted a short session to discuss data/modelling/assumption etc progress.

[572] Later that afternoon, Mr Ray circulated the pack for the ARC meeting. He also called Mr Rhodes and said they had dropped the PwC report from the pack – the plan was to take it to the whole Board. They agreed that Mr Rhodes should get in touch with Mr Hannon on Monday to discuss the upcoming ARC meeting.

[573] The same day, Mr Hannon forwarded PwC's draft report to Sir John Wells, saying:

> I have indicated that we do not want this into the ARC as yet.
>
> Much more work and discussion required.

[574] This also reflects the misunderstanding referred to at [560] but I accept that this PwC draft report was not withheld from Sir John Wells.[146] All three members of the Disclosure Committee received PwC's draft report. There was no documentary evidence that the other directors received it, but it may be that other directors were also made aware of it – they did not give evidence. In any event, I do not consider that Mr Mulholland was involved in seeking to withhold PwC's draft report from the Board. As indicated, however, he should have raised the need to consider continuous disclosure.

[575] On 25 November 2017, the Board met by teleconference. Mr Mulholland did not attend. The minutes record that Mr Harris' CEO update included:

> There were indications that there will be a strengthening required at year-end. A strengthening would not be significant in terms of CCL's balance sheet, but a 10% adjustment of €30m in terms of P&L would be.
>
> Alongside the data project work, the forensic review of the debtors, collections and [accounts receivable] had begun. As the internal team did not have access to the appropriate software, KPMG were engaged to carry out the forensic accounting work.
>
> KPMG had just finished their preliminary work to evaluate initial figures, establish a scope, and make initial observations. They had completed some reconciliations and found an initial gap of €30m between SFS and CBL.

[576] The minutes do not record that the Board was told about PwC's total prior year impact of between $67m and $120m.

[577] On 26 November 2017, Mr Mackay emailed Mr Ray:

> How are you?
> Seems to be a lot of heat and debate !
>
> I am sympathetic with [Mr Harris'] view that the PWC reserving ppt still needs a lot of management review. (You are better placed than me as to whether it is within scope of the ARC. )
> My view of the ppt:
> Whilst I agree with the work that [Mr Coulter] has done, I hadn't seen this version before. I agree that some reserve strengthening will be needed but I have challenged [Mr Coulter] (via email) that maybe he is slightly conservative?
> I will cc you in an email I sent to [Mr Coulter].

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[146] The FMA had suggested otherwise during cross-examination of Mr Mulholland, but acknowledged this in closing and counsel's subsequent memorandum dated 21 August 2024 in response to a memorandum on behalf of Mr Mulholland dated 16 August 2024.

> Hopefully this makes sense for you if there is a debate at ARC in this agenda item?

[578] Mr Mackay also emailed Mr Ray and Mr Clements with a response to Mr Mulholland's question (at [567] above) in case it was brought up in the ARC discussion:

> If this gets brought up in the ARC discussion:
>
> I *asked [Mr Mackay] to look at for example is the average claim size in year 2 and 3 say 4000 but in years 4-10 it is 500. If so if we don't get a claim in the early years why would we apply (if we do ... waiting on this answer) a higher average claim size to all years*
>
> -1 have already asked [Mr Coulter] about this.
>
> - however, without any evidence we can't make assumptions about IBNR claims being smaller than the average for claims already reported - which is the actuarial way of expressing [Mr Mulholland's] hypothesis.
>
> - also, it is important that this is not mixed up with the average claim size charts in the PWC report. That is a different issue. Ie it is about already reported claims taking a long time to settle, and with that delay extra payments seem to be made. This is [IBNR] in actuarial parlance.
>
> [Mr Coulter] and I hadn't forgotten [Mr Mulholland's] question. It's just that we haven't found any evidence as yet ( and if there was it would be coming through in [Mr Coulter's] analyses as lower averages in the recent claims lines)
>
> We will keep investigating though.

[579] Mr Marsh replied to Mr Ray's ARC pack, saying he was unable to attend the meeting but "would very much have liked to hear PWC's Actuarial Report!" and asked to be sent any supporting documentation they would be talking to. Mr Hannon responded:

> In terms of the current process – it is very much Draft and In Progress between PWC and Management – initial commentary seems to be difficult to understand hence the reason for only having a brief verbal update Tuesday. It seems that considerable more work is required to land on better reasoning.

*ARC meeting – 28 November 2017*

[580] On 28 November 2017, the ARC met. Mr Mulholland attended. The draft minutes prepared by Mr Ray indicate that Mr Rhodes gave an actuarial update but do not mention the need to strengthen reserves that had been raised on 23 November.

Rather, the draft minutes record that Mr Rhodes' concluding point was that "the next steps after the data improvements are finalised will be to develop the reasonable range of actuarial reserves for year end, and work with management to agree the best estimate within the range".

[581] Mr Rhodes said in evidence that he gave a verbal update that a significant reserve strengthening would be recommended for the full year, and that when he saw this was not recorded in the minutes prepared for the next ARC meeting in February 2018, he expressed surprise. Mr Mulholland and Mr Ray said they did not recall that, but the minutes of the ARC meeting on 22 February 2018 record:

> [Mr Rhodes] noted that the last minutes missed the fact that [Mr Rhodes] mentioned a significant strengthening in reserves
>
> [Mr Mulholland] commented that care needed to be exercised about this comment as it impacts market announcements given the timing of ARC meetings.
>
> [Mr Hannon] said they will craft appropriate wording.

[582] Also, Mr Coulter's email to Mr Rhodes on the evening of 28 November 2017 included:

> However, overall happy that we didn't sit in silence today and we should check that all your good points are reflected in the minutes. I'm thinking we need a catch up with Tony Hannon next week separately as I just don't think he gets it. Are you happy for me to organise or do you want to check with [Mr Harris]?

[583] Given the documentary record, I think it more likely that Mr Rhodes' verbal update to the ARC on 28 November 2017 did include that a significant reserve strengthening would be recommended for the full year. Omitting this level of detail from the minutes is consistent with the misconceived view about disclosure if the ARC received the draft report. However, given Mr Ray's evidence, I do not consider the omission can be attributed to Mr Mulholland. I also acknowledge that Mr Rhodes' update was an indication as to the Appointed Actuary's intended recommendation rather than the recommendation itself, which the Board, ARC and management would need to consider. The minutes could have reflected that.

[584] Mr Mulholland also said that if he did say anything about disclosure at the meeting on 22 February 2018, it was because he was conscious that as soon as information was finalised it needed to be immediately disclosed to the market; therefore, it was important to distinguish between draft – that is, incomplete – and final information and opinions. I doubt that explanation given the wording of the minutes.

*Second RBNZ direction*

[585] Meanwhile, on 22 November 2017, following a signalling call to Mr Harris and Mr Parrott the day before, RBNZ wrote to Sir John Wells issuing directions to CBLI and CBLC, under ss 143 and 145 of IPSA respectively, requiring them to consult RBNZ before entering any transaction or series of related transactions involving a payment or transfer of assets of $5m or greater.[147] The Castlerock transaction had increased RBNZ's concern. These directions also referred to the s 150 disclosure prohibition (confidentiality).

*Solvency and reserving updates – November / December 2017*

[586] On 28 November 2017, Mr Clements emailed Mr Coulter about the solvency treatments they needed to catch up on, including:

> 1. Castlerock – we view this as converting from aged premium receivable to an 'other receivable' (40%)
>
> 2. Elite collateral – this is going to lose its classification as 'cash' in our accounts (as it will no longer be freely available). CBL view is that [it] will revert to being 'premium receivable' in nature, and will have a contractual settlement in accordance with attached draft endorsement (4%).

[587] On 29 November 2017, Mr Ray and Mr Clements prepared a draft memorandum to Mr Harris and Mr Mulholland to explain the accounting and solvency treatment of the Castlerock transaction. It also set out the background to the transaction and the SFS receivables. The transaction amount was now calculated as €29.6m net of SFS's commission and any other acquisition costs that CBLI had expected to pay.

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[147] The s 143 direction to CBLI applied in respect of transfers of assets in excess of $5m, whereas the s 145 direction to CBLC applied in respect of transfers of assets of $5m or greater. See also n 126 above.

[588] The same day, RBNZ requested a meeting with Mr Rhodes the following week. PwC and Mr Parrott exchanged emails about talking points ahead of the meeting scheduled for 6 December 2017. Mr Parrott's input included:

> Not sure about saying "As a result of this work, it is likely that reserve strengthening will be required at the full year". Whilst it may be true that you believe strengthening will be required, we need to be careful about saying too much too soon. [Mr Harris] has told them previously that an increase is likely but he does not want to speculate.

[589] On 4/5 December 2017, Mr Mulholland (with others from CBLC) presented a technical session in Auckland and Sydney. Mr Frost of Argo attended. Mr Mulholland was "pretty upbeat about 2H activity".[148] There was no reference to any review of reserving or risk of reserve strengthening, nor to the SFS receivables issue. Mr Mulholland said he could not mention the reserve strengthening without Board approval. He also said he was in a difficult position by the end of 2017 as he was aware the market did not know about the regulators' concerns about CBLC, but understood he could not disclose those concerns due to confidentiality restrictions.

[590] Also on 4 December 2017, Mr Harris emailed Mr Mulholland and Mr Griffiths about a market update:

> We promised the market an update in November.
>
> We are criticised for the lack of transparency around our earnings, and the information investors get.
>
> I was thinking that if we did give the market an update, on revenues at least, it would (a) overcome some of the lack of transparency, and also give us a chance to reinforce that it is subject to reserving for future claims, [and] maybe a heads-up around that, and also enable a [heads-up] and better manage the potential for any reconciliation issues around accounts receivable and the [Castlerock] proposal.
>
> Instead of playing catchup next year, close to the time.
>
> Appreciate thoughts, and may we would have a meeting on Wed /Thursday on this.

148 According to Mr Frost's subsequent email asking UBS about the trading halt in February 2018.

[591] On 6 December 2017, RBNZ had a meeting/call with Mr Rhodes, Mr Coulter and Mr Parrott to update RBNZ on progress on the reserving work. The discussion also referred to CBLI's solvency reporting:[149]

> - [RBNZ] noted CBL's response to the s121 notice failed to correct the solvency errors, which in itself is a breach of the notice. He asked if PWC had reviewed the response before it was sent. [Mr Rhodes] said no. [RBNZ] recommended the appointed actuary have some input &/or review into CBL responses if they cover solvency-related issues, and noted RBNZ copies [Mr Rhodes] into our communications with CBL that are relevant for solvency and financial condition.
>
> - [RBNZ] added that subsequent to the 31 October 2017 letter, the September 2017 solvency reporting appears to continue with the errors, and noted the next monthly solvency reporting is due early next week. These should be correct also.
>
> - [Mr Rhodes] and [Mr Coulter] said they would look into this and respond.

[592] Later on 6 December 2017, Mr Coulter and Mr Clements exchanged emails following RBNZ's comments that day that CBL never complied with the RBNZ direction to resubmit July and August 2017 solvency returns (with Castlerock removed and the Elite premium adjusted to collateral at 40%). Mr Clements said RBNZ were "correct that we didn't provide the figures, but it's probably worth noting that CBL didn't just ignore the request, there were questions put back to RBNZ, and a proposal to discuss on 12 December". Mr Coulter replied:

> OK, I can see why the RBNZ was frustrated now. Although I think you know my view on the July and August (and September) solvency updates anyway given we haven't actually got any signed agreements in place ...

[593] Also on 6 December 2017, Mr Ray sent Mr Harris and Mr Mulholland the CBL Group Finance Report for October 2017. The report outlined some unfavourable financial impacts looking ahead to year-end reporting, including the actuarial reassessment of reserves.

[594] On 8 December 2017, Mr Griffiths emailed Deloitte a revised Receivables Purchase Agreement and said "[t]he legal obligation and risk of collection rests solely with Castlerock, with no recourse to CBL Insurance".

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149 This is taken from Mr Parrott's notes, which are consistent with RBNZ's.

[595] On 11 December 2017, Mr Greyling emailed Mr Griffiths about the Castlerock Receivables Services Agreement:

> …conscious that you're looking to give a verbal update to the Board tomorrow. If we're being asked for a view as of today I'm afraid the position for now will be that the Elite debtor can't be derecognised and replaced with a receivable from Castlerock Receivables Management Ltd. Main reason still being the deferred payment arrangement from the SPV [whose] returns are solely dependent on the collection of the end receivable – Under the accounting principles, this gives CBL exposure to variability in return from [Castlerock] (i.e. Castlerock needs to collect the receivable from the customer to be able to pay CBL). Our technical guys are looking at it from all angles to try what else could change this. As mentioned last week, an upfront payment would have a substantial impact on the outcome as it effectively removes that exposure.

[596] Also on 11 December 2017, Mr Clements emailed Mr Harris and Mr Mulholland asking them to confirm that CBLI should upload its monthly solvency filing with RBNZ. This recorded CBLI's Solvency Ratio at 31 October 2017 as 176.3%. Mr Clements noted that RBNZ had expressed dissatisfaction that CBLI had not complied with the direction to re-submit earlier solvency filings without the Castlerock and Elite collateral changes. He said the attached was prepared on the assumption that CBLI was continuing to file with Castlerock and Elite included. Mr Harris replied, "I am happy with the consistency of our application of our management accounts if [Mr Mulholland] is". Mr Mulholland replied, "I am happy".

[597] Mr Mulholland's attitude to solvency filings was also reflected in his statement to investors at the technical session on 4 December 2017, which was noted by ACC:

> [Mr Mulholland] reiterated that [RBNZ] has been extremely unfair in requiring higher provisioning on what is basically cash coming into the business. He expects some reversal.

*Board meeting with RBNZ*

[598] On 12 December 2017, the Board met from 9:00 am to 1:35 pm. Mr Harris' CEO report to the Board included:

> PwC NZ have been making suggestions that reserve strengthening might be required as high as $60m for year end, but BN, OD, and GM are working hard to prove that wrong. RBNZ has met with PwC last week, and asked them for an advance "heads up" of what the adjustment might be. PwC have confirmed that their workings are draft only and will not be finished until late January.

[599] That did not accurately reflect PwC's advice (at [546]-[547] above) but suggests Mr Harris remained of the view that PwC was wrong As indicated above at [573], Sir John Wells had received the draft PwC report. In any event, there is no evidence that Mr Mulholland was aware of Mr Harris' CEO report to the Board. Mr Mulholland did not attend this Board meeting.

[600] The Board minutes stated, under the agenda item relating to the minutes of the ARC meeting held on 28 November 2017:

> PwC were expected to finalise the actuarial report in late January, with management's input completed by 10 January.
>
> The minutes of the ARC meeting held 28th November 2017 were received by the Board.

[601] The minutes also stated, under the agenda item relating to the CEO report:

> A strategy on messaging for the Market was raised. Market feedback showed a lack of confidence in CBL's transparency over earnings, with a lack of 'warning' indicators, and signals. Guidance ahead of the Year-End Announcement was proposed by [Mr Harris]. There were concerns from the Board about the uncertainty of any guidance which may result from ongoing issues such as additional reserving, and the danger of 'flip-flopping' on the share price. However it was agreed that in 2018 shareholder communication strategy should be reviewed following Year-End.

[602] This indicates the Board was considering disclosure of market guidance ahead of the year-end announcement, rather than CBLC's obligation of continuous disclosure of potentially material information itself (such as PwC's reserving updates, CBI's regulatory action, the aged receivables and the Castlerock transaction). Further, insofar as the Board decided not to make an announcement with guidance ahead of the year-end announcement, it appears the Board was not fully informed as to PwC's reserving updates, as indicated at [598]-[599] above.

[603] After the Board meeting, Board members had a meeting with RBNZ in Wellington (with Mr Marsh on the phone). Mr Mulholland did not attend. RBNZ called the meeting primarily to ensure that the entire Board was aware of RBNZ's concerns and taking them seriously. Each of the directors confirmed that all issues had been raised and discussed with them, and that they did not share RBNZ's views.

[604] In relation to confidentiality, CBL and its lawyers indicated at this meeting that confidentiality orders would need to be lifted in due course to enable CBL to inform markets and pursue resolution options (such as a capital raise). In particular, according to the RBNZ file note, CBL's lawyer from MERW said that CBL had not disclosed any issues because RBNZ confidentiality provisions meant to do so would be a breach of law, and this trumped NZX/ASX rules. She said they were concerned that the investigators' report would not be subject to the same safe harbour provisions and so would need to be disclosed when finalised. The CBL/MERW file note recorded her as explaining "the continuous disclosure test and CBL's reliance on the safe harbour provisions to not disclose RBNZ investigation, but if any of the 3-prongs is not met (e.g. with CBI) this will need to be disclosed". This indicates that the advice was focused on disclosure of the RBNZ investigation. Even then, the file note indicated that if any of the three prongs (paragraphs (i), (ii) and (iii) of cl 10.1.1(a) of the Listing Rules) was not met, this information would need to be disclosed. This file note did not suggest that RBNZ confidentiality extended beyond the existence and content of the RBNZ direction. Section 150(1) of IPSA applies to disclosure that an applicable direction has been given – not to the underlying information. Further, in relation to the CBI directions, the CBL/MERW file note was consistent with one of the key messages in Mr Parrott's email to Mr Harris (following a meeting with CBL's QC):

> The continuous disclosure requirements on CBL Corporation (and in particular the CBI directions which may be material to the Group and which are not subject to any confidentiality requirements)

[605] These documents indicate the Board was aware that the safe harbour exception did not apply to the CBI directions. I accept that Mr Mulholland may not have seen this file note or email.

[606] On 14 December 2017, Mr Mulholland sent Mr Griffiths a "market update narrative" and accompanying excel spreadsheet explaining the figures for review, noting the announcement "needs some work on the wording". The draft included the following statement attributed to Mr Harris:

> The only item that we are unable to predict with a high level of certainty at this time is the future claim reserving. This is part of our annual audit and actuarial review and the report is produced and finalised close to the time CBL must report to the market.

[607] Mr Mulholland said he would not have proposed these words for Mr Harris. Given the email exchange, it seems more likely these words were suggested to Mr Harris rather than by him. Further, consistent with [602] above, the focus of this draft announcement was on guidance ahead of the year-end announcement rather than disclosure of the material information itself, and when the Board decided on 12 December 2017 not to make an announcement, it appears the Board was not fully informed as to PwC's reserving updates.

[608] On 15 December 2017, CBI advised CBLIE that its governance inspection had "highlighted that there are serious issues in relation to the CBLIE governance framework" and that "the system of governance in place at CBLIE deviates significantly from the appropriate standards required under Solvency II and the Corporate Governance Requirements for Insurance Undertakings 2015". CBI considered the "deficiencies identified during the inspection could expose CBLIE to an increased risk of under-pricing and under-reserving, which can ultimately lead to company failure" and that "a number of inspection findings are in contravention to the legislative requirements under Solvency II and the Corporate Governance Requirements". Therefore, CBI advised CBLIE that, as a result of CBI's governance inspection findings, it was minded to direct CBLIE to apply a capital add-on, which would remain in place until the governance issues identified by CBI had been rectified. CBI asked CBLIE to respond by 3 January 2018. This CBI letter was marked "Central Bank of Ireland – CONFIDENTIAL". Mr Mulholland accepted that he was aware of this CBI letter around the time it was sent to CBLIE.[150]

[609] On 19 December 2017, PwC sent Mr Mackay and Mr Christer a document answering a series of questions CBLI had asked about reserving following on from the November update. Mr Coulter's covering email included:

> I've tried to provide more detail where possible to document the management challenge of the assumptions and demonstrate that I'm not being overly conservative in light of what the cleansed historical data is showing. As we have discussed a number of times, the key to the reserve strengthening is the increases in average costs as the historical development is providing new insights into the fact that claims develop for longer plus the 'a priori' loss

[150] The same day, CBI wrote to CBLIE (marked "Central Bank of Ireland - CONFIDENTIAL") advising that it was minded to require a skilled persons' report to assess CBLIE's approach to the calculation of its technical provisions and the sufficiency of the reserves.

> ratios have been increased in most cases as we have enough information to test historical management assumptions now. It's clearly identified differences between one claims administrator and another, which has the potential to be remediated.
>
> We have no further updates on this pack as at today. I'm a little reluctant to go for a death by a thousand cuts when we have three major things outstanding for year-end…

[610] An internal PwC email from Mr Coulter to Mr Rhodes stated:

> Attached are responses to a number of questions fired this way in terms of the reserving position. I've made it pretty formal so it's all on file that we've been asked questions and have responded accordingly. [Mr Mackay] also met with [Mr Harris] and [Mr Mulholland] today on reserving (but we weren't invited!) ... they appear to be still in the denial phase and expecting reserves to magically go down by tweaking modelling for fees / expenses.

[611] Mr Mulholland did not accept that this was an accurate description of his position. He said that he was struggling to understand how PwC had changed its position so much in the space of six months. This mischaracterised PwC's earlier advice, but I accept that despite his lack of expertise Mr Mulholland had a concern that the PwC model may not be right. He acknowledged that CBLC's finance team never really reviewed the model. In any event, Mr Rhodes said that PwC were pretty clear that a substantial amount was going to be required – the actual number was still being worked on, but by this stage, it was very clear that a substantial strengthening was required. Indeed, Mr Rhodes said they had tried their best to convey that there was going to be a significant number throughout the whole period from September or October 2017.

[612] At 7:00 pm on 19 December 2017, the Board met by teleconference. Mr Mulholland attended. The minutes included that Mr Harris updated the Board on CBI's 15 December 2017 correspondence.

[613] Also on 19 December 2017, Mr Mulholland emailed Mr Harris and Mr Griffiths about a market update:

> Did you want to do the market update as we circulated?
>
> We are getting so far past when we told investors we would do anything I am concerned of is now getting lost in the Christmas shut down.

[614] Mr Harris replied:

> The board has said no, but I am worried about not giving any heads up of anything. A bad surprise will shred our price.
>
> The only thing is to draft something to see what it looks like, and then put it to the board again.
>
> Will you/[Mr Griffiths] draft up what you had in mind?

[615] Mr Mulholland responded:

> We sent it to you last week.
>
> I will dig it out and resend

[616] Mr Mulholland then resent the draft to Mr Harris. Mr Harris replied to the preceding email:

> Sorry [Mr Mulholland], I missed it. I did bring up the subject in the board meeting last Tuesday, but got told a firm no.
>
> As I say, I think we should put it back to them.

[617] Mr Mulholland replied that night:

> Okay [I] will leave it with you.
>
> We tried to get the basic bits down that we think is all that needs to be disclosed to the market at this time.

[618] The next morning, Mr Griffiths also sent Mr Harris and Mr Mulholland the draft market update with amendments from the 14 December version marked up. The only change to the passage of the draft attributed to Mr Harris (referred to above at [606]) was as follows:

> The only item that we are unable to predict with a high level of certainty at this time is the future claim reserving. This is part of our annual audit and actuarial review and the report is produced and finalised close to the time CBL ~~must~~ will report to the market.

[619] On 19 December 2017, Mr Griffiths drafted (but may not have sent) an email to Mr Hannon attaching a "draft receivables announcement" at Mr Hannon's request. This appears to be a different draft announcement. There was reference to a document

which appeared to be this draft announcement although its provenance was not confirmed. It included:

> Since acquiring SFS on 5 January 2017, CBL Corporation Limited (CBL) has been undertaking an intensive review of insurer receivables on its books, including a forensic analysis, and reconciling these to the receivables in CBL Insurance that have been recorded from information provided in bordereaux reporting from SFS. The work is still in progress as it involves tens of thousands of line items, however the early indications show that it is likely to result in a material write-off in CBL Insurance which will mean CBL is unlikely to meet the Operating Profit guidance provided during our 1H17 results announcement. We will update the market once the final reports are complete.

[620] In any event, no announcement was made in December 2017.

*Castlerock update – December 2017*

[621] At the Board teleconference meeting on 19 December 2017 already referred to, the minutes also indicate that Deloitte had advised that it did not accept CBLI's accounting treatment of the Castlerock transaction, and it did not accept the security of Castlerock nor the guarantee of Castlerock's parent.

[622] On 20 December 2017, Mr Griffiths asked Mr Wilkes to email confirmation of the matters that were preventing Deloitte from agreeing with CBLI's accounting treatment that the Castlerock transaction would facilitate the derecognition of the aged receivables. Mr Wilkes replied:

> As discussed yesterday the main point is that at a high level, it does not appear that CBL has transferred substantially all of the risks and rewards as it appears CBL is still exposed to the original receivables. This is because the SPV is relying on collection of those receivables to pay the deferred settlement. While the SPV may be able to collect some money through the call option it would not appear to be able to collect more than a small portion through the call option (almost certainly not Euro29m). Therefore the exposure appears to be largely the same as before.

[623] On 22 December 2017, Mr Wilkes sent a further email to Mr Harris:

> We have taken another look at this, including the additional information provided by [Mr Brownie] yesterday. We are still not satisfied that the accounting derecognition rules are met and therefore CBL still has a dependency on the underlying receivables. This will need to be disclosed in the Group financial statements together with the fact that CBL has entered into an arrangement with a 3rd party to sell some of its receivables.

> From a solvency position the original receivables aging will need to apply unless the RBNZ is satisfied that the Castlerock receivable can be recognised as the appropriate asset for solvency purposes. We are happy to be part of a conversation with RBNZ and with PWC as your appointed actuary in this regard in the New Year.

*SFS regulatory sanction*

[624] A disclosure issue arose in late December 2017 in relation to a regulatory sanction in Europe by CAA against SFS. On 27 December 2017, Mr Harris emailed the Board reporting on a difficult situation where CAA had fined SFS €5,000 for not splitting its business into MGA and broker, and said SFS could not trade under its current status pending an appeal. Mr Harris said they had not known about this until it was pointed out by RBNZ on 15 December 2017. As mentioned above at [200], under action points Mr Harris said:

> Market, - once I have the latest update regarding ability to trade, I will draft an initial draft for Disclosure Committee for a decision on the need for disclosure, and a draft statement for the board to view.

[625] Mr Harris forwarded his email to Mr Mulholland (and others).

[626] On 29 December 2017, Mr Harris emailed Sir John Wells and Mr Mulholland (copying Mr Griffiths and Mr Parrott) explaining this situation which had resulted in CAA fining SFS for acting without authority as an agent and the measures being taken as a work-around. Mr Harris asked, "Should we disclose these interim measures to the NZX/market, and if so what and when?" Sir John Wells replied, "On the matter of Disclosure it's not really a [straightforward] decision, with a number of pros and cons!" He said the impact appeared to be negligible, but:

> On the other hand, the sanction and fine ( quite insignificant ) is in the Public Domain, and if not disclosed could receive adverse comment,
>
> with questions being asked by the NZX/ASX.et al.

[627] Mr Harris replied:

> My thoughts;
> The action of the CAA is in the public domain.
> So is the sanction and the fine.
> Would that be something that might materially affect someone from investing in or selling CBL shares?

> I would say yes it might, and therefore we should disclose.
> The matter of a significant company in the CBL Group being sanctioned and fined, and potentially stopped from operating is something that an informed market should know about.
> If the NZX or FMA asked us why [we] did not disclose, we might find it difficult to answer.

[628] Mr Mulholland replied:

> I agree with [Mr Harris],
> I think this is a material item though can be messaged as something that is reasonably immaterial.
> Investors will [want] to know can SFS continue to do business, which is yes.
> It is not ideal but I think we can disclose and not turn it into a big issue if we get the message on point.

*Castlerock update – January 2018*

[629] On 5 January 2018, Mr Griffiths emailed Mr Mulholland and Mr Harris, copying Mr Ray and Mr Clements:

> As discussed yesterday, please find attached our analysis of IAS 39 in relation to the Castlerock transaction. Can you please review and confirm you agree with our analysis.
>
> We believe there are strong arguments to meet the derecognition requirements of the standard on the basis that "substantially all" the risks and rewards have been transferred from CBL to Castlerock. We believe Deloitte's sticking point is the substance over form argument, which we have addressed in the attached.
>
> If Deloitte continue to be obstinate and argue that we have not reached the "substantially all" threshold, then we can also prove that CBL has "not retained substantially all" the risks and rewards and it therefore falls on whether CBL has retained control of the assets, which clearly it has not in both substance and form.
>
> However, we think it is best in the first instance to advance our arguments as attached. If, after attempting the attached, and if necessary a second argument as above, we could seek an alternative opinion as mentioned yesterday as support for management's chosen accounting treatment.

[630] On 9 January 2018, Mr Harris said he agreed with the analysis (subject to asking one question) and suggested it be sent to the ARC.

[631] On 11 January 2018, Mr Harris asked Deloitte to pick this up again, saying CBL had done a thorough evaluation of the accounting standard and stepped through the questions posed by it, and come out with a different answer. Deloitte agreed to meet with CBLI in person on 24 January 2018 to discuss the Castlerock transaction

(and on 22 January 2018 Mr Griffiths sent CBL's analysis of the Castlerock transaction and accounting standard NZ IAS 39 to Deloitte to form the basis of the discussion). At the conclusion of that meeting, Deloitte's position remained unchanged. In Deloitte's view, the transaction simply did not satisfy the criteria for derecognition.

[632] Mr Borrie had not reviewed all necessary documentation to be able to provide an independent accounting opinion but he said that Deloitte's questions and concerns appeared reasonable and that he was not surprised by Deloitte's conclusion.

*Solvency update – January 2018*

[633] Meanwhile, on 10 January 2018, Mr Parrott forwarded Mr Harris an email with the solvency filing as at 30 November 2017 prepared by Mr Clements. Mr Parrott said:

> This is the RBNZ Report for November for [your] review and approval. Note, solvency down to 170.8% but still above the new imposed minimum (with our treatment for Elite Cash Loss Reserve and Castlerock transaction unchanged from prior months). This will be the last "month-end" report of any contention regarding these treatments since the next one will be the year-end where everything will effectively be "re-set" as part of the actuarial year-end reserving review etc.

[634] Mr Harris said, "I am good with the filing of this if [Mr Mulholland] confirms". Mr Clements asked Mr Mulholland if he was happy for the November filing to be made as attached, and Mr Mulholland replied "[y]es I am happy".

*Third CBI direction*

[635] On 12 January 2018 in Ireland, CBI wrote to Mr Sherin at CBLIE issuing a further direction to CBLIE (as signalled in December 2017) requiring CBLIE to apply a capital add-on according to the methodology specified in an appendix to the letter, to mitigate the heightened risk as a result of inadequate systems of governance being in place (third CBI direction). This required additional capital of approximately €31.5m, more than double CBLIE's existing reserves, albeit I accept the actual amount was not known until the requisite SCR calculation was done. It was unclear when the SCR calculation was done but at the latest it was by 30 January 2018. As Mr Borrie said, the third CBI direction was primarily of significance because it created further

pressure on the CBL Group's cash flow position by requiring additional capital to be held specifically in CBLIE, and not used elsewhere in Group operations (or distributed as dividends).

[636] CBI also remained concerned that CBLIE was under-reserved as a result of its approach to calculating its technical provisions and therefore on the same date issued a separate direction to CBLIE requiring it to obtain an independent third-party report (a skilled persons' report) by a relevant expert, to assess CBLIE's approach to the calculation of its technical provisions and the sufficiency of the reserves held by CBLIE. This report was not ultimately obtained.

[637] Each of these CBI letters was also marked "Central Bank of Ireland - CONFIDENTIAL". Even so, as indicated at [48] above, confidentiality is insufficient alone to exempt release under the Listing Rules. In this context, the relevant requirements of the safe harbour exceptions in the Listing Rules are that:

(i) a reasonable person would not expect the information to be disclosed; and

(ii) the information is confidential and its confidentiality is maintained; and

(iii) one or more of the following applies:

(A) the release of information would be a breach of law.

[638] Given Ms O'Mahony's evidence, I accept that the third CBI direction was not given to CBLIE in confidence such that release by CBLIE or CBLC would have been a breach of law. I will address Mr Mulholland's understanding separately below.

[639] The next day, Mr Sherin forwarded both these CBI directions to the directors of CBLIE, including Mr Harris, Mr Mulholland and Mr Donaldson. Mr Mulholland emailed Mr Harris saying:

> Are the CBI that stupid? They do know there is already an independent [report] being done don't they? What is the point of another report?

[640] Mr Harris began his reply to Mr Mulholland with "Yes they are that stupid". He referred to showing them a document the day before that indicated that CBLIE was €9m short of what was needed, ignoring the €5m just injected. The €4m short would be taken care of with surplus funds withheld from December and January. He concluded by saying "This is not a jurisdiction that wants CBL to do business from".

[641] Mr Mulholland said he did not recall knowing at the time that this capital add-on would require a substantial amount in the order of €31.5m. Accepting that the evidence was unclear as to when Mr Mulholland knew this figure, he and Mr Harris should have known that the capital add-on would require a substantial amount and in any event that disclosure of this regulatory direction needed to be considered by the Disclosure Committee and the Board.

[642] There was an issue complying with the third CBI direction given RBNZ's restriction on transfers of more than $5m. It is unnecessary to address this in any detail in this proceeding, but on 29 January 2018 Mr Mulholland responded to an email from Mr Sherin about a $5m bank transfer. Mr Mulholland said:

> All of this needs discussion. These are significant amounts of money and our capital management plan is not as easy as just plucking millions from other parts of the organisation within 24 hours.
>
> It is also a public holiday here today.

[643] On 30 January 2018, Mr Harris emailed the Board, copying Mr Mulholland (and others), stating:

> CBI have imposed a capital add-on to CBLIE, on 12th January, and have directed it to reserve for it in a prescriptive manner and to re-calculate its Solvency Capital Ratio (SCR) for Q1 2018 going forward under its revised ORSA statement.
>
> Arising from that recalculation completed overnight by our actuaries, CBI require the Minimum Capital Ratio to exceed 100%. CBI also require that any capital increase as a result must be invested into the company by 31st January 2018. (Extremely tight).
>
> That calculation has now been done, and the SCR has come out as 101%.
>
> The 101% is too close to the potential for CBLIE to commit a breach, and quite a way from the minimum capital management plan of 125%.
>
> To get to 125% would require €10 invested.

> CBLIE would like urgent consideration to be given to CBL Corporation Ltd arranging for a capital injection into CBLIE of NZ$5m in € equivalent. That will get CBLIE to 110% which is less [than] its optimum capital management plan, but gives it some breathing space whilst actions around reducing premium levels, re-arranging reinsurance retentions etc are all worked on and ahead of whatever the Milliman Report comes out as.
>
> ***May we get the board's approval to do this please?***
>
> It is unfortunate and urgent, and at the moment CBL Corp does not have the cash on hand, but if we are able to resolve to carry out the transaction, then management will do what it can to execute on the resolution by the required date this week.
>
> As an update, CBI at the time also required some work done to close the "GAP" between reinsurer exposure and reinsurer cash/security which CBI calculated on the back of an envelope as being €55m, but which is still under debate, and probably going to be put aside for the moment whist a skilled person's report is done on the company's books of business. (A decision on who that is going to be is due on Friday this week).
>
> My recommendation is that CBL Corp does do this, and I know that Paul who is travelling, is in favour – if only to get some breathing room, and not run the risk of committing a solvency breach of MCR.

[644] Although Mr Mulholland suggested otherwise, this was the first evidence of the full Board being informed of the third CBI direction dated 12 January 2018. Even on or about 30 January 2018 when the Board was asked to approve an urgent capital injection of $5m into CBLIE, there was no evidence the Board or the Disclosure Committee considered disclosing to NZX that CBI had directed CBLIE to apply the capital add-on.

*PwC reserving update – January 2018*

[645] Meanwhile, prior to receipt of PwC's January 2018 actuarial update and liability valuation, CBLC considered drafting an announcement. On 18 January 2018, Mr Griffiths received a link to NZX's Investigation Report into Fletcher Building Ltd's continuous disclosure,[151] which he forwarded to Mr Harris and Mr Mulholland. Mr Griffiths said, "[t]here are some interesting comments made by NZX in the investigation ...". Mr Harris replied to them both that night, saying:

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[151] *Investigation Report, Fletcher Building Limited - Continuous Disclosure*, above n 35.

> Thank you [Mr Griffiths], - yes indeed. I think we should get ready with an announcement as soon as the PwC liability valuation is tabled, or finalised.
>
> Thoughts?

[646] Mr Harris sent a similar email to Sir John Wells:

> Some interesting points in the Web-link below.
>
> I am wondering if we should be ready to make an announcement when;
>
> 1. When the liability valuation is tabled, - this could be as soon as Friday next week (26th) or early the week after.
>
> 2. When we reach an agreement or otherwise with the Auditors on the Castlerock transaction. That might be around the same time.
>
> Thoughts?

[647] The next morning, 19 January 2018, Mr Griffiths responded to Mr Harris and Mr Mulholland:

> I agree, drafting an announcement in advance would provide time to appropriately articulate it, however, there is a time allowance within the continuous disclosure rules to ensure the announcement is "*complete, accurate and not misleading*". If we draft an announcement now, are we not pre-empting the contents of the valuation? CBL may require time to properly interrogate the valuation, although if it is finalised then I assume we have already had that opportunity.
>
> I have copied in a section [from] the NZX Guidance Notes on Continuous Disclosure which discusses when information must be released:
>
> …[152]

[648] This indicates that Mr Griffiths had a role in relation to disclosure, but also that he had provided the extract from the Guidance Note on when information must be released (albeit the focus of these emails was on receipt of PwC's liability valuation rather than the preceding actuarial update referred to next).

[649] On Thursday 25 January 2018, PwC provided an actuarial update. Following an initial meeting with Mr Mackay and other management, Mr Rhodes and Mr Coulter met with Mr Harris, Mr Hannon and Mr Mulholland in the afternoon. PwC's slide presentation was marked "Draft". The "Headlines" slide referred to the previous

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152 Mr Griffiths copied most of section 5.1, "What does "immediately" mean?" set out at [58] above.

(November 2017) estimate of prior year impact of $67m-120m strengthening in reserves, and said:

> **Work has now completed** for the full year review with actions around ACS contracts planned
>
> Using latest loss ratios moves overall French construction loss ratio from **27% to 46%**
>
> - This is a **timing issue**, not an overall issue of profitability
>
> The latest estimates are **not conservative**
>
> - They are what a reasonable actuary would do based on the data now available
>
> There remain more risks (downsides) and positives (upsides)
>
> Need to manage market expectations and **strengthening the balance sheet** is a positive

[650] PwC's "Summary of impacts" slide said the total prior impact proposed was $112m (plus $14.8m current year).

[651] The two main points of discussion which PwC agreed to consider were the level of risk margin that should be applied, and the amount of savings that should be recognised in respect of changing the claims administrator (from ACS to CLE).

[652] I accept this meant that the $112m may change and so the exact amount of reserve strengthening to be included in PwC's valuation report was not yet known. However, it was clear to CBLC by 25 January 2018 that very significant reserve strengthening would be required. I address the quantum further below.

[653] Mr Mulholland said his understanding was that Mr Hannon and Mr Harris were informing the rest of the Board, but there is no evidence they did so at that time. Mr Mulholland would likely have known if the Board had considered PwC's 25 January update. He would likely have been aware if a Board meeting had been called as he or his team would have needed to prepare a report, as occurred when a meeting was called the following week (see [663]-[664] below).

[654] Mr Mulholland also said that at the time he understood that disclosure would occur once PwC provided a final draft report that could be presented to the Board. That had yet to occur.

[655] On Saturday 27 January 2018, Mr Coulter emailed Mr Ray about the upcoming insurance model they would be supplying, noting the impact of reserves was sitting around $100m with allowances for ACS management and risk margin releases (now at 15%).

*Third RBNZ direction*

[656] On 29 January 2018, RBNZ wrote to Sir John Wells issuing directions under ss 143 and 145 of IPSA modifying the wording of the earlier 22 November 2017 directions prohibiting CBLI and CBLC from entering into transactions greater than $5m without consultation with RBNZ so as to make them clearer.[153] These directions also referred to the s 150 disclosure prohibition (confidentiality).

*30 January 2018*

[657] On Tuesday 30 January 2018 at 9:18 am, Mr Mulholland sent Mr Harris a request to meet at noon to discuss the solvency issue, saying that on the current reserving for CBL "we will be under 100%".

[658] At 1:55 pm, Mr Coulter emailed Mr Mulholland advising that PwC had made further adjustments resulting in a $98m increase in reserves, and that they were proceeding to produce a valuation report on that basis:

> Thank you for your time on Thursday to discuss the initial valuation results on the French business. As we discussed, the impacts are large due to a step change in the amount and accuracy of historical data that is showing claims are developing for longer. Long-tail reserves are very sensitive to these assumptions and, given the significant premium volume written historically, there is a one-off reserving impact to re-set the business.
>
> On the Thursday session, the baseline increase in reserves, including risk margin, was $132m (prior year) plus $15m (current year). A total increase of $147m. Since then, we have made the following adjustments:

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153 See [585], and also n 126 above.

> • Allowance for tighter management of ACS and/or switching to CLE to achieve the stated 85% reduction in fees. This resulted in a **$26m reduction** in total reserves, which we believe is the full allowance possible from moving to CLE immediately.
>
> • In addition, we have reduced the risk margin percentage to 15% for net outstanding claims. This resulted in a further **$22m reduction** in total reserves.
>
> …
>
> Overall, when we implemented all of these changes in the insurance model we have a $98m increase in reserves compared to what [Mr Clements] had booked on Friday (on a FX adjusted basis). We are proceeding to produce a valuation report on this basis as we believe we've taken account of all the possible management actions and mitigations discussed last week. However, we note that these are still draft numbers for further discussion (as required), so let us know if you have any concerns or what further information you'd like to see.

[659] Mr Mulholland immediately forwarded this email to Mr Harris.

[660] At 3:02 pm, Mr Coulter sent CBLI an updated version of the 25 January slide pack. The main change was to include an updated strengthening recommendation of $99m (the change from $98m to $99m appears to be due to rounding).

[661] At 5:18 pm, Mr Harris replied to Mr Mulholland:

> We still need to get a detailed "bridge" document as to where the significant discrepancies are as between reserving 6 months ago.
>
> Would you ask [Mr Coulter] for that?
>
> We are going to call a meeting of directors for 7pm tomorrow night for a discussion on all aspects, - it might be [worthwhile] getting them in,

[662] At 5:44 pm, Mr Mulholland emailed Mr Harris confirming he would ask for such a "bridge" document from PwC. At 5:59 pm, Mr Mulholland forwarded Mr Harris' email to Mr Coulter and asked if he would be available to attend. At 7:22 pm, Mr Coulter replied saying he would be available to attend "tomorrow at 7pm".

[663] Meanwhile, at 5:47 pm, Mr Clements sent Mr Harris, copying Mr Mulholland and Mr Ray, a draft Finance Report with the estimated impact of the draft PwC reserving review. This identified that the Solvency Ratio as at December 2017 was

92.1%, and the final slide showing regulatory solvency movements over time indicated that "Actual [Solvency] Capital" fell below "Minimum [Solvency] Capital" as at December 2017. The risks identified included "Castlerock acceptance from Deloitte" and "RBNZ view that Elite premium should be at 40%".

[664] At 7:13 pm, Mr Harris forwarded Mr Coulter's 1:55 pm email to the Board with the Finance Report and the following detailed covering message:

> - PwC has landed on a reserving increase adjustment to be flowed through the year end accounts of NZ$98m.
> - This puts CBL Insurance Ltd into its first loss in over 10 years, and results in a preliminary YTD Operating Loss (for CBL Insurance only) of (NZ$56m), and NPAT of (NZ$43m).
> - The reserving adjustment started out as $147m being prior period "catch-ups" of $132m from not reserving enough in prior periods, and $15m for this current period.
> - From this and our meeting with the actuaries last week, they have gone away and re-calculated their numbers – the detail of which is set out below this email, - and arrives at a figure of $98m.
> - The paper attached goes on to show what the solvency level of CBL Insurance would be as a result, - 90% - 92%.
> - This would breach IPSA.
> - **We would like to arrange a board call at 7pm NZ time Wednesday (Ireland time 6am) to discuss the situation and the implications, and way forward.**
>
> Management has spent today working through the implications, the potential steps that could be taken, and the audiences to communicate to.
>
> **Potential/immediate audience (in no particular order)**
> - RBNZ
> - ANZ, - we have a potential Event of Default or Event of Review on our hands, - [Mr Griffiths] reviewing.
> - NZX/ASX – have considered a trading halt to shares, - but probably the proper route is a disclosure . profit warning. For discussion and [Mr Griffiths] reviewing.
> - AM Best – to be met/dealt with and will potentially put CBL on credit watch or negative outlook for a period, but should not over-react or panic.
> - CBL Boards
>
> **Investors will want to see some decisive action taken around:**
>
> **How did this happen** – when a full review on reserving was done 6 months ago. PWC have been asked to provide a bridge on just where and why this adjustment has occurred. PwC have agreed that it is reasonable for CBL to reduce its risk margin now that it has much more data and in much better shape. They have also taken into account the potential savings from the

> recommendation to shift from ACS as a [third-party administrator] claims handler. See below and memo attached.
>
> **What is causing the bleeding:** The issue is around EISL RCD/RCP – which has been shown to be unprofitable, and SFS RCD/RCP which is still profitable but less so. The main thing however, is that we have not been reserving enough on both books, and the "catch-up" to do so now is significant.
>
> CBL could act to immediately [shift] down the writing of EISL RCD/RCP. This would also go some way to appease the CBI which wants to see some material action taken to reduce GWP.
>
> CBL could act to sell the EISL RCD/RCP book to another broker for circa 1-1.5 [years'] commissions. An Insurer would not be interested in a loss-making book,
>
> EISL could re-price the book, but it may not be able to sell that to its clients. The discrepancy between EISL and SFS outcomes on the same book and clients suggests poor underwriting, poor risk selection or pricing on the part of EISL over the last 5 years when this book has started to materially increase.

[665] Mr Harris' email to the Board continued under the following headings:

> **What is the underlying business operating at YOY on a normalised basis,**
>
> **How can we be certain it will not happen again?**
>
> **Other points for discussion:**
>
> **Capital Raise**

[666] This email was the first notice to the Board of PwC's reserve strengthening position conveyed on 25 and 30 January 2018.

[667] At 7:38 pm, Mr Harris forwarded his Board email to Mr Ray, Mr Mulholland and Mr Clements (copying Mr Griffiths), saying:

> All, - is this how we see it?
>
> Any further suggestions?

[668] At 7:55 pm, Mr Mulholland replied, "I think this covers everything thanks Peter".

[669] Later that night, Mr Coulter forwarded to Mr Rhodes Mr Mulholland's 5:59 pm email, saying:

> FYI - potential meeting with directors tomorrow at 7pm. I understand they're thinking about closing the French business / selling the book so they have a strong message for the market.

[670] Mr Mulholland said he did not believe that "strong message for the market" were his words and suggested they may have been Mr Harris or the Board's. However, it is more likely Mr Coulter spoke with Mr Mulholland in response to his question about availability to attend the Board meeting and derived this understanding from Mr Mulholland. This is also consistent with Mr Mulholland's email three days later referring to an announcement, and making sure we do everything we can to hold as much value in the stock as possible (see [707] below).

[671] Accepting that Mr Hannon and Mr Harris also received PwC's report on 25 January 2018, Mr Mulholland took no steps before 30 January to ensure the Board was made aware of it or considered the need for disclosure.

*31 January 2018*

[672] At 7:44 am the next morning, 31 January 2018, Mr Griffiths replied to Mr Harris' email from the previous night (at [667]) with some questions and suggestions as to how CBLI would manage a market disclosure and a capital raise. Soon after, Mr Harris emailed RBNZ seeking to arrange a conversation about a capital raise the following afternoon.

[673] At 11:40 am, Mr Coulter emailed Mr Mulholland about the Board meeting, including:

> In terms of context, are you able to tell me what papers / pre-reading they have seen on the reserving for French business over the past few months please? Also if you could let me know the likely talking points / direction of the meeting - eg is it just a better understanding of why the big change since June or are they thinking more strategic options regarding exit / sale of parts of the portfolio?

[674] Mr Mulholland forwarded this email to Mr Harris at 12:08 pm:

> Can you confirm to [Mr Coutler] the information below, I am not sure what the Board have seen to date if anything.

[675] This appears inconsistent with Mr Mulholland's evidence that he understood the Board was fully aware of PwC's reserving updates.

[676] At 1:41 pm, Mr Mulholland sent Mr Coulter a list of comments/questions from Mr Harris in preparation for the Board meeting.

[677] At 2:47 pm, Mr Ray sent the completed CBLC P&L for 31 December 2017 to Mr Harris, copying Mr Mulholland and Mr Clements.

[678] At 3:29 pm, Mr Coulter sent PwC's draft CBLI valuation report as at 31 December 2017 to Mr Mulholland, Mr Clements, Mr Ray, Mr Niehaus, Mr Christer and Mr Mackay. This indicated that overall, the net outstanding claims provision for CBLI had increased by $145.7m to $342.8m in the half-year to 31 December 2017. The main reason was that overall strengthening in the gross loss ratio assumptions increased the gross provision by $167.1m since 30 June 2017 and increased the net provision, including risk margin, by $101.3m (a slight further change from $98m, accounting for the final two months of the year as the figure advised on 30 January 2018 was based on data through to October 2017). Mr Coulter's email said, "[w]e look forward to your feedback as we'd like to get an updated draft out to Deloitte by the end of the week to stay on track in terms of timeframes to the audit and risk committee / results announcement".

[679] At 5:44 pm, Mr Ray sent Mr Harris and Mr Mulholland a report he had quickly prepared for the upcoming Board meeting on underlying performance adjusting for prior year actuarial reserve strengthening. This report showed the combined Solvency Ratio as at 31 December 2017 after prior year adjustments of 86.8%.

[680] The Board met that evening from 7:00 pm to 9:45 pm. Mr Mulholland attended. The minutes say the meeting was by teleconference, but some attended in person. Mr Harris updated the Board on the draft year-end results and PwC's draft actuarial report indicating a reserving increasing adjustment of $98m to be applied to the year-end accounts.[154]

[681] PwC attended the Board meeting from 7:45 pm until 8:40 pm. Mr Rhodes could only attend by telephone with a bad line, and Mr Coulter updated the Board

[154] This appears not to have taken into account PwC's minor update that day in the draft valuation report.

based on the questions Mr Harris had sent previously. PwC's talking points explained what had led to the change (the bridge) – the data relied on at 30 June 2017 had turned out to be insufficient to estimate the reserves. Increases in average cost were the main contributor to the change in reserves because claims had been found to be developing longer than previously assumed to a higher ultimate average claim size. There were new assumptions due to improvements in data and changes in assumptions. There were also changes to existing assumptions. Average costs assumptions had been increased across product lines – in cases, significantly. This had been driven by modelling of claims development by report year, which had revealed claims develop for longer. The longer development both affected the average cost of reported and unreported claims. The other significant change was no longer relying on a management estimate for setting the loss ratio in more recent underwriting years. With more data available, the historical management estimate had been proven to be too optimistic and could be replaced with a modelled result. Mr Rhodes said in evidence that a decision on strengthening was not made at the meeting by the Board, but he only attended part of the meeting.

[682] The minutes also indicate that the Board agreed to discontinue the Castlerock transaction without incurring further liability due to Deloitte's decision not to accept the proposal.

[683] The Board also discussed a capital raise and agreed to proceed with a figure of approximately $180m as part of its Capital Management Plan, with details to be decided in the coming days.

[684] The minutes indicate the Board discussed disclosure requirements:

> [Mr Hannon] reminded the Board of its continuous disclosure stipulations in the light of the adjustment and a proposed capital raising. The Board discussed requirements in respect to immediate market disclosure, including wording and timing.
>
> The Board agreed that disclosure needed to be made within the next 48 hours. The release would disclose details of the reserving impact, the effect on the Financial Results and plans for a capital management structure, and further advise that more details would be disclosed at the time of the Financial Results Announcement on 27 February.

> Following the Meeting, the disclosure would be drafted and circulated to the Board for review.

[685] Mr Mulholland did not accept that 48 hours after the Board meeting was too long for immediate disclosure. Against the background set out above, I consider the immediate disclosure obligation required Board consideration before the evening of 31 January 2018, and a market release within a shorter period after the Board meeting. I address this further below.

[686] After the meeting, at 10:38 pm Mr Clements sent Mr Harris, copying Mr Ray and Mr Mulholland, a document tilted "Castlerock scenario testing" (which included additional scenarios). This showed the profit and solvency impacts of the "Write-off scenario". The profit impact after tax was $10,406,723 and the solvency impact moved the Solvency Ratio from 92.1% to 99.3%.

*1 February 2018*

[687] The next morning, 1 February 2018 at 9:04am, Mr Griffiths sent Mr Mulholland a draft market announcement. At 9:13am, Mr Mulholland replied with an updated draft market announcement.

[688] At 10:24 am, Mr Coulter emailed Mr Mulholland:

> Thank you for the opportunity to meet the full Board last night, albeit under such unfortunate circumstances.
>
> If you have 5 minutes this morning, I would be keen to catch up (by phone or in person) to discuss how you thought it went last night and the next steps. We are keen to help you hit your timelines for reporting to the market, so have pencilled in a first catch up with Deloitte actuaries for this afternoon where we propose that we run them through the updated draft pack of results ([Mr Rhodes] and [Mr Mackay] are both attending but nothing has been sent or communicated to Deloitte yet).
>
> However, before we do that, we'd like to know from your perspective how 'firm' the numbers are in your eyes and the remaining areas of challenge that you (or the Board) have.

[689] That same day, CBLI requested a conference call with RBNZ, which took place at 12:30 pm. Mr Harris, Mr Mulholland and others attended from CBL. Mr Harris gave RBNZ an update in relation to PwC's reserving advice to the Board, saying the

figures were only draft, subject to change, but in the worst case $98m reserve strengthening was currently indicated. The Board had checked the Capital Management Plan and given the position a capital raise was indicated. The estimated amount was $150m for the CBL Group, of which $75-85m would be injected into the NZ licensed insurer to bring its solvency back to the 135-165% target level. There would only be one opportunity to do a capital raise – they could not go back for more later on. This assumed the 170% Solvency Margin direction was removed.

[690] In relation to disclosure, Mr Harris said:

> - CBL will need to disclose the valuation figures, results and plans for capital raise.
> - A capital raise will take 8 to 12 weeks to be completed.
> - The market must be fully informed.
> - CBL needs to disclose the investigation - confidentiality needs to be released.
>
> …
>
> - A market announcement for profit warning is needed no later than 24 to 36 hours from now.

[691] Mr Harris said he would provide RBNZ with a draft of the announcement for input before it was made. Mr Fiennes noted that CBL had disclosure obligations and said it made sense for CBL to be preparing to raise capital quickly to fill any hole. He said that RBNZ would probably agree to lift confidentiality immediately as it was appropriate for the market to be properly informed at this stage, but would follow up to confirm once RBNZ personnel had discussed it amongst themselves. This was the first time CBLC had specifically approached RBNZ about lifting or adjusting its confidentiality restrictions.

[692] At 5:07 pm, Mr Harris sent Mr Griffiths and Ms Tindal (who had been appointed chief operating officer) a draft announcement. After Ms Tindal replied with comments at 5:46 pm, Mr Harris responded at 7:10 pm. This included:

> Carl, Could you please cut another clean draft of this, and circulate to [Sir John Wells] as well as [Mr Mulholland] and I?

> I will get back to this later tonight, but not for a few hours.
>
> We have woken up the bear with RBNZ and they want to virtually sign off on the disclosure, but I feel we will mostly just advise with ability to warn of alarm bells, - not to consult and wordsmith it with them.

[693] At 5:41 pm, RBNZ emailed Mr Harris, copying Mr Parrott:

> Thank you for the call earlier today. As promised we have discussed the situation internally. In principle there appears to be merit in lifting the confidentiality on the directions and investigation. We are drafting formal notices to that effect and will forward these to you tomorrow.

[694] At 6:28 pm, Mr Parrott replied to RBNZ:

> Thanks for your email.
>
> Since the meeting, we've given further thought about the current situation.
>
> We respect the Directions and their confidentiality and feel that we can work with the status quo.

[695] Meanwhile, at 5:54 pm, Mr Mulholland replied to Mr Coulter's email from 10:24 am:

> Apologies it has been a full on day.
>
> We are still challenging the number internally, but accept there will have to be a significant strengthening, and we are coming to terms with such a huge figure and how we report and strengthen the company.
>
> We are considering whether or how to account for this as an error, including a number of mistakes and errors in not putting claims into the right underwriting years, policy numbers and dates missing, and therefore a prior period adjustment versus it all going through in this financial year.
>
> We would like to know what effect Alpha and EISL DO shifting to CLE would mean. I understand that has not been adjusted, can you confirm please.
>
> The board were impressed and you made a good impression on them.

[696] This indicates that, despite the Board meeting the night before, Mr Mulholland's finance team were still spending time on 1 February 2018 "challenging the number internally". Without detracting from CBLC's right to present its perspective, there should have been more focus on immediate disclosure of the expected future claims reserve strengthening adjustment of around $100m advised by the Appointed Actuary.

[697] At 7:37 pm, an internal PwC email from Mr Coulter to Mr Rhodes included the following:

> - Castlerock transaction - they are now thinking about writing off aged premium and reducing claims liability attached given Castlerock transaction unlikely to be agreed in time.
>
> …
>
> I'll respond to [Mr Mulholland's] email tonight too. Adjusting prior year sounds like a bad idea to everyone there - if they go back too far, they'll effectively be insolvent.

[698] At 9:45 pm, Mr Griffiths sent Mr Harris, copying Ms Tindal and Mr Mulholland, a marked up recut announcement. Mr Harris forwarded this to Sir John Wells at 10:36 pm. His email also included the following in relation to confidentiality:

> We did ask RBNZ if we would be able to disclose that there is another expert report being prepared.
>
> They have now responded to say that they are prepared to remove the Direction - which is what we were afraid of, and not really what we want.
>
> They have also said they want the announcement around this to go to them for approval before we send it.
>
> I have asked Michael [Parrott] to send an email response to say that we respect why the confidentiality requirement is in place, and have thought things through, and consider that we can live with the status quo.
>
> I think this means we can disclose what we want, in a light mention only, but not to declare everything about RBNZ/[McGrathNicol], Milliman etc.

[699] Meanwhile, at 9:48 pm, Mr Clements sent the Board, copying Mr Mulholland and Mr Ray, a summary of the workings behind the Castlerock discussion at the Board meeting. This was the same Castlerock scenario testing document but without the additional scenarios. Mr Clements asked Mr Harris or Mr Mulholland "whether the decision is to proceed per the discussion yesterday".

[700] At 10:05 pm, Sir John Wells replied to all:

> I thought we all agreed last night not to proceed with the Castlerock transaction due to Deloitte saying they couldn't support it.Big shame given yet another hit we have to take !

[701] At 11:42 pm, Mr Harris also replied all to Mr Clements' email:

> …
>
> Directors, given the board decided to enter this transaction provided Deloitte would accept the transaction and credibility of Castlerock (and unfortunately has not), Management would like [to] inform the board of the consequences, and to get formal approval to discontinue the transaction and to drop hands and walk away without further liability.
>
> Essentially as per [Mr Clements'] paper, - the effect of writing the debts off for accounts purposes is a negative hit to NPAT of $10m. There is an uplift on solvency because the receivables asset was discounted by 40% (unrated receivable), but the liability was not previously discounted, - so a full reduction

*2 February 2018*

[702] On the morning of 2 February 2018, RBNZ discussed whether CBLI's email on the evening of 1 February 2018 changed RBNZ's view about lifting confidentiality and decided it did not. At 10:04 am, RBNZ emailed a letter to CBLI advising that RBNZ:

(a) consented under s 150(2)(c) of IPSA to CBLI and CBLC disclosing the directions to the public;

(b) allowed CBLI and CBLC to disclose the fact of the independent investigation under s 130, on the condition that RBNZ was consulted before CBLC made any market announcement referring to the investigation.

[703] RBNZ met with the FMA that day and advised the FMA that RBNZ was lifting confidentiality. The FMA then contacted NZX. At 12:23 pm, NZXR placed a trading halt on CBLC shares pending the release of an announcement by the company. At 12:25 pm, NZX's Head of Market Supervision emailed Mr Mulholland:

> Hi Carden - appreciate that you are arranging for the Board to meet etc on the write down issue.
>
> In the circumstances put to me by the FMA, NZX will be halting CBL's securities immediately. I don't propose to issue the standard market memorandum regarding the halt, pending a better understanding of the issue from CBL and CBL's next steps.

[704] At 12:32 pm, Mr Mulholland replied confirming that CBLC's shares should be placed in a trading halt immediately.

[705] At 1:12pm, Mr Mulholland updated the directors and senior management. His email included:

> CBL shares were placed in a trading halt today at 12.45pm New Zealand time.
>
> This is a result of the Reserve Bank breaching confidentiality to the FMA who in turn were obliged to contact the NZX.
>
> As at 1pm today the following needs to happen as a matter of urgency.
>
> 1. The announcement needs to be finalised and released to the market by 4pm NZ time to inform the market prior to the weekend. [Mr Harris] this will need your sign off this afternoon if possible. I would suggest that [MERW] be looped into this, we have a call in with [Ms Schenone] already.

[706] At 1:20 pm, Mr Hannon replied:

> Thanks Carden - this accords with our telephone call
>
> Can we please see the draft announcement such that we can input if appropriate
>
> In addition maybe provide a draft to UBS
>
> Can we delay the announcement until first Monday?

[707] This indicates that Mr Hannon, at least, was looking to Mr Mulholland for input on CBLC's continuous disclosure obligations. Although Mr Mulholland suggested he was being asked to go and ask lawyers and various other parties, at 1:22 pm he replied:

> I think we can delay the announcement until Monday morning prior to the market opening.
>
> Our meeting with UBS is to also discuss that announcement and make sure we do everything we can to hold as much value in the stock as possible.

[708] Mr Mulholland emphasised his words "I think" and suggested he then went off to obtain further information, but there was no further evidence of this. He also said the reason for his view was that, as the shares were in a trading halt, he thought they had time to get the announcement right, especially given the directors were in different time zones. They could then make the announcement before trading commenced on

the following Monday. Overseas-based directors was an issue that CBLC had to accommodate at all material times, but I accept that the trading halt changed the circumstances.

[709] At 1:25 pm, Mr Harris sent an email that indicated that the announcement may or may not be able to go out that day or Monday.

[710] At 5:06 pm, Mr Griffiths circulated an updated draft announcement. Further emails with comments included through that evening.

[711] At 9:55 pm, Mr Harris emailed the Board and Mr Mulholland requesting a short update teleconference at 7:00 am on Saturday (3 February 2018) concerning the events of Friday, including the NZX/ASX trading halt and market disclosure.

[712] Late that night, Mr Clements sent an updated insurance model to Mr Coulter and indicated that the cancellation of the Castlerock transaction was not necessarily happening at that point.

*3 February 2018*

[713] The next day, Saturday 3 February 2018, Mr Clements sent Mr Coulter a new version of the insurance model and said it was confirmed that the Castlerock transaction was being cancelled.

[714] As Mr Brown said, in calculating the Minimum Solvency Capital, the effect of a write-off of aged receivables when compared to applying a 100% RCF is the same. However, a write-off of aged receivables will also have an impact on the Actual Solvency Capital. Thus, the Solvency Margin and Solvency Ratio will differ in the case of a write-off of aged receivables when compared with applying a 100% RCF to those aged receivables.

[715] Meanwhile, on 2 February 2018 in Ireland, CBI wrote to CBLIE revoking the 8/9 November 2017 direction (at [522] above) and issuing a further direction to CBLIE prohibiting it from disposing of assets without the written approval of CBI and requiring it to notify its credit institutions in writing (in terms agreed by CBI) of this

restriction by no later than 5pm on Monday 5 February 2018. This letter was marked "Central Bank of Ireland - CONFIDENTIAL".

*4 February 2018*

[716] On Sunday 4 February 2018 at 7:03 pm, Mr Mulholland emailed NZX with a trading halt application requesting a trading halt (extension) until Thursday 8 February 2018. This was approved by NZX at 9:39 pm. NZX added:

> As discussed with [MERW], NZX Regulation expects that CBL will make an announcement pre-market open tomorrow on the matters it is currently able to advise the market (providing sufficient detail and context to enable investors to assess the implications of that information), including information on (i) the report commissioned and the outcome that CBL will be required to strengthen its reserves for the French business - and the implications of that for CBL's FY17 result expectations, (ii) the proposal to conduct a capital raise (noting that details of the capital raise structure remain to be finalised), with a target for that to be communicated to the market on Thursday, and (iii) the situation relative to the RBNZ's own report (noting that we understand non-disclosure orders may still apply to elements of CBL's engagements with the RBNZ). We appreciate that these matters may continue to develop over the coming days, and anticipate that CBL will continue to update the market as information crystallises.

*5 February 2018*

[717] On 5 February 2018, the trading halt was extended. NZX advised the market:

> NZX Regulation ("NZXR") advises that further to the memorandum released on Friday, 2 February 2018, and the announcement released by CBL this morning, the trading halt on CBL Corporation Limited ordinary shares ("CBL") will remain in place until an announcement by CBL regarding its expectations with respect to a capital raising (anticipated to be on or before Thursday 8 February 2018), at which time it is likely the halt will be lifted. The halt will be lifted by no later than market open on Friday 9 February 2018.
>
> CBL has advised NZX that CBL has received the results of a report it commissioned in respect to its reserving, and the recommendation of this report is to strengthen the reserves of CBL's French business. CBL has advised NZX that the Board of CBL considers that a capital raising is appropriate to strengthen reserves and also to ensure sufficient capital strength to enable CBL to continue its growth. A process is currently underway with respect to adjustments to reserving and major shareholder discussions; accordingly, CBL has requested that a trading halt be put in place to ensure an orderly market for CBL's shares while discussions with major shareholders take place.

[718] That same morning, CBLC made a market announcement:

> **CBL UPDATES THE MARKET ON FY17 RESULTS EXPECTATIONS**
>
> CBL Corporation Limited (NZX/ASX: CBL) will report its FY17 result on 27 February 2018.
>
> CBL expects to report a FY17 total revenue growth in excess of 35%, above previous guidance of 12% -15%.
>
> CBL also expects to make a future claims reserve strengthening adjustment of around $100m to the reserves of CBL Insurance Limited in respect of its long-tail French construction insurance business, and another one-off write-off of receivables of approx. $44m arising from broker/insurer/reinsurer reconciliations and related differences arising from a detailed post-acquisition examination of SFS throughout 2017.
>
> These adjustments are expected to result in the CBL Group reporting a consolidated FY17 after tax loss of $75m - $85m.
>
> …
>
> After completing an extensive 4-month exercise intensely reviewing its French construction business data in conjunction with its independent Appointed Actuary PwC, and the draft conclusions coming out of this, the CBL board determined that CBL Insurance should strengthen its reserves by revising the actuarial assumptions applicable to ongoing French construction business, and take a one-off future claims reserve catch-up adjustment to take into account potential future claims over the next 10-12 years in respect of policies written in previous years. The data exercise backs up the overall profitability of the French construction business, but at lower levels than recommended or reported in the past.

[719] I accept this news was a very considerable surprise to the market.

[720] At 11:00 am, RBNZ had a call with Mr Rhodes. According to RBNZ's file note of the call, Mr Rhodes advised that CBLI was "roughly on 100% solvency ratio but stated that the review is not yet complete. Probably not looking good to be over 100%."

[721] At about 2:30 pm, RBNZ had a call with Mr Harris and CBL's lawyer to discuss the lifting of confidentiality, the announcement and the lack of advance notice to RBNZ. Ms Schenone said she presumed CBL would need to discuss disclosures with CBI also.

[722] CBLC also conducted a brief roadshow with institutional shareholders in Australia and New Zealand to update investors on the adverse developments, and to seek feedback on a potential capital raising.

[723] The Board met again that evening and discussed the institutional shareholder update, the disclosure issues with RBNZ and the capital raise.

*6 February 2018*

[724] On 6 February 2018, Mr Harris sent Mr Christer and Mr Donaldson (copying Mr Sherin) a further draft announcement. His email included:

> For the purposes of market information, we have taken a pre-consultation position with things Irish, and added in a lot of detail. That may not be appropriate or necessary from the Irish/CBI side.
>
> 1. It may well be too much detail, and
>
> 2. Given that much of this detail is subject to confidential requirements from CBI, it may be that the CBI do not want all this detail disclosed.
>
> If CBI would also prefer that a lot of the actual detail is taken out, then I don't think RBNZ will have any difficulties with that whatsoever, but not to the point of non-disclosure of course.
>
> If the CBI does not want any mention of anything, then that will give us some difficulty in our disclosure obligations in NZ.
>
> The ideal position for CBL would be to mention the headline situation with CBI, without being unnecessarily detailed, but which still properly informs all investors about the situation.

[725] Mr Donaldson replied:

> As we agreed on the call :
> - [Mr Christer] to talk to Frys [CBLIE's Irish lawyers] and subsequently [Mr Christer] to talk to CBI
> Context
> Following our market announcement of with profit warning CBL shares were placed on voluntary Trading Hold in NZX /ASX until Thursday NZT.
> CBL Board is under a statutory obligation of Continuous Disclosure and therefore sought and agreed release from RBNZ of the confidentiality restrictions imposed during the ongoing investigation. CBL is required to continuously disclose to the market any matter that would be considered to be share price sensitive and therefore obliged to disclose that both CBL & CBLIE have been subject to confidential regulatory investigations.
> This is a matter of law in NZ. RBNZ are comfortable with the announcement insofar as it relates to the action described.

> We are obliged similarly to disclose the CBI regulatory process and therefore have included a paragraph on this in the announcement.

[726] Mr Mulholland was not party to these emails but I accept they suggest that Mr Donaldson and Mr Harris (the two CBLIE directors on the CBLC Board) believed that the CBI regulatory investigation was confidential.

*7 February 2018 announcement*

[727] On 7 February 2018, CBLC made another market announcement in relation to the RBNZ and CBI regulatory action:

> **CBL UPDATES THE MARKET ON RBNZ REVIEW, CBI, AND AM BEST CREDIT RATING DOWNGRADE**
>
> Further to CBL Corporation Limited (**CBL**)'s market announcement of 5 February 2018 included in which it advised the market of an independent report commissioned by the RBNZ, CBL is now at liberty to advise further details.
>
> RBNZ has been reviewing CBL Insurance Limited (**CBL Insurance**)'s information in order to assess the adequacy of its reserving for the French construction business. CBL Group has co-operated with the RBNZ in respect of this process. This review has been in addition to the usual six-monthly Valuation Reports and annual Financial Conditions Report, issued by CBL Insurance's Appointed Actuary and filed by all insurance companies in New Zealand. The review was triggered by the concerns raised by the Gibraltar regulator with respect to Elite Insurance's reserves, and a report commissioned by its regulator. Since then, Elite Insurance has gone into voluntary run-off and recently sold. CBL Insurance had announced a strategic decision to transition the majority of its European business away from Elite Insurance to CBL Insurance Europe (**CBLIE**) in February 2016.
>
> In accordance with this, the RBNZ has commissioned an independent expert review and also issued a number of directions to CBL Insurance. This includes a direction on 27 July 2017 setting CBL Insurance's minimum solvency at 170%, by reference to the actual solvency that CBL Insurance reported at that time, and on 22 November 2017, directions to CBL Insurance, CBL Corporation and its subsidiaries, requiring them to consult on any non-BAU transactions greater than $5m.
>
> These directions and discussions that CBL Insurance has had with RBNZ have been occurring under strict confidentiality orders prohibiting CBL from making any announcement to the market while those orders remained in place. These orders have now been lifted.
>
> Further, in the same context, the Central Bank of Ireland (**CBI**) also commenced a similar supervisory engagement process in respect of CBLIE given the exposure that CBLIE has to CBL Insurance as a major reinsurer to CBLIE. As a result, the CBI has issued a number of directions and conditions

> on CBLIE intended to strengthen its capital base, reserves, and reinsurance security, and has asked CBLIE to commission an independent skilled persons report into CBL's French construction business.
>
> …

[728] Although there was an email from Mr Sherin to CBI attaching the announcements after they were made, which referred to trying to contact CBI in advance (and Mr Christer left a voicemail message), there was no evidence that anyone from the CBL Group discussed these announcements with CBI before they were made, nor did anyone ask CBI for permission to disclose the existence of the various directions, conditions and general regulatory action taken by CBI. The subsequent conversation noted that RBNZ had agreed to release the information on the directions imposed on CBLNZ, and as a result CBLNZ published further information. Ms O'Mahony said that if asked, CBI would have had no objection.

*Subsequent events*

[729] On 7 February 2018 in Ireland, CBI wrote a further letter to CBLIE, saying 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.

[730] On 8 February 2018, NZX announced that it had suspended the quotation of CBLC's shares with effect from 2:09 pm that day.

[731] On 13 February 2018, CBLC made an announcement to NZX that it would be exiting the French Construction Insurance business.

[732] On 19 February 2018 in Ireland, CBI issued another direction to CBLIE, requiring it to cease writing all new contracts of insurance and refrain from renewing any existing contracts of insurance.

[733] On 20 February 2018, CBLC made an announcement to NZX about this further CBI direction.

[734] On 23 February 2018 at 5:50 pm, the High Court appointed Ms Kare Johnstone and Mr Andrew Grenfell as interim liquidators of CBLI on the without notice (*Pickwick*) application of RBNZ (see n 23 above).

[735] On the same day, the Board appointed Mr Brendon Gibson and Mr Neale Jackson as voluntary administrators of CBLC.

[736] On 26 February 2018, CBI applied to the High Court of Ireland to have a provisional administrator appointed to CBLIE. Mr Kieran Wallace of KPMG was appointed as provisional administrator, and then administrator on 12 March 2018.

[737] I turn now to analyse each of the specific causes of action advanced by the FMA.

## One-off representation

### *CBLC contravention (first cause of action)*

*Was the representation describing the reserve increase as "one-off" misleading?*

[738] The relevant representation that CBLC made in the 24 August 2017 market announcement (and on the investor call the same day) was that:

> … as already signalled last week operating profit was impacted by the decision to take a one-off $16.5m increase to its reserves against future claim forecasts.

[739] The first issue is what that statement conveyed to typical investors in context – that is, in all the circumstances. This is a factual assessment. The helpfulness of expert evidence on this issue is perhaps limited to identifying the impression the statement in its proper context would have given to a typical investor. That context is reserving by insurers, explained at [156]-[168] above. As Mr Jones submitted, a typical investor would have known that CBLI worked out reserving on data and using assumptions relating to future claim profiles, that reserving is inherently changeable and reserves can be increased or released, and that CBLI reassessed its reserving every six months. I also accept that under-reserving was identified as a key risk in the IPO (at [231]-[232] above).

[740] Despite the reference to an "increase" to reserves and the distinction in this context between the concepts of "increasing" and "strengthening" of reserves referred to above (at [168]), it is common ground that CBLC was referring to a "one-off" strengthening of reserves.

[741] The FMA submitted the natural meaning of "one-off" in this context is to convey the impression that no further reserve strengthening was required or likely in 2017. The FMA accepts this is a statement as to future events, and therefore is only misleading if there was no reasonable basis for it, so as to amount to a representation about a present fact.[155]

[742] Mr Pigou considered that describing the strengthening in reserves as "one-off" suggested there would not be another strengthening in reserves, at least for the financial period ending 31 December 2017. He considered that, by the wording of its announcement, CBLC would have led shareholders and the market to believe that there only needed to be a single increase in reserves, and the company was taking this amount fully into account in the half-year results.

[743] Mr Pilkington did not specifically address the reference to "one-off". He said the general impression that CBLC's August 2017 announcements gave to the market was that all was going well, reserving had been comprehensively addressed with a ten-year forward and back review, and reserves could "easily" improve with Euro bond yields. The increase in reserves was positioned as a result of growth in the business and the conservative position being taken by the company. There was no reference to the known issues around the aged receivables, the CBI directions/conditions issued to CBLIE, or the likelihood of further reserve strengthening in the second half of 2017. Mr Pilkington said this positive message was reflected in the analyst reports at the time. I note, however, that CBLC's share price continued to decline from 25 August 2017 to 15 September 2017.

[744] At a general level, Mr Mulholland submitted that every adjustment to reserve assumptions results in a "one-off" reserve adjustment, and therefore the announcement was not misleading. He submitted that investors could not have believed there would

155 See [35] above.

not be any more strengthening at the year end. The Appointed Actuary reviewed reserves every six months. Strengthening was always a possibility at year end, regardless of what CBLC said or did not say.

[745] Mr Mulholland's evidence first explained the use of "one-off" to distinguish the adjustment made from spreading the reserve strengthening over the financial year:

> … one-off simply meant that based on new information that had become available we had taken the adjustment to the financials as a one-off adjustment and not spread it. It did not mean that there might not be further adjustments. The possibility that future adjustments would be necessary is something that would have been known to all of the analysts…

[746] He also said:

> Investors were aware that CBLI might need to further strengthen reserves at any point. We expressly advised analysts that we were increasing our actuarial reviews to ensure adjustments were announced to the market faster. Plainly this signalled that further adjustments to reserving could occur. In any event this is [common sense]. The possibility of being under reserved is the single biggest risk that any insurance company faces and reserve strengthening, and reserve releasing, is a reality for all insurers.

[747] In cross-examination he said the adjustment was "one-off":

> Because the adjustment that was made was one-off to all of the policies in existence to that point in time and then it is applied to all future policies. So it is a one-off change. It is not something that is done then every month, every year, because you make the change in your model for all the future but you take all the historical once, it's a one-off.

[748] Mr Clements also did not think the statement was misleading. Mr Robertshawe of ACC said that every reserve adjustment was "one-off" even if adjustments were occurring every six months, given each adjustment would usually relate to a different set of assumptions. Every time an assumption set was changed, he would call it a "one-off".

[749] I do not consider that what the statement conveyed to a typical investor was confined to there being no spreading of (already identified) reserve strengthening over the financial year. Nor do I consider the statement merely meant that the adjustment was, like any adjustment, a change to the model with a one-off effect on all policies. Given the specific reference to the review of policies looking back and forward up to

10 years leading to the "one-off" adjustment in the announcement (at [388] above), I consider the statement with the half-year results conveyed that no further reserve strengthening would be required, at least in that financial year. This amounted to a representation that following this review of policies CBLC had a reasonable basis for saying that no further reserve strengthening would be required, at least in that period.

[750] Given the evidence that if claims experience continued, there may have been a need for further strengthening, I consider the statement was misleading. There was not a reasonable basis to say otherwise. As Mr Rhodes said, the announcement did not account for what PwC had told CBLI about the possibility of future strengthening at the year end.

[751] Even if "one-off" meant only that CBLI was not spreading the reserve strengthening over the year but taking it all at once (in the first half-year), there were indications that spreading was in mind, and the statement was misleading. For example, spreading was suggested as a possibility in Mr Harris' email of 5 August 2017 (at [358] above) when he said "… I detect that [PwC] are really at their lowest, even though they might agree on Monday to a small reduction now but knowing that there will be another strengthening adjustment in H2". Mr Coulter's subsequent email about the "measured approach" (at [511] above, referring back to the talking points for the 22 August 2017 ARC meeting) also indicates that spreading the reserve strengthening may have been in mind in August 2017.

[752] This primary contravention by CBLC of s 19 at least is established.

***Involvement (second cause of action)***

*Did Mr Mulholland know the representation describing the reserve increase as "one-off" was misleading?*

[753] As to whether Mr Mulholland knew the statement was misleading, he accepted that prior to 18 August 2017 he, and the Board, had been told by PwC that if claims experience continued, there may be a need for further strengthening at the year end – although he did not accept he knew that further strengthening was likely at year end. Given PwC's reserving position, the ongoing work, and the regulatory concerns, he

should have known that CBLC lacked a reasonable basis for conveying that no further reserve strengthening would be required at least in the remainder of that financial year. However, the FMA accepts the issue is whether he did in fact know.

[754] The FMA relied particularly on Mr Mulholland's 24 August 2017 email saying "I think we should remove the words one off" (at [417] above), and Mr Coulter's subsequent email indicating that that spreading the reserve strengthening may have been in mind in August 2017 (at [511] above).

[755] In relation to Mr Mulholland's 24 August email, he said:

> I believed the description "one off" was available at the time as CBLI was taking the strengthening recommended by the appointed actuary at the half year. To avoid any possible confusion or misunderstanding, I suggested that "one off" be removed from the announcement. I do not know why the statement remained in the announcement but note that the board approved the announcement with the term "one off" in it.

[756] Mr Mulholland's email to Mr Harris on the morning of the announcement advising the removal of "one-off" – which was good advice – suggests he was aware it was misleading or likely to mislead. I doubt Mr Mulholland's explanation that he suggested removal merely because he thought people who were not as up to speed as investors may get confused. Also, Mr Mulholland's reference to legal advice was a distraction, as indicated (at [430] above).

[757] In relation to Mr Coulter's subsequent email, I accept that no inference should be drawn from the fact that Mr Mulholland did not dispute its accuracy at the time. Also, Mr Coulter did not give evidence. Even so, the reliability of his email needs to be assessed against Mr Mulholland's evidence and the other contemporaneous documents. Mr Coulter's reference to reducing the level of strengthening by circa $5m is more relevant to the spreading allegation, but it does suggest there were discussions around reserve strengthening with Mr Mulholland at the half year that indicated further strengthening in the second half. I accept there may be an element of hindsight in Mr Coulter's email. The ARC minutes of 22 August 2017 say "… there are still uncertainties that could result in further strengthening at the full year", not "that further strengthening is likely". Even Mr Coulter's talking points for that meeting only said "Further strengthening at year end may be required depending on

claims experience and outcomes of any case reserve review." However, in addition to Mr Harris' email to Mr Mulholland of 5 August 2017 already referred to at [751], the Board minutes of the 27 September 2017 meeting stated from the CEO's report that "PWC had indicated at the ARC meeting and again afterwards that further strengthening was expected". While Mr Mulholland did not attend this part of that Board meeting, it was accepted this referred to the ARC meeting on 22 August 2017. Subsequent documents indicate that, even though Mr Mulholland was no expert in actuarial reserving, he took months to accept PwC's increasingly firm advice on the need for further reserve strengthening at year end. As late as December 2017, he was described as being "in the denial phase" (at [610]).

[758] On balance, I am satisfied on the evidence that Mr Mulholland knew on 24 August 2017 that further strengthening was at least a real possibility if not likely, and there was no reasonable basis to say otherwise. Consistent with his email to Mr Harris that morning (at [417] above), he must have known that the reference in the announcement to the adjustment being "one-off" was misleading.

*Did Mr Mulholland intentionally participate by acts or omissions that had a practical connection with the contravention?*

[759] The FMA says that Mr Mulholland's role revising and sending the announcement is plain and sufficient to show intentional participation.

[760] Mr Mulholland did not draft the 24 August 2017 announcement or the investor presentation, although he did review drafts of both documents before they were finalised. I acknowledge that the announcement including "one-off" was approved by the Board. Given Mr Mulholland's advice to remove "one-off" as part of his fact checking, which was more than proofreading in a narrow sense, his participation depends on why it was not removed. If he changed his mind and decided to leave it in despite what he had agreed with Mr Harris, or if he and Mr Harris changed their minds and agreed it should stay in, there would likely be a practical connection with the contravention. However, if Mr Mulholland intended to take it out but genuinely omitted by mistake to do so, or if Mr Harris changed his mind and decided it should stay in unilaterally despite Mr Mulholland's advice, effectively overruling him, there would likely not be a practical connection. I do not discount Mr Mulholland's

evidence that he does not remember. In the absence of evidence as to the explanation, and with the onus of proof giving Mr Mulholland the benefit of the doubt, I am not satisfied that Mr Mulholland intentionally participated in this contravention.

*Section 503 defence*

[761] It is unnecessary to consider this affirmative defence. I merely note that I do not consider MERW's involvement would give rise to a reasonable reliance defence for the reasons already indicated, and the absence of evidence as to the explanation for leaving "one-off" in would not assist Mr Mulholland in establishing reasonable steps.

*Conclusion*

[762] The FMA's second cause of action against Mr Mulholland is not made out.

**Non-disclosure of aged receivables**

***CBLC contravention (ninth cause of action)***

*Was CBLC aware of the alleged information?*

[763] The FMA's narrowed case is that the alleged information was:

(a) that approximately $35m of premium receivables due to CBLI were over a year past due (referred to already as the aged receivables); and

(b) the solvency impact of the aged receivables under the Solvency Standard.[156]

[764] The claim in the ninth and tenth causes of action is that CBLC was aware of this information from 24 August 2017 (or alternatively 11 October 2017). It is unnecessary to consider whether CBLC was aware of this information earlier. It is also unnecessary to consider the recoverability of the aged receivables.[157]

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[156] The FMA's amended claim also alleged that the aged receivables could have had a profit impact if it was subsequently determined that they were not likely to be collected, which was disputed, but it is unnecessary to consider the profit impact of the aged receivables: see [386]-[387] above.

[157] See [387] above.

[765] Mr Mulholland submitted that the quantum and make-up of the aged receivables was still being investigated, even up to the appointment of interim liquidators in February 2018, but he accepted there was already a solvency impact. Even though work was ongoing to provide granular detail, and Mr Mulholland pointed to the minutes of the 25 November 2017 Board meeting referring to KPMG finding an "initial gap" (at [575] above), I consider that CBLC was aware from 24 August 2017 that approximately $35m of premium receivables due to CBLI were over a year past due. That is evident from the SFS Receivable Finance Report (at [369] above), the covering memorandum whether or not it was before the Board on 17 August 2017 (at [374]-[381] above), and the surrounding documents.

[766] CBLC was also aware of the solvency impact of the aged receivables. It was evident at least from the draft solvency calculation as at 30 June 2017 that Mr Clements sent to Mr Coulter on 14 August 2017 (at [371] above).

[767] It is therefore unnecessary to address the alternative date of 11 October 2017, but I note that the Board received an update on 14 September 2017 (at [448] above) and that the aged receivables were sufficiently identified to be the subject of the signed Castlerock term sheet on 11 October 2017 albeit the transaction was still subject to due diligence. This further reinforces that CBLC was aware of the aged receivables and their solvency impact.

*Was the information not generally available to the market?*

[768] Mr Mulholland admitted that there was no market announcement about aged receivables, but submitted this information was disclosed in the solvency figure in CBLC's accounts. However, contrary to Mr Mulholland's submission, this information was not disclosed in CBLC's interim financial statements in Note 6 (at [400] above). This issue was addressed by Mr Borrie from an accounting perspective and by Mr Pigou from an investor perspective. Note 6 addressed the fair value of SFS assets and liabilities following the acquisition given the ongoing reconciliation process. However, it merely identified uncertainty as to that fair value, stating "…the balances for the acquisition may be revised, which could, but won't necessarily, result in material favourable or unfavourable impacts to goodwill or the

SOPL". Note 6 did not address the known aged receivables of approximately $35m sufficiently for continuous disclosure purposes. Further, Note 6 did not address their solvency impact.

[769] Nor were the aged receivables and their solvency impact evident from the Solvency Ratio disclosed in Note 3 to the interim financial statements (at [431] above). There was no reference to the aged receivables nor the reason for the decline from 188.6% as at 31 December 2016. The information about the aged receivables and their solvency impact was not generally available to the market in late August 2017. The existence of the aged receivables and the solvency impact was only disclosed to RBNZ in the more detailed solvency return filed on 29 September 2017 (at [470] above). The existence of the aged receivables was only disclosed to the market (indirectly) when the write-off (of $44m) was announced on 5 February 2018 (at [718] above). Even then, the solvency impact was not disclosed to the market.

*Would a reasonable person expect the information, if it were generally available to the market, to have a material effect on the price of CBLC shares?*

[770] Mr Pigou gave evidence that an investor would have expected disclosure of the solvency impact of the aged receivables to have had a material effect on the price of CBLC shares.

[771] Mr Mulholland submitted that the existence of the aged receivables was not material given CBLI expected to recover these in full. He also submitted that their solvency impact was not material, and that it was the overall Solvency Ratio that was material information, which was disclosed to the market.

[772] As indicated, in August 2017 CBLC considered disclosure of the fair value of SFS assets and liabilities in the interim financial statements given the ongoing reconciliation process. However, there was no evidence that the Board, the ARC or the Disclosure Committee considered disclosure of the aged receivables or their solvency impact.

[773] Accepting that as at 24 August 2024, CBLI had not made an assessment that the aged receivables were irrecoverable and an impairment provision was necessary,

I consider 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. In IPSA solvency terms, the 100% RCF was equivalent to writing off the aged receivables. As the Board noted at the 27 September 2017 meeting, "aged debtors" was one of the two major drivers of CBL solvency (at [461](b) above). A $35m impact for CBLC should have been considered material. It reduced CBLI's Solvency Ratio from over 180% to approximately 150% (at [505] above, even with the doubtful offset for the Elite collateral, and reduced the Solvency Ratio considerably more without that offset). As Mr Coulter recorded only a few days after 24 August 2017, the key driver for the deterioration in solvency position had been the SFS aged debt, and a steering committee, including Mr Mulholland, had been established (at [437] above). The subsequent attempts to avoid the solvency impact also suggest it was considered material. The 11 October 2017 Castlerock term sheet further reinforced the materiality of the aged receivables and their solvency impact by that alternative date.

*Did the information relate to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[774] It was not disputed, and I consider, that this information related to CBLC shares in particular.

*Did any of the safe harbour exceptions to disclosure apply?*

[775] There is no evidence the Board or the Disclosure Committee even considered whether a safe harbour exception applied. Mr Mulholland submitted that the information was confidential and comprised matters of supposition, or was insufficiently definite to warrant disclosure. However, the information was not confidential in the sense that release by CBLC would have been a breach of law. Nor was the information supposition or insufficiently definite to warrant disclosure. As CBLI was aware that approximately $35m of premium receivables due to CBLI were over a year past due, it could not rely on this limb of the safe harbour exception to avoid disclosure until the exact quantum of the aged receivables was clear. Nor could CBLC rely on the confidentiality of RBNZ's required 170% Solvency

Margin to avoid disclosure of the aged receivables or their solvency impact.[158] CBLC should have disclosed what it could about the aged receivables and their solvency impact as at 24 August 2017.

*Immediate release?*

[776] For the reasons given, CBLC did not immediately release this information.

*Conclusion*

[777] The primary contravention is established.

***Involvement (tenth cause of action)***

*Did Mr Mulholland know of the relevant information?*

[778] Mr Mulholland admitted he knew of the existence of the aged receivables. He said, however, work was ongoing to establish the quantum of these and therefore he did not understand the information to exist in the way the FMA alleges. He admitted he knew of the solvency impact.

[779] I am satisfied Mr Mulholland knew that approximately $35m of premium receivables due to CBLI were over a year past due. That was evident at least from the draft Finance Report of 11 August 2017 sent to Mr Mulholland (at [369]). This suffices for knowledge of the existence of the aged receivables. He also knew their solvency impact.

*Did Mr Mulholland know that the information was not generally available to the market?*

[780] Mr Mulholland submitted that he believed the reference to the reconciliation in Note 6 of the interim financial statements sufficiently disclosed the uncertainty surrounding the aged receivables, and believed the solvency impact was disclosed in the interim financial statements.

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158 It is unnecessary to address how CBLC could have disclosed CBLI's breach of the (confidential) first RBNZ direction requiring a 170% Solvency Ratio since that is not part of the FMA's case.

[781] Acknowledging that Deloitte was specifically asked at the 22 August 2017 ARC meeting whether Note 6 was sufficient and confirmed this, I do not accept that Mr Mulholland believed this meant the information that approximately $35m of premium receivables due to CBLI were over a year past due was generally available, essentially for the reasons already given as to the limited nature of Note 6. It said nothing about $35m of receivables aged over a year. Nor do I accept he believed that the solvency impact of the aged receivables was disclosed in the interim financial statements. Reference to the Solvency Ratio in Note 3 (at 0 above) provided no basis for such a belief.

*Did Mr Mulholland know that the information was information which a reasonable person would have expected, if it were generally available to the market, to have had a material effect on CBLC's share price?*

[782] Mr Mulholland submitted that he believed the existence of the aged receivables was not material information given CBLI expected to recover these in full. He accepted that CBLI's solvency under IPSA was an important metric and mattered to investors. Although he believed the SFS receivables were still collectable, he accepted they had to be aged for solvency purposes. He submitted that he did not consider the treatment of a single asset on CBLI's Solvency Ratio was material information that ought to be disclosed. However, 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.

[783] Given the different scenarios presented in the iterations of the Finance Reports in the month leading up to finalisation of the interim financial statements (for example, at [329] and [351] above), and the other documentation during this period including the SFS Receivable Finance Report and the emails relating to the covering memorandum (at [369] and [381] above), I consider that Mr Mulholland must have known that the existence and solvency impact of the aged receivables was material. Describing them as a single asset did not provide any basis for believing the impact was not material.

*Did Mr Mulholland know the information related to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[784] It was not disputed, and I consider, that Mr Mulholland knew this information related to CBLC shares in particular.

*Did Mr Mulholland know that the information was not information that was exempted from disclosure by the safe harbour exceptions in the Listing Rules that he raised?*

[785] Mr Mulholland submitted that he believed the information comprised matters of supposition and was insufficiently definite to warrant disclosure.

[786] Accepting that reconciliation work was ongoing, including by KPMG Luxembourg, I do not accept that Mr Mulholland believed the information was exempted from disclosure by the safe harbour exceptions. There was no evidence that he or anyone else at CBLC considered the application of the safe harbour exceptions to the aged receivables or their solvency impact. Nor did Deloitte's position support any such belief.

*Did Mr Mulholland know that the information was not immediately released?*

[787] For the reasons given, I am satisfied Mr Mulholland knew that CBLC did not immediately release this information.

*Did Mr Mulholland intentionally participate by acts or omissions that had a practical connection with the contravention?*

[788] The FMA does not suggest that Mr Mulholland withheld this information from the Board. The FMA's case on participation is based on Mr Mulholland's involvement in the announcement and his omission to raise the need for disclosure of this information given his opportunity and/or responsibility to act. There is no evidence that Mr Mulholland did anything to raise the need for disclosure of this information. Aside from providing material information to the Board, Mr Pilkington said that Mr Mulholland also needed to ensure the Board understood its financial implications and what that could mean in terms of the disclosure requirements. He suggested the Board was focused on the solvency rather than profit implications of the aged

receivables, but it is the solvency implications that were most relevant unless and until the Board decided to write off the aged receivables.

[789] Mr Mulholland submitted that he did not participate in this contravention (if there was one). He submitted that he ensured the Board had the information the directors needed so they could decide whether to write off the aged receivables and what to disclose about them. He said this was information the Board was looking at constantly, and that Mr Ray and Mr Clements were dealing with. He maintained it was not his decision as to whether it was material information. He accepted that under his employment contract he had an obligation to ensure the Board knew about material information but considered disclosure was then up to the Board. He submitted that contemporaneous documents prove the Board was intending to disclose this until it decided not to write off the aged receivables. He also submitted that the Board's decision not to make a market announcement in December 2017 indicates that it would not have been prepared to disclose this information any earlier.

[790] The Board minutes of 30 July 2017 indicate that Mr Mulholland was tasked with providing detail on the collectability and aging of the debt (at [341] above). Accepting that he had his finance team do that work and prepare solvency reports, he nevertheless was involved in the aged receivables issue. As CFO, he also had a role in relation to the interim financial statements. Both are evident from his signing of the representation letter on 23 August 2017. I have already addressed his role in relation to disclosure.

[791] As to whether Mr Mulholland intentionally participated in the contravention, I accept that disclosure decisions were made by the Board (as indicated at [198] above). I also accept the Board was aware of this material information. However, there is a difference, as Mr Pilkington said, between being aware of the information and considering the need for its disclosure. Mr Pilkington said that continuously reflecting on whether a company is meeting its disclosure responsibilities is a responsibility of a listed company's board and executive, and not one that can be delegated to a sub-committee. If the Board considered disclosure of the information and decided not to disclose it, Mr Mulholland's omission to raise the issue would likely not amount to participation. Mr Pilkington seemed to accept this, saying that if an

officer of a listed company has made the board fully aware of information and knows the issue of its disclosure has been fully considered, the officer will generally have discharged his or her obligation (although he had previously said that an officer who disagrees with the board's decision is expected to advance the contrary view). In this context, I doubt an executive has a specific duty to "urge" disclosure, as the FMA suggested. Also, in such circumstances, a s 503 defence may be available based on taking reasonable steps to ensure the company complied with its continuous disclosure obligations.

[792] On the other hand, accepting that board members are expected to understand the continuous disclosure obligations, a failure by board members to ensure the board considers the need for continuous disclosure of particular information does not automatically absolve executive officers of their responsibility to raise the need to consider continuous disclosure. 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. Accessory liability for continuous disclosure contraventions is not necessarily limited to board members.[159] I accept that in the case of an executive officer who is not privy to all board discussions, intentional participation may well depend on knowing there is at least a real risk that the board has not considered, or not correctly considered, the need for disclosure. So here, if the Board did not consider continuous disclosure and Mr Mulholland knew that disclosure was required and that the Board had not considered the issue, his omission to raise the issue with the Board could amount to intentional participation given his role as CFO and a member of the Disclosure Committee under the Continuous Disclosure Policy.

[793] Therefore, having concluded that Mr Mulholland knew that disclosure was required, the remaining issues are whether the Board considered the issue and, if not, whether Mr Mulholland knew that the Board had not done so or at least there was a real risk it had not. I accept it appears that in mid-August 2017, the Board was

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[159] In *Australian Securities and Investments Commission v Austal Ltd* [2022] FCA 1231 (*Austal*) and *Australian Securities and Investments Commission v Helou (No 2)* [2020] FCA 1650 (*Helou*), a CEO and CFO respectively were found liable as accessories, albeit following admissions. More recently, see *Australian Securities and Investments Commission v Noumi Ltd (No 4)*, above n 69, where a CFO was found liable as an accessory, again following admissions.

intending to write off the aged receivables in the interim financial statements and disclose that to the market, but decided on 17 August 2017 not to write them off. However, the evidence did not indicate that the Board considered the need to disclose the existence of the aged receivables themselves or their solvency impact; that is, whether this was material information that needed to be immediately disclosed to NZX as a matter of continuous disclosure under the Listing Rules. That the Board may have also failed to consider continuous disclosure of other information correctly in December 2017 does not mean it would have declined to disclose this information if it had considered the correct issue in August 2017. This was a Board failing in its responsibilities. I accept that Mr Mulholland did not directly cause that failure by withholding information from or deliberately misleading the Board, which differs from some of the Australian executive officer cases.[160] 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 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.

*Section 503 defence*

[794] Mr Mulholland submitted he has a defence to the continuous disclosure causes of action under s 503 of the FMCA on the basis that he reasonably relied on information supplied by others and/or took all reasonable steps to ensure that CBLC complied with its continuous disclosure obligations. I do not accept this defence is made out. The relevant issue is not whether Mr Mulholland believed the aged receivables were collectable, but whether their existence and their solvency impact

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[160] At least in part, *Austal* and *Noumi* involved information not disclosed promptly to the board by the CEO/CFO respectively. In *Helou*, both the managing director and the CFO were aware of the relevant information from the beginning of each contravention period.

needed to be disclosed. Relevant to that, and given my earlier findings, I do not consider Mr Mulholland reasonably relied on advice or information from others, and there was no evidence that he took reasonable steps to ensure that CBLC complied with its continuous disclosure obligations.

*Conclusion*

[795] I conclude that Mr Mulholland was involved in this contravention.

**Non-disclosure of Castlerock transaction**

***CBLC contravention (eleventh cause of action)***

*Was CBLC aware of the alleged information?*

[796] The alleged information is that CBLI signed a term sheet to sell the aged receivables to Castlerock, and its effect. The claim in the eleventh and twelfth causes of action is that CBLC was aware of this information on 11 October 2017.

[797] Mr Mulholland submitted that the Castlerock transaction was not a concluded transaction. That is accepted. However, the first issue is whether CBLC was aware of the signed term sheet and its effect on 11 October 2017. There is no doubt that CBLC was aware of the signed term sheet (at [479]-[480] above). The intended solvency effect of the Castlerock transaction was also known (for example, at [477]-[479] above) albeit the transaction did not ultimately come to fruition. I deal with its actual effect below in the context of materiality.

*Was the information not generally available to the market?*

[798] Mr Mulholland admits the fact of the Castlerock transaction was not generally available, but here too he relied on disclosure in the interim financial statements in August 2017. However, the interim financial statements preceded the Castlerock transaction, and did not disclose the transaction nor its effect.

*Would a reasonable person expect the information, if it were generally available to the market, to have a material effect on the price of CBLC shares?*

[799] There was no evidence the Board (or the Disclosure Committee) considered disclosure of the Castlerock transaction or its effect. Mr Mulholland submitted that the existence of the Castlerock transaction and its solvency impact were not material.

[800] Mr Pigou considered that, given the Castlerock transaction was the mechanism by which the solvency and profit impacts of the aged receivables could potentially be avoided, an investor would view the Castlerock transaction as material information once it had been finalised and become effective. At that point, when disclosed, it would have had a material effect on the CBLC share price. He said that if CBLC's view was that the Castlerock transaction had been completed as at 11 October 2017, then it should have been disclosed. He pointed to Mr Harris' emails in November and December 2017 stating that the deal was done.

[801] However, I have concluded that the transaction was conditional (at [504] above). In his brief, Mr Pigou did not suggest that the Castlerock transaction needed to be disclosed if it was not complete and/or was ineffective in de-risking CBLI from the risk of non-collection of the aged receivables. Rather, he said that CBLI's solvency capital position was not improved and therefore CBLI would be in breach of the 170% Solvency Ratio required by RBNZ under the first RBNZ direction, that CBLl's Solvency Ratio would be lower and that this information should have been disclosed as solvency was a key metric for CBLI as an insurer in New Zealand. He considered that CBLC could have found a way to tell the market what it needed to know without going as far as disclosing the first RBNZ direction.

[802] I have already addressed the need for disclosure of the solvency impact of the aged receivables.[161] The materiality of the Castlerock transaction needs to be considered separately.

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[161] It is unnecessary to address Mr Pigou's evidence about disclosure of the profit impact of the aged receivables if the Castlerock transaction was not complete and/or was ineffective in de-risking CBLI from the risk of non-collection.

[803] In cross-examination, Mr Pigou said that the Castlerock transaction needed to be disclosed as it involved a material sale of assets, but he also acknowledged that it might not have had a material impact on the share price.

[804] Given the conditional nature of the Castlerock term sheet and its lack of effect on CBLI's Solvency Ratio (at [504]-[505]above), I am not satisfied that a reasonable investor would expect disclosure to have had a material effect on the price of CBLC shares. The relevance of the transaction was to address the aged receivables and their solvency impact, which should already have been disclosed. CBLC's mistake was treating the Castlerock transaction as a done deal for solvency purposes when it was not, and had no effect on solvency. CBLC's mistaken view of the transaction did not make the ineffective transaction itself material. The evidence was equivocal as to whether the mere assignment of the aged receivables would be material. Also, this claim relates to non-disclosure of the transaction to NZX, not whether CBLC's solvency returns to RBNZ (or statements to investors on 11 October 2017) were accurate. Any accurate disclosure to NZX would have said how the transaction was conditional and had no effect on CBLI's Solvency Ratio unless and until it became unconditional.

*Did the information relate to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[805] It was not disputed, and I consider, that this information related to CBLC shares in particular.

*Did any of the safe harbour exceptions to disclosure apply?*

[806] Mr Mulholland submitted the information was confidential and comprised matters of supposition or was insufficiently definite to warrant disclosure. Accepting that the Castlerock transaction was not in fact final, once the term sheet was signed and CBLC was treating the transaction as effective, no safe harbour exception to disclosure applied.

*Immediate release?*

[807] CBLC did not immediately release this information.

*Conclusion*

[808] Given the conditional nature of the Castlerock term sheet and its lack of effect on CBLI's Solvency Ratio, I am not satisfied that non-disclosure was a contravention.

***Involvement (twelfth cause of action)***

[809] It is therefore unnecessary to consider Mr Mulholland's involvement. I briefly record my view if there were a contravention.

*Did Mr Mulholland know of the relevant information?*

[810] Mr Mulholland admitted this.

*Did Mr Mulholland know that the information was not generally available to the market?*

[811] Mr Mulholland admitted this albeit submitted he believed the solvency impact was adequately disclosed – which I have not accepted.

*Did Mr Mulholland know that the information was information which a reasonable person would have expected, if it were generally available to the market, to have had a material effect on CBLC's share price?*

[812] Mr Mulholland submitted that he did not believe the Castlerock transaction was material – it was a factoring agreement. I am not satisfied he knew that the transaction and its effect were material (and as discussed above at [804], I am not satisfied the transaction and its effect were, in fact, material).

*Did Mr Mulholland know the information related to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[813] This was not disputed.

*Did Mr Mulholland know that the information was not information that was exempted from disclosure by the safe harbour exceptions in the Listing Rules that he raised?*

[814] I am not satisfied that Mr Mulholland knew the Castlerock transaction was sufficiently definite to warrant disclosure.

*Did Mr Mulholland know that the information was not immediately released?*

[815] I am satisfied Mr Mulholland knew that CBLC did not immediately release this information.

*Did Mr Mulholland intentionally participate by acts or omissions that had a practical connection with the contravention?*

[816] Mr Mulholland did nothing to prompt the Board to consider disclosure of the Castlerock transaction and its effect. However, given his lack of involvement and absence at the key time, I am not satisfied that any omission of his would have had a practical connection with the alleged contravention, had it been made out.

*Section 503 defence*

[817] It is unnecessary to consider this affirmative defence.

*Conclusion*

[818] This cause of action is not made out.

**Non-disclosure of third CBI direction**

***CBLC contravention (twenty-first cause of action)***

*Was CBLC aware of the alleged information?*

[819] The alleged information is that CBI had directed CBLIE to apply a capital add-on, essentially requiring it to hold additional cash reserves of €31.5m. The claim in the twenty-first and twenty-second causes of action is that CBLC was aware of this information on or shortly after 13 January 2018 (or alternatively, 30 January 2018).

[820] Mr Mulholland admits that as at 13 January 2018, CBLC was aware of the third CBI direction. It is unclear when CBLC first became aware that the capital add-on requirement meant CBLIE had to hold additional cash reserves of €31.5m, but CBLC was aware of this by 30 January 2018 at the latest (see [635] above).

*Was the information not generally available to the market?*

[821] Mr Mulholland admits this information was not generally available to the market.

*Would a reasonable person expect the information, if it were generally available to the market, to have a material effect on the price of CBLC shares?*

[822] As indicated at [644] above, there was no evidence the Board was aware of the third CBI direction until 30 January 2018, nor was there evidence even then that the Board or the Disclosure Committee considered disclosing this information.

[823] The FMA submitted this information was material irrespective of the amount of the additional capital required.

[824] Mr Mulholland disputed that this CBI direction was material. He submitted it only required capital to be moved from one entity in the CBL Group into another. However, even accepting that the specific figure of €31.5m was unknown until the SCR calculation was done, the third CBI direction required injecting a material amount of money that CBLC did not have at that time. According to Mr Pigou, based on the unaudited consolidated financial statements as at 31 December 2017 and the incomplete supporting workbook, capital of the magnitude required was not readily available in the CBL Group. As Mr Borrie said, the third CBI direction, requiring capital from somewhere in the CBL Group to be transferred to CBLIE, imposed a significant restraint on the Group and created pressure on cash and Group resources. Due to the fact that CBLI reinsured policies written by CBLIE, the performance of, or constraints on, CBLIE would have had flow-on consequences for CBLI, which was the Group's most important operating subsidiary.

[825] Further, I accept Mr Pigou's evidence that an investor would expect the disclosure of the third CBI direction to have had a material effect on the price of CBLC's shares, on the basis of regulatory risk. The PDS highlighted regulatory risk including loss of licence (at [231](e) above), which would also apply to CBLC's insurer subsidiary CBLIE. Such risk included changes to conditions under which they were allowed to operate. CBLIE was a key trading subsidiary of CBLC, and by this

time was the primary means by which the CBL Group accessed the European market. Although CBLI was the largest operating subsidiary, most of its business was as a reinsurer for CBL Group entities, and by 2017 CBLIE (as the second-highest premium revenue earner in the Group) was the most significant contributor to the CBL Group's cash flow. CBLIE was key for CBLC's revenue and growth. This third CBI direction was indicative of a serious concern on the part of CBLIE's regulator about its prudential solvency. As Ms O'Mahony explained, CBLIE had been under investigation by CBI since January 2017. She described these investigations as "increasingly intensive regulatory and supervisory engagement". I consider the third CBI direction was material.

*Did the information relate to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[826] It was not disputed, and I consider, that this information related to CBLC shares in particular.

*Did any of the safe harbour exceptions to disclosure apply?*

[827] There was some confusion as to whether Mr Mulholland admitted, for the purpose of the primary contravention, that none of the exceptions to the Listing Rules applied. While I understood from Mr Jones' reply at least that this was admitted, I briefly address the safe harbour exception.

[828] The only evidence suggesting that CBLC considered the safe harbour exception may have applied to the CBI directions after becoming aware of the third CBI direction was MERW's comment to RBNZ on 5 February 2018 presuming CBL would need to discuss disclosures with CBI (at [721] above). However, although someone in the CBL Group tried to speak with CBI in advance of the 7 February 2018 market announcement, there is no evidence that anyone did speak with CBI before CBLC made the announcement (at [728] above).

[829] In any event, as indicated at [637]-[638] above, disclosure of the third CBI direction would not have been a breach of law. Nor do I accept that its disclosure would have then required CBLC to disclose the confidential RBNZ directions and

investigation. As Mr Pilkington said, it is often the case that a listed company will make an announcement and then be faced with questions from analysts or investors that it cannot answer for confidentiality or other reasons. This does not excuse the requirement to make market disclosure of the information that does not itself fall within the safe harbour exception.

[830] As Mr Pigou acknowledged, the obligation to disclose matters such as regulatory steps does not preclude the company using its announcement to explain to investors its interpretation of matters and proposed action.

*Immediate release?*

[831] CBLC did not immediately release this information on receipt of the direction or even when the SCR calculation was done.

*Conclusion*

[832] I conclude that this primary contravention is established.

***Involvement (twenty-second cause of action)***

*Did Mr Mulholland know of the relevant information?*

[833] Mr Mulholland acknowledged that as a director of CBLIE he was aware of the third CBI direction from 13 January 2018. As he noted, it was CBLC, not CBLIE, that had the NZX market disclosure obligation. He must have become aware that the capital add-on requirement meant CBLIE had to hold additional cash reserves of €31.5m by 30 January 2018 at the latest.

*Did Mr Mulholland know that the information was not generally available to the market?*

[834] This is not disputed. The information of the third CBI direction and the capital add-on needed was not generally available.

*Did Mr Mulholland know that the information was information which a reasonable person would have expected, if it were generally available to the market, to have had a material effect on CBLC's share price?*

[835] Mr Mulholland denied that he knew this was material information. He accepted that CBI was imposing directions that made it more difficult as time went by. He also accepted that CBLIE had said in November 2017 that the direction then proposed (to cease writing insurance) would be "catastrophic" (at [531]-[532] above). Given this, his approach to the SFS sanction (at [624]-[628] above) and the significance of the capital add-on, I consider he 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.

*Did Mr Mulholland know the information related to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[836] It was not disputed, and I consider, that Mr Mulholland knew this information related to CBLC shares in particular.

*Did Mr Mulholland know that the information was not information that was exempted from disclosure by the safe harbour exceptions in the Listing Rules that he raised?*

[837] Mr Mulholland said his understanding was that the third CBI direction was confidential and could not be disclosed to any other party including NZX or ASX. He also said he believed that CBLC's directors took legal advice including about whether it could disclose, or needed to disclose, CBI's actions to the NZX and ASX. He said he was not able to waive privilege in that advice and disclose it. He added that he did not see, and still does not see, how CBLC could have disclosed the steps CBI was taking without disclosing RBNZ's directions, which CBLC was expressly not allowed to disclose. He described them as intrinsically linked. He submitted that if he was mistaken, it was not a mistake of law, but in the application of the law to the facts as he knew them to be.

[838] I have concluded that the third CBI direction was not exempted from disclosure by the safe harbour exceptions in the Listing Rules. The remaining issue is whether Mr Mulholland nevertheless lacked knowledge of that or believed otherwise. As indicated (at [67] above), actual knowledge includes wilful blindness.

[839] As a starting point, I accept that Mr Mulholland may have erroneously thought the reference to "CONFIDENTIAL" on the third CBI direction meant that CBI was purporting to impose confidentiality on CBLIE or at least on the CBL Group. However, Mr Mulholland acknowledged he understood there were safe harbour exceptions. He must have been generally familiar with their requirements. Confidentiality alone is insufficient – disclosure must be a breach of law. Moreover, as indicated, Mr Mulholland said he believed legal advice was sought, which reduces the likelihood that he had a completely erroneous view of the safe harbour requirements. Leaving aside advice in Ireland about responding to the CBI directions (which does not assist), the only documentary evidence of advice about New Zealand continuous disclosure of the CBI directions – referred to at a meeting Mr Mulholland did not attend – suggested that disclosure would be required (at [603]-[605] above). Further, if there had been legal advice that disclosure of the CBI directions would be a breach of law, permission would have been sought and obtained before disclosure occurred on 7 February 2018.

[840] Mr Mulholland also referred to advice about RBNZ confidentiality. I accept there was advice in relation to RBNZ confidentiality (as indicated at [357] and [603]-[604] above). I also accept it was known that the two regulators were liaising. However, there was no evidence of any advice that CBLC could not disclose the third CBI direction without disclosing RBNZ's directions. I doubt there was such advice, which would have been incorrect. CBLC could have disclosed to NZX that CBI had issued a capital add-on direction to CBLIE without reference to any RBNZ direction.[162] At least in a disclosure sense, the different regulators' directions were not intertwined.

[841] Further, as indicated at [828] above, the only evidence suggesting that CBLC considered the safe harbour exception may have applied to the CBI directions after CBLC became aware of the third CBI direction was MERW's comment to RBNZ on 5 February 2018. There is no evidence that CBLC or Mr Mulholland relied on confidentiality at an earlier stage. As indicated, the third CBI direction known on 13 January 2018 was not even disclosed to the full Board until 30 January 2018.

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162 Further, the first CBI direction on 23 June 2017 preceded any RBNZ direction by a month, but was also not disclosed.

[842] For these reasons, I do not accept Mr Mulholland believed that CBLC had legal advice that the third CBI direction could not be disclosed.

*Did Mr Mulholland know that the information was not immediately released?*

[843] Given the above findings, I am satisfied Mr Mulholland knew that CBLC did not immediately release this information. There was no reference to any CBI direction until the announcement of 7 February 2018 (at [727] above).

*Did Mr Mulholland intentionally participate by acts or omissions that had a practical connection with the contravention?*

[844] Here too, the FMA's case on participation is based on Mr Mulholland's omission to raise the need for disclosure of this information. There is no evidence that Mr Mulholland did anything to raise the need for disclosure of this information.

[845] Again here, Mr Mulholland said that disclosure was not his decision, that the Board had to approve any disclosure and that the Board, or least two Board members, were aware of this information.

[846] Applying the same approach as above (at [791]-[793]), I accept that disclosure was decided by the Board. I also accept that two CBLC directors were on the CBLIE board (Mr Harris and Mr Donaldson) and became aware of the third CBI direction at about the same time as Mr Mulholland – on or about 13 January 2018 (at [639] above). However, other Board members were apparently not aware of this information until 30 January 2018. Mr Mulholland said in cross-examination that Mr Harris told him that he and the other directors were responsible for ensuring the full Board was kept aware of all issues. Even if Mr Harris did say that, and accepting that Mr Harris and Mr Donaldson also had a responsibility to pass on material information to the full Board, there is no evidence that they considered the need to disclose this information on 13 January 2018, nor that the Board did so once all Board members were aware of the information following Mr Harris' email of 30 January 2018. This is against the background that the Board was told the safe harbour exception may not apply to the CBI directions (at [604]-[605] above) albeit that Mr Mulholland may not have been aware of this advice. Here too, that was a failure by those Board members. However,

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. I consider that Mr Mulholland's failure to raise the need for disclosure of this information was an omission that had a practical connection with CBLC's contravention.

*Section 503 defence*

[847] Mr Mulholland submitted he has a defence under s 503 of the FMCA on the basis that he reasonably relied on information supplied by others and/or took all reasonable steps to ensure that CBLC complied with its continuous disclosure obligations. I do not accept this defence is made out in relation to this information. Given my earlier findings, I do not consider Mr Mulholland reasonably relied on advice or information from others, and there was no evidence that he took reasonable steps to ensure that CBLC complied with its continuous disclosure obligations.

*Conclusion*

[848] I conclude that Mr Mulholland was involved in this contravention.

**Late disclosure of reserve strengthening**

***CBLC contravention (seventh cause of action)***

*Was CBLC aware of the alleged information?*

[849] The alleged information is that CBLI's reserves needed strengthening by approximately $100m.[163] The claim in the seventh and eighth causes of action is that CBLC was aware of this information from 25 January 2018 (or alternatively 30 January 2018) but did not disclose it to the market until 5 February 2018. Here too, it is unnecessary to determine whether CBLC – and who within CBLC – was aware

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163 Mr Jones did not take any pleading point based on the specificity of "approximately $100m".

of this information earlier, as PwC's signals about further reserve strengthening firmed up between August and November 2017.[164]

[850] Mr Mulholland's position was that there was no firm or final figure to disclose until 31 January 2018, and that up until that point there was no material information to disclose. He said disclosure would occur once PwC provided a final draft report that could be presented to the Board (above at [654]). Indeed, he said his understanding was that CBLC did not have to disclose that it needed to strengthen reserves until it had a final recommendation from PwC that the Board had accepted. He said he believed this was the general understanding in the office. He added that he was management and had resigned from his role at the end of October 2017, and was working out a 6-month notice period. He said he was also aware that Mr Harris, and Mr Hannon and Mr Donaldson on the ARC, knew of PwC's views.

[851] As indicated at [652] above, while the exact amount of reserve strengthening to be included in PwC's valuation report was not known as at 25 January 2018, it was clear to CBLC by 25 January 2018 that very significant reserve strengthening would be required. The pleaded issue is whether CBLC was aware that the reserve strengthening needed was approximately $100m before the figure was finalised. This overlaps with assessment of whether the information was "insufficiently definite to warrant disclosure" in the safe harbour exception.

[852] I accept that reserve strengthening was the subject of expert assessment and advice by the Appointed Actuary, which was signalled in less than definite terms and in draft before it was finalised. However, on 25 January 2018, PwC said work was completed for the full-year review, its latest estimates were not conservative, they were what a reasonable actuary would do based on the data available, and the total prior impact proposed was $112m (at [649]-[650] above). Although PwC agreed to consider two matters such that the $112m may change (at [651]-[652] above), I consider CBLC was aware on 25 January 2018 that CBLI's reserves needed strengthening by approximately $100m. There was no evidence that PwC's

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164 Indicating it was possible in August 2017 (at [363], [366], [395] and [409]-[410] above); expected/likely in September/early October 2017 (at [461](a), [466] and [474] above); >$33m required in mid-October 2017 (at [507]-[508] above; and between $67m and $120m in November 2017 (at [546]-[547] above).

consideration of the two matters would result in a change of greater magnitude in the Appointed Actuary's final report. Adjustment was not going to move the estimated required strengthening below approximately $100m.

[853] As the Guidance Note states, if an issuer is able to determine that it holds material information based upon incomplete information, that information must be immediately disclosed to the market, regardless of the fact that there may be additional information to follow. The issuer cannot simply wait until it has received all information concerning a material event before a disclosure obligation arises. Similarly, if receipt of the Appointed Actuary's report is treated as an event, as the Guidance Note states, an issuer is required to immediately disclose upon becoming aware that the event will occur instead of waiting until the event has occurred.[165] However characterised, CBLC was aware on 25 January 2018 of material information concerning the need for reserve strengthening of this magnitude. Against the background of PwC's earlier updates, the need for immediate disclosure should have been referred to the Board without delay. Mr Harris and Mr Mulholland had been reminded of the need for immediate disclosure on 19 January 2018 (at [646] above). CBLC could not further delay Board consideration of disclosure.

[854] Even if the magnitude was uncertain on 25 January 2018, it was confirmed on 27 January 2018 when Mr Coulter emailed Mr Ray referring specifically to $100m (at [655] above).

*Was the information not generally available to the market?*

[855] Mr Mulholland accepted that CBLC did not make any announcement about reserve strengthening between 24 August 2017 and 5 February 2018.

*Would a reasonable person expect the information, if it were generally available to the market, to have a material effect on the price of CBLC shares?*

[856] It is not disputed that information that CBLI's reserves needed strengthening by approximately $100m was material. I consider it clearly was material information. This is evident at least from the prominence of reserving in the "risks" section of the

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[165] At 3.6.

PDS and PFI (at [231]-[232] above), the fact that reserving changes affect profit and loss, regulatory concern about reserving and the sharp share price fall following the reserve strengthening announcement on 18 August 2017.[166] As Mr Pigou said, disclosure was particularly required given CBLC's profit expectation that was out in the market (from 24 August 2017, at [423]-[426] above).

*Did the information relate to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[857] It was not disputed, and I consider, that this information related to CBLC shares in particular.

*Did any of the safe harbour exceptions to disclosure apply?*

[858] Mr Mulholland submitted that an exception to the Listing Rules applied until 31 January 2018 on the basis that:

(a) a reasonable person would not expect the need to strengthen reserves by $100m to be disclosed when there was significant uncertainty about the quantum and accuracy of the figures;

(b) the need to strengthen reserves by $100m was confidential and confidentiality was maintained;

(c) the need to strengthen reserves by $100m comprised matters of supposition or was insufficiently definite to warrant disclosure; and

(d) on 31 January 2018 PwC provided a final draft report. On this date materiality crystalised.

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[166] On the day of that announcement CBLC's share price fell by 9.8% from the previous day's closing price compared with a 0.04% increase in the S&P/NZX50 index. The price fell by 13.8% between 17 and 25 August 2017 compared with a 0.2% decline in the S&P/NZX50 index. The volume of trading was also significant, particularly given that 60% of CBLC's shares at the time were held by directors, employees and related parties combined. CBLC was included in the S&P/NZX50 index from 19 June 2017, making it one of the larger NZX-listed companies by market capitalisation, and therefore one to which the 5% threshold for material information in the Guidance Note for "issuers with large market capitalisations" (see [53] above) could apply, but it was still one of the smaller companies by market capitalisation in that index.

[859] The only evidence indicating the Board considered the safe harbour exception relating to confidentiality was the reference to RBNZ confidentiality in the 3 August 2017 Board meeting (at [357] above) and the 12 December 2017 meeting with RBNZ (at [604] above). In any event, the information that reserves needed strengthening was not confidential in the sense that its release by CBLC would be a breach of law based on RBNZ or any other confidentiality. PwC was engaged by the CBL Group.

[860] I also consider the need for reserve strengthening was sufficiently definite to warrant disclosure on 25 January 2018. A reasonable person would expect the information to be disclosed. Given the nature of PwC's reporting, saying nothing until the report was finalised was not a legitimate option. Use of the label "draft" is not determinative (and indeed CBLC did not wait for PwC's final valuation report, which only came later in February). I accept that CBLC could have disclosed the material information in various ways. For example, it could have said that based on PwC's update, it expected CBLI's reserves needed strengthening by approximately $100m and that it would make a further announcement once the exact number was known. It could have said that based on PwC's update the total prior impact proposed was $112m, but PwC had agreed to consider two matters such that the $112m may change, and that it would make a further announcement once the exact number was known.

*Immediate release?*

[861] Mr Pigou gave evidence that, following PwC's advice on 25 January 2018, an investor would have expected disclosure of this information on or soon after 25 January 2018. Mr Pilkington considered that CBLC should have discussed a proposed market announcement and been ready to announce on 25 January 2018.

[862] Even if the need for reserve strengthening of approximately $100m was not sufficiently certain before 25 January 2018, given the increasingly clear indications by PwC to CBLC over the preceding months, CBLC should have prepared and discussed a draft market announcement so that disclosure could be made immediately when the position was sufficiently certain. Urgency was required and I consider that CBLC should have disclosed what it could about the need for material reserve strengthening

on 25 January 2018, or at least overnight. The exact amount could have been updated immediately after the further PwC advice on 27 and 30 January 2018.

[863] Even if the information was insufficiently certain on 25 or 27 January to warrant disclosure, CBLC should have prepared in this way so that disclosure could have followed immediately upon receipt of PwC's updated position on 30 January (an email at 1:55 pm advising that they had made further adjustments resulting in a $98m increase in reserves and that they were proceeding to produce a valuation report on that basis, followed by the updated slide pack at 3:02 pm),[167] thus avoiding further delay. Mr Pilkington said he would have expected a same-day release. If necessary, an urgent Board meeting should have been arranged in advance. However, there was no evidence of preparation of a draft announcement between 25 and 30 January 2018. CBLC did not comply with its obligation to make immediate disclosure.

[864] Instead, Mr Harris emailed the Board at 7:14 pm on 30 January calling a Board meeting the next evening (31 January) at 7:00 pm. CBLC then told RBNZ before lunchtime the next day (1 February),[168] but had still not made an announcement a further 24 hours later (on 2 February) when it was placed in trading halt (after RBNZ had met with the FMA, who then contacted NZX).[169] It is evident from the detailed nature of Mr Harris' email to the Board and the nature of the discussion with RBNZ that, after receipt of PwC's updated position on 30 January, CBLC made plans to address the need for reserve strengthening with a capital raise which delayed disclosure of the information itself. The proposed capital raise meant that CBLC (initially) considered it needed RBNZ confidentiality lifted, but this did not excuse delaying disclosure of the need for reserve strengthening itself. Rather than delaying for days while it tried to solve the problem, CBLC should have disclosed what it could immediately after an urgent Board meeting, and indicated that it would disclose its more detailed remediation plan as soon as possible thereafter.

[865] Even if the information was insufficiently definite until 30 January, CBLC's delay from that date, which was extended further after the trading halt was imposed,

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[167] At [658]-[660] above.
[168] At [689] above.
[169] At [703].

also would not have complied with its obligation to make immediate disclosure. As Mr Pigou said, there was a total of almost three business days between PwC's landing on 30 January and the trading halt on 2 February. Non-disclosure during this period did not accord with the requirement to disclose material information immediately.

*Conclusion*

[866] I conclude that this primary contravention is established.

***Involvement (eighth cause of action)***

*Did Mr Mulholland know of the relevant information?*

[867] Mr Mulholland admits knowing on 25 January 2018 that some form of significant strengthening was likely, but not the level. He admits knowing this information on 31 January 2018. Given that Mr Mulholland met with PwC and received their update on 25 January 2018, and the background knowledge he had about their reserving work, he knew at least as much as Mr Harris and Mr Hannon who also attended the meeting. Mr Mulholland must have known that the level of significant reserve strengthening required was approximately $100m. I address any residual uncertainty further in relation to the safe harbour exception below.

*Did Mr Mulholland know that the information was not generally available to the market?*

[868] This is admitted.

*Did Mr Mulholland know that the information was information which a reasonable person would have expected, if it were generally available to the market, to have had a material effect on CBLC's share price?*

[869] Mr Mulholland admits that he knew on 31 January 2018 that the information was material but said he did not recall whether he knew before then (which differed from his evidence referred to above) and that the PwC number was in draft, changing and uncertain.

[870] I accept that Mr Mulholland believed there was no imminent prospect of CBLI failing to meet claims as they were made and that the issues being raised about reserving related to potential claims that might be made years in the future. However, he accepted the indications were that the need for strengthening of reserves was going from bad to worse. 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.

*Did Mr Mulholland know the information related to CBLC shares in particular rather than to financial products generally or listed issuers generally?*

[871] It was not disputed, and I consider, that Mr Mulholland knew this information related to CBLC shares in particular.

*Did Mr Mulholland know that the information was not information that was exempted from disclosure by the safe harbour exceptions in the Listing Rules that he raised?*

[872] Mr Mulholland said he did not recall whether at the time he thought a safe harbour exception applied to this information. Mr Jones submitted that PwC did not land on final figures for its report on CBLI's reserves until 30 January 2018, and did not provide a final draft of that report until 31 January 2018.

[873] I do not accept that Mr Mulholland believed until 30/31 January 2018 that reserve strengthening was a matter of supposition or insufficiently definite to disclose. If he had any misunderstanding, it did not relate to the information itself, but was a mistake of law that disclosure was not required at all until the year-end announcement or at least until CBLC received PwC's finalised numbers or valuation report. That is not the effect of the continuous disclosure regime. PwC's actuarial update on 25 January 2018 (even though marked "Draft") amounted to material information

provided in advance of the full valuation report. The valuation report (also marked "DRAFT") was provided on 31 January 2018 after Mr Harris had called a Board meeting. Further, Mr Griffiths' email of 19 January 2018 (at [647] above) did not support such an erroneous view – it focused on the requirement for immediate release. Mr Mulholland must have known the safe harbour exceptions did not apply.

*Did Mr Mulholland know that the information was not immediately released?*

[874] For the reasons given, I am satisfied Mr Mulholland knew that CBLC did not immediately release this information. He was involved in the key events during the period from 25 January to 2 February 2018.

*Did Mr Mulholland intentionally participate by acts or omissions that had a practical connection with the contravention?*

[875] Here too, Mr Mulholland submitted that he did not participate in CBLC's contravention; he did not "decide" to defer disclosure. He submitted that notwithstanding any obligation in the Continuous Disclosure Policy, the Board was seized of the issue.

[876] I accept, as indicated, the Board had not delegated decisions about disclosure. The Board had ultimate responsibility for ensuring that CBLC complied with its disclosure obligations. Mr Mulholland had no authority to make disclosure to the market himself. I also accept the Board was aware of this information by the evening of 30 January 2018. But the prior issue concerns what happened before 30 January 2018.

[877] The relevant background includes the emails from Mr Griffiths to Mr Harris and Mr Mulholland on 18 and 19 January 2018 relating to the continuous disclosure obligation.[170]

[878] I accept that two Board members – Mr Harris and Mr Hannon – received the same information as Mr Mulholland from PwC on 25 January 2018. Applying the same approach as above (at [791]-[793]), there is no evidence that on or about

[170] At [645]-[648] above.

25 January 2018 the information was passed to the full Board or that Mr Harris or Mr Hannon – or the Board – considered immediate disclosure of this information. 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.

[879] Mr Mulholland does not suggest he took any steps on 25 January 2018 (or subsequently) to raise with Mr Harris or anyone else at CBLC the need for the Board to consider immediate disclosure of PwC's update that CBLI's reserves needed strengthening by approximately $100m. Accepting that Mr Harris and Mr Hannon could and should have taken steps to raise the issue, Mr Mulholland should have raised the need for a market announcement at this time, as he had in December 2017, especially given CBLC's previous market guidance. I consider that his failure as CFO and a member of the Disclosure Committee to raise the need for immediate disclosure with Mr Harris, the Disclosure Committee or the Board was an omission that had a practical connection with CBLC's contravention. By the time Mr Mulholland was considering the need for disclosure after the trading halt on 2 February 2018, it was already too late. But Mr Hannon's email that day (at [706]-[707] above) indicates that the Board was looking to Mr Mulholland for advice in relation to the need for continuous disclosure.

*Section 503 defence*

[880] Mr Mulholland submitted he has a defence under s 503 of the FMCA on the basis that he reasonably relied on information supplied by others and/or took all reasonable steps to ensure that CBLC complied with its continuous disclosure obligations. I do not accept this defence is made out in relation to this information. Given my earlier findings, I do not consider Mr Mulholland reasonably relied on advice or information from others, and there was no evidence that he took reasonable steps to ensure that CBLC complied with its continuous disclosure obligations.

*Conclusion*

[881] I conclude that Mr Mulholland was involved in this contravention.

**Alternative cumulative claim (twenty-third and twenty-fourth causes of action)**

[882] Given my findings in relation to other primary contraventions, it is unnecessary to address the FMA's alternative claim alleging a failure to disclose the cumulative material effect of the information concerning receivables, directions and conditions issued by CBI, and reserving. There are further reasons why I decline to address it even in the alternative. First, it would require more detailed consideration of, and further factual findings in relation to, a number of parts of the FMA's pleading relating to matters between July 2017 and January 2018 that were not pursued in their own right given the narrowed claim. Secondly, the FMA's materiality evidence did not readily lend itself to analysis of CBLC's alleged non-disclosures together on a chronological basis, nor identify with any precision when an investor would expect the combined effect of the information about the various elements to have a material effect on the CBLC share price. These fell into separate and distinct categories – relating to profit and loss, solvency and regulatory action. Accepting that materiality of any information is to be determined by reference to its expected effect on the share price, Mr Pigou fairly said it was difficult to define a date by which the combined effect of the information would have become material albeit he was confident that it would have been much sooner than 5 February 2018.

**Result**

[883] I make declarations of contravention as follows:

(a) in relation to the eighth cause of action, a declaration pursuant to s 486(1)(b) of the FMCA that from 25 January 2018 Mr Mulholland was involved in CBLC's contravention of a s 385 pt 5 market provision, specifically s 270, by failing to cause CBLC, a listed issuer, to disclose that CBLI's reserves needed strengthening by approximately $100m;

(b) in relation to the tenth cause of action, a declaration pursuant to s 486(1)(b) of the FMCA that from 24 August 2017 Mr Mulholland was involved in CBLC's contravention of a s 385 pt 5 market provision, specifically s 270, by failing to cause CBLC, a listed issuer, to disclose

the existence of approximately $35m of premium receivables due to CBLI that were over a year past due and their solvency impact; and

(c) in relation to the twenty-second cause of action, a declaration pursuant to s 486(1)(b) of the FMCA that in January 2018 Mr Mulholland was involved in CBLC's contravention of a s 385 pt 5 market provision, specifically s 270, by failing to cause CBLC, a listed issuer, to disclose the CBI direction to CBLIE to apply a capital add-on essentially requiring it to hold additional cash reserves of €31.5m.

[884] I direct the registry to allocate a one-day pecuniary penalty hearing and make timetable directions as follows:

(a) The FMA is to file and serve its submissions as to penalty 10 working days before the hearing; and

(b) Mr Mulholland is to file and serve his submissions as to penalty 5 working days before the hearing.

**Costs**

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

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Gault J

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