IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-000948
[2018] NZHC 2052

UNDER	Section 48 of the Financial Markets Authority Act 2011 and part 21 of the High Court Rules
IN THE MATTER	of a case stated by the Financial Markets Authority
BETWEEN	FINANCIAL MARKETS AUTHORITY Applicant
AND	NEALE JACKSON and BRENDAN JAMES GIBSON as voluntary administrators of CBL Corporation Limited (administrators appointed) of Korda Mentha Interested Parties

Hearing: 6 August 2018

Appearances: J A Farmer QC, K C Francis, and B A Keown for Applicant
R B Stewart QC, D J Friar, and N F D Moffatt for Interested Parties

Judgment: 13 August 2018

JUDGMENT OF VENNING J

This judgment was delivered by me on 13 August 2018 at 11 am , pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Meredith Connell, Auckland
Bell Gully, Auckland
Counsel: J A Farmer QC, Auckland
R B Stewart QC, Auckland

[1] The Financial Markets Authority ("FMA") seeks the opinion of the Court on the following questions of law:

(a) Do the disclosure obligations imposed by r 10.1.1(a) of the NZX Main Board/Debt Market Listing Rules ("Listing Rules") and s 270 of the Financial Markets Conduct Act 2013 ("the Act") continue to apply to a listed issuer, (whether of debt or equity securities) that has been placed into voluntary administration under Part 15A of the Companies Act 1993?

(b) If so, are those disclosure obligations fully discharged by the voluntary administrator/s of the listed issuer complying with the periodic reporting obligations imposed on voluntary administrators by Part 15A of the Companies Act 1993?

Background

[2] The FMA regulates financial services and securities markets in New Zealand. Its main statutory objective is to promote and facilitate the development of fair, efficient and transparent financial markets. Its functions include monitoring compliance with and enforcing provisions of the Act.

[3] Section 270 imposes a statutory obligation on listed issuers to comply with continuous disclosure provisions of the listing rules relating to the licensed markets on which they are listed.

[4] Entities listed on NZX and/or the NZDX ("issuers") are required to comply with the NZX Main Board/Debt Market Listing Rules. Rule 10.1.1(a) of the Listing Rules provides the continuous disclosure obligations of the NZX and NZDX.

[5] The FMA's application to the Court has been prompted by the issues arising in the administration of CBL Corporation Ltd (CBL). CBL was put into administration on 23 February 2018. Neale Jackson and Brendan Gibson have been appointed as administrators. CBL has been dual listed on both the NZX and ASX since 12 October 2015.

[6] The administrators do not believe the continuous disclosure obligations under the Listing Rules apply to a company in administration. They argue that once a company is placed in administration its disclosure obligations are limited to those provided for under Part 15A Companies Act 1993.

Jurisdiction

[7] Section 48 of the Act provides the FMA with a specific statutory power to state a case for the opinion of this Court. Although the administration of CBL has been the prompt for this application, the answer to the questions will have broader application. It will confirm whether the continuous disclosure obligations apply to any issuer listed on the NZX or NZDX that is placed in voluntary administration.

[8] As Dobson J noted in *Securities Commission v Contributory Mortgage Investments Ltd* the Court will generally be assisted on issues of law by the presentation of a contrary argument.[1]

[9] In this case contrary argument has been presented by the administrators of CBL who have fully engaged with the application by filing evidence and instructing senior counsel. The Court has heard full submissions by senior counsel for the FMA and for the administrators.

[10] The NZX has filed a memorandum in support of the FMA, confirming that it considers r 10.1.1(a) of the Listing Rules continues to apply to listed issuers in administration. It does not seek to be heard. No other parties have entered an appearance in the matter.

Relevant statutory and rules framework

[11] Section 270(1) of the Act provides:

> (1) A listed issuer must notify information in accordance with the continuous disclosure provisions of the listing rules for the licensed market if—

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1 *Securities Commission v Contributory Mortgage Investments Ltd* HC Wellington CIV-2008-485-792, 19 November 2008.

(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.

[12] Continuous disclosure provisions are defined as:[2]

> … 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.

[13] Material information is defined as information that:[3]

(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.

[14] Rule 10.1.1(a) of the Listing Rules provides:

> Without limiting any other Rule, every Issuer shall:
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> (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:
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> (i) A reasonable person would not expect the information to be disclosed; and
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> (ii) the information is confidential and its confidentiality is maintained; and
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> (iii) one or more of the following applies:
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> (A) the release of information would be a breach of law; or
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> (B) the information concerns an incomplete proposal or negotiation; or
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> (C) the information comprises matters of supposition or is insufficiently definite to warrant disclosure; or

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2 Financial Markets Conduct Act 2013, s 271.

3 Financial Markets Conduct Act 2013, s 231(1).

(D) the information is generated for the internal management purposes of the Issuer; or

(E) the information is a trade secret.

[15] While the Listing Rules create a contractual obligation on an issuer, s 270 of the Act confirms the obligation to comply with the continuous disclosure provisions is also a statutory obligation. Failure to comply with the obligations under s 270 can lead to civil liability and pecuniary penalties.

Timing

[16] The watershed meeting that was held under Subpart 8 of Part 15A of the Companies Act was held on 18 May 2018. Due to a voting deadlock the meeting was adjourned to 17 August 2018. In the meantime CBL remains in voluntary administration with Messrs Jackson and Gibson, the administrators.

The FMA's case

[17] Mr Farmer QC advanced the FMA's case on the following three general propositions:

(a) The continuous disclosure provisions should be broadly construed to reflect the importance of continuous disclosure to participants in licensed markets as well as financial markets more generally.

(b) The continuous disclosure provisions should and do apply to a listed issuer that is in administration.

(c) Part 15A of the Companies Act does not modify or set aside the continuous disclosure provisions.

The importance of the continuous disclosure provisions

[18] Mr Farmer submitted the overarching purpose of the Act was to promote the integrity of New Zealand's financial markets, (not just NZX and NZDX) which informed the interpretation of the continuous disclosure provisions.[4]

[19] He submitted that the proper conduct of licensed markets (such as NZX and NZDX) is central to achieving that overarching purpose. Section 270 of the Act is located under Part 5 of the Act which itself has two specific purposes:[5]

> (a) to promote fair, orderly and transparent financial product markets; and
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> (b) to encourage a diversity of financial product markets to take account of the differing needs and objectives of issuers and investors.

[20] Heightened standards are applied to such markets to prevent insider trading and market manipulation. As a condition of listing on the markets, listed companies have concomitant positive obligations of disclosure. Mr Farmer submitted that the various listing requirements and standards reflected the importance of information and the effect it can have on financial markets generally. The public has an expectation the markets will be operated to a high standard. An important aspect of that was the requirement for continuous disclosure.

[21] For the administrators, Mr Stewart QC accepted the objectives of the Act and the reasons for the continuous disclosure obligations under the Listing Rules and s 270. He emphasised that the purpose of the continuous disclosure obligations is to protect the integrity of the trading in the company shares and to ensure that company management can be held to account,[6] neither of which situations applied during an administration.

[22] The real issue between the parties and raised by the case stated is whether the continuous disclosure obligations (which both acknowledge as important) apply during an administration or whether, like the ability to trade on the market, they are

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4 Financial Markets Conduct Act 2013, s 3(a) and (b), s 4(a) and (c).
5 Financial Markets Conduct Act 2013, s 229(1).
6 *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 (NSWCA) at [355].

suspended while an issuer company is in administration under Part 15A of the Companies Act.

Part 15A Companies Act

[23] Part 15A of the Companies Act was introduced in 2006 as an alternative insolvency regime. It is modelled on the equivalent Australian legislation. Its objectives are to provide for the company to be administered in a way that maximises the chances of it continuing in existence or, if that is not possible, that results in a better return for creditors and shareholders than would result from an immediate liquidation.[7]

[24] Section 239V of the Companies Act provides the administrator has the powers to carry out the functions and duties of an administrator under the Companies Act and as conferred on an administrator under the Companies Act, which include, to the extent necessary for the administration, to carry on the business of the company.

[25] While the company is in administration s 239U provides the administrator:[8]

(a) has control of the company's business, property and affairs;

(b) may carry on the business and manage the property and affairs;

(c) may terminate or dispose of all or part of that business and may dispose of property; and

(d) may perform any function and exercise any power that the company or its officers could perform.

Subsections (b) to (d) are permissive rather than directory.

[26] Other sections in Part 15A provide for the obligations on an administrator. For example, as soon as practicable after the administration of a company begins the

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7 Companies Act 1993, s 239A.
8 Section 239U.

administrator must investigate the company's business, property, affairs and financial circumstances.[9] The administrator is obliged to report misconduct of a past or present director, officer or shareholder,[10] including offences under the Act. The administrator must also call a creditors' meeting, a watershed meeting and other meetings as required.[11]

[27] The creditors' meetings are a fundamentally important aspect of the voluntary administration. Following the investigation the administrator must form an opinion which one of a number of scenarios would be in the creditors' interests and then provide that information to creditors before the watershed meeting. The outcome of all the meetings is determined by the creditors' votes. The administration is brought to an end by decision of the creditors.

[28] Mr Farmer argued that the interests of shareholders were still relevant during an administration. The concept behind Part 15A and voluntary administration was that of a "rescue culture." If it was not possible for the company to continue in existence, then the object was to achieve better returns for the company's creditors and shareholders.

[29] By contrast, Mr Stewart and Mr Friar emphasised that the focus of the Part 15A procedure was on the creditors position, not that of the shareholders. They referred to *Tolcher v National Australia Bank Ltd.* In that case the Supreme Court of New South Wales confirmed the administrators' control of the company's business, property and affairs is only to facilitate the investigation and assessment required so that the creditors, guided by the administrator, may make a decision as to the company's fate.[12]

[30] Importantly an administration puts a freeze on trading in the company's shares. Section 239AB provides that during the administration shares in the company may not be transferred and the rights or liabilities of a shareholder cannot be altered. There are only two limited exceptions. The administrator may consent to the transfer of a share if satisfied the transfer is in the best interests of the company's creditors. The second

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9 Section 239AE.
10 Section 239AI.
11 Section 239AJ.
12 *Tolcher v National Australia Bank Ltd* [2004] NSWSC 6, (2004) 48 ACSR 741 at [15].

exception is where the court may, in very limited circumstances, make an order for the transfer of shares.[13] The freeze applies to both market and off market trading.

[31] Part 15A also expressly provides for the disclosure requirements (or reporting requirements as Mr Farmer characterised them) on an administrator. The administrator is required to send a report to creditors before the watershed meeting.[14] Until that time there is no requirement under the Act for the administrators to make disclosure. An administrator must also file accounts with the Registrar of Companies relating to the six month period after appointment and for each subsequent six month period. The reports must be filed within 20 working days after the end of each relevant period.[15]

Do the continuous disclosure provisions apply to a listed issuer in administration or does Part 15A of the Companies Act have the effect of modifying or setting them aside?

[32] Mr Farmer noted that the continuous disclosure provisions are expressed in mandatory terms. Neither the listing requirements nor Part 15A itself provide any express exception for a listed issuer in administration. Absent such an express exemption he submitted the disclosure obligations continue to apply to a listed company in administration.

[33] The obligation is that of the listed issuer. Mr Farmer noted that after an administrator was appointed the administrator may become aware of material information which should be disclosed as knowledge of the issuer for the purposes of r 10.1.1(a). Such an obligation is consistent with the attribution of knowledge pursuant to a director, employee or agent under s 535(1) of the Act. An administrator is an agent of the company.[16] That is correct as far as it goes, but it begs the question of whether the obligation persists in the circumstances of an administration.

[34] The continuous disclosure obligations are intended to provide the market with material information relating to the issuer to preserve the integrity of the market. A

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13 Section 239AB.
14 Section 239AU.
15 Section 239ACZ.
16 Companies Act 1993, s 239W.

company in administration is not able to participate in the market. The issue is whether, as a matter of construction, the provisions of Part 15A displace the continuous disclosure obligations during the course of the administration.

[35] In support of the FMA's argument, Mr Farmer referred to a number of Australian cases which have confirmed the practical benefit of construing continuous disclosure provisions broadly: *James Hardie Industries MV v Australian Securities Investments Commission; National Australia Bank Ltd v Pathway Investments Pty; Grant Taylor v Babcock & Brown Ltd*, all of which emphasised the object of the continuous disclosure requirements is to enhance the integrity and efficiency of the capital markets, requiring timely disclosure of price or market sensitive information.[17] As a matter of principle, I respectfully agree, but the cases do not directly address the present issue.

[36] Mr Farmer submitted that it was no answer that on the termination of the administration there would be a "cleansing report" as the release of such information prior to the resumption of trading could disrupt the smooth functioning of the market. While not directly relevant, there is no evidence to support that submission, and markets are often placed in the position of having to absorb information regarding a company at relatively short notice. The point is that before trading in the stock resumes, the market will be fully informed.

[37] Mr Farmer next referred to Mr Joost van Amelsfort's (the head of market supervision at the NZX) evidence of his previous experience that administrators have been receptive to the obligations of continuous disclosure and have announced what appears to be material information via the NZX Platform so that there is a precedent for it. Mr van Amelsfort referred to the Postie Plus Group Limited, Wynyard Group Limited and Intueri Education Group Limited administrations for example. During the course of those administrations the administrators released information which appeared to be material information.

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[17] *James Hardie Industries MV v Australian Securities Investments Commission*, above n 6*; National Australia Bank Ltd v Pathway Investments Pty* [2012] VSCA 168, (20120 265 FLR 247*,* and *Grant Taylor v Babcock & Brown Ltd* [2016] FCAFC 60.

[38] On the other hand, Mr Jackson notes that members of his firm have also been appointed administrators in Australia in the administration of Arrium Limited and TEN Network Holdings Limited. He says that the accepted practice in Australia has been to disclose periodic information about the progress of the administration to the market but the disclosure went no further than that.

[39] Of course, as Mr Farmer submitted, current practice is not determinative, now the issue has been framed as a question of law. Either there is an obligation to make continuous disclosure during an administration or there is not.

[40] Next, Mr Farmer submitted that there was no real conflict between the obligation to make continuous disclosure and the reporting obligations under Part 15A. He submitted they are quite different to each other and serve different purposes.

[41] Further, he noted that even during an administration the company and its administrators are still required to comply with laws beyond the obligations in Part 15A Companies Act. While proceedings cannot be brought against a company without the administrator's written consent or the permission of the Court,[18] authorities in New Zealand, Australia and England confirm that a company in administration continues to be subject to laws beyond the legislation under which the administrators were appointed.[19] An obvious example would be obligations under the revenue laws. Mr Farmer also noted that, apart from the Registrar of Companies, the FMA is the only regulatory body given standing to bring certain applications relating to a company in administration.

[42] Mr Farmer is correct in those observations, but they do not address the main points for the administrators which are that s 239AB prohibits a transfer of shares during the administration so that the continuous disclosure provisions no longer apply and are replaced by the reporting obligations under Part 15A.

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18 Section 239ABE.

19 *Chief Executive of the Ministry of Fisheries v E & B Management Ltd (Administrator Appointed)* [2011] NZCCLR 18 (HC); *Pioneer Water Tanks (Australia 94) Pty Ltd v Delat Pty Ltd* (1997) 25 ACSR 757 (FCA); *Barclays Mercantile Business Finance Ltd & Anor v Sibeck Developments Ltd* [1992] 1 WLR 1253 (ChD); and *Vero Insurance Ltd v Kassem* [2011] NSWCA 381, at 81-82.

[43] Parliament has decided to prohibit (with very limited exceptions) trading in the company shares once an administration is in place. Given that, the rationale for continuous disclosure during the administration loses significant force. As Mr Stewart submitted, Part 15A specifically prohibits the very activity that the continuous disclosure regime is primarily intended to facilitate, the integrity of an operating market.

[44] I consider the administrators are correct in their argument that when the Listing Rules and Part 15A are read together the administrator issuer is only required to provide disclosure or to report on behalf of the issuer to the extent set out in Part 15A. In introducing Part 15A Parliament intended that administrators would only be required to provide such limited disclosure while a company remained in administration. Given the trading in the company's shares is frozen, the provisions of Part 15A rather than the Listing Rules apply.

[45] The objective of s 229 of the Act of promoting fair, orderly and transparent markets proceeds on the premise there is an active market. During the administration there is no active market or trading of the issuers shares. Its operation in the market is suspended. As was observed in one of the cases Mr Farmer referred to, *James Hardie Industries NV v Australian Securities Investment Commission*, the primary purpose of the continuous disclosure regime is to protect the integrity of trading in the market and particularly in relation to trading in the companies' securities.[20] Without the ability to trade the securities, there is not the need for continuous disclosure.

[46] The emphasis under the disclosure regime is on timely disclosure. The whole premise is that there is an active market and continuous disclosure is necessary to prevent trading without the market participants being fully informed. That does not arise when the issuer is in administration and trading in its shares are frozen.

[47] By way of response, Mr Farmer submitted that, even when the trading of securities in relation to which the information relates was not possible, the continuous disclosure requirements would still have practical benefits to participants in the markets as well as to financial markets more generally. Information material to the

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[20] *James Hardie Industries NV v Australian Securities Investment Commission*, above n 6.

issuer could inform decisions in terms of adjusting investment portfolios. Similarly fund managers need to be able to report and may need to rebalance fund investments. Debt securities can still be transferred when the issuer is in administration. Derivatives can still be entered into and traded. The settlement option for credit default swaps requires as much information as possible. Mr van Amelsfort also said in his evidence that disclosure could assist the NZX, for example, to decide whether the issuer should remain or be excluded from the index.

[48] There may well be other practical benefits from continuous disclosure, but that does not address whether the disclosure is required for the purposes of the listing rules and s 270. Investors and Fund managers may be interested in revaluing the shareholding. But they are not interests the continuous disclosure rules are intended to protect. The focus must be the reason for the continuous disclosure regime as it affects participants in the market. As for the holders of Debt securities, they will be creditors and disclosure to them is expressly provided for by Part 15A. Next, the listing rules are not directed at trading in off-market derivatives. For similar reasons, Mr van Amelsfort's example of consideration of exclusion from the index is not what the rules were designed for.

[49] There are both policy and practical reasons that support the administrators' position. I do not accept Mr Farmer's argument that because s 239A(b) refers to shareholders and the administrator may carry on the business of the company, the focus is not on the position of creditors. For the reasons given above I consider that the scheme of the Part 15A procedure is clear. An administrator has only limited power to act in carrying on the business of the company, and the focus of the administration is on providing information to enable creditors to make the appropriate decision as to the company's future.

[50] The disclosure regime under Part 15A is deliberately limited so the administrator is not distracted from his or her principal role in that regard. It would derogate from the administrator's task if he or she had to divert time and resources to, in addition, satisfy the disclosure obligations. Despite the reference to shareholders and the ability of the administrators to carry on the business of the company, read as a whole the emphasis of Part 15A is on the interests of creditors. They control the

process. That is plain from the decision left to the creditors at the watershed meeting[21] and the administrator's responsibility for preparing the report and recommendations for that meeting, which are focused on the creditor's interests.[22]

[51] Mr Farmer submitted the difficulties suggested by the administrators presented by compliance were irrelevant to whether the obligation existed and in any event, were overstated. He submitted that in fulfilling their obligations under Part 15A of the Companies Act the administrators will inevitably gain information, some of which may be material information for the purposes of the listing requirements. Mr Farmer also noted there were sources the administrator could have reference to in order to meet the obligations, such as former directors, management or employees.

[52] But the practical difficulties experienced in the course of the CBL administration highlight the difficulties with that approach. Mr Jackson's evidence was that administrators and their staff would struggle to cope with determining whether particular information was material or not. They would need to review pre-administration history, much more so than would be required for the purposes of the investigation under Part 15A. In the CBL administration itself, CBL has a number of subsidiaries. Two are not in the same administration and are under the control of other insolvency practitioners (one in Ireland). Neither of them are obliged to provide information to satisfy continuous disclosure requirements, so that any information provided by the CBL administrators in purported compliance with the disclosure obligations might well be incomplete. Rather than properly and fully inform the market, disclosure in those circumstances might mis-inform it.

[53] The response for the FMA is to suggest a pragmatic approach would be taken to the requirements, as it suggests has been the case in the past. But with respect that does not address whether there is a legally binding obligation nor the practical difficulties in providing this information.

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21 Companies Act 1993, s 239ABA.
22 Section 239AU.

[54] Mr Friar suggested that that as an alternative argument, s 239AEF could operate to suspend the continuous disclosure obligations during an administration. Section 239AEF states:

> If there is a time before which, or a period during which, an act for any purpose may or must be done, and this Act prevents the act from being done in time, then the time or period in question is extended by the period during which this Act prevents the act from being done in time.

[55] Mr Friar submitted that adopting a liberal interpretation of "prevents" it could be said the administration prevented compliance in that it hinders or impedes it.[23] That seems a rather strained interpretation of the wording. I prefer Mr Farmer's submission that s 239AEF is directed at extending the time to do any acts that the administration has otherwise prevented – by its statutory moratorium on creditors from pursuing their rights, for example.[24] I consider it is stretching the language of the section to suggest that Part 15A "prevents" the compliance with the listing obligations. The point is that as a consequence of the administration the only disclosure required during the administration is that required by the provisions of Part 15A.

[56] Like the moratorium on action by a creditor, the purpose of the freeze on trading is to enable the administrator to focus on the investigation and preparation of reports for the creditors' meetings rather than defending a creditor's action or to seek out what information should be disclosed to the market. Such an approach is consistent with the comments in the Corporate Law Reform Bill 1992 (Commonwealth) Explanatory Memorandum regarding the relevant clause which treated the two together:[25]

> Proposed section 437F will render share transfers void (except so far as the Court orders otherwise) during the administration of a company. It will ensure that the position of shareholders is frozen during the administration, in the same way as actions by creditors are to be prevented during the period.

[57] The FMA also relies on Rule 5.4.5 of the Listing Rules and the provision in CBL's listing agreement that it will comply with all of the obligations imposed on the issuer under the listing rules. Rule 5.4.5 of the Listing Rules requires the issuer to

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23 Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, Minnesota, 2014) at 1380.

24 *State of Queensland v Walter Construction Group & Ors* 194 FLR 40 (QSC).

25 Corporate Law Reform Bill 1992 (Cth) Explanatory Memorandum at [494].

comply with the continuous disclosure requirements even if trading in the shares is halted:

> … the suspension of Quotation or trading shall not release the issuer concerned from any obligation (whether to pay fees or otherwise) it has under the rules …

[58] The rule must be read in context. It follows the NZX's powers to halt trading under r 5.4.1(c) or to suspend the quotation of an issuer's quotation under r 5.4.2(b). The statutory freeze under s 239AB is of a quite different nature.

[59] Mr Farmer then argued that if the operation of Part 15A was intended to suspend the continuous disclosure obligations, Part 15A would have set that out explicitly, and one would not expect it to be set out in the NZX rules. But the continuous disclosure obligations are created by the NZX rules. The rules should also govern what is to occur during an administration, just as they have provided for what is to happen during the suspension or trading halt. The NZX could use the process under r1.3 to amend its rules and provide what is to occur during an administration if it wishes.

[60] I note the ASX Guidance Note specifically recognises the difference between a listing suspension and the prohibition on trading due to administration.[26] Guidance Note 8 of the ASX Listing Rules provides at 4.23:

> Where an entity is subject to a longer-term of suspension (eg, as a result of an administration or liquidation) ASX recommends that it implement a system of periodic (at least quarterly) disclosures to ensure the market and its security holders are provided with regular updates as to its status and, in particular, the plans it may have for trading and its securities to resume and its progress in implementing those plans.

[61] Mr Farmer made two responses. First, a guidance note cannot derogate from a statutory obligation. Second, the guidance note could be read as imposing an additional layer of reporting in the case of an administration. While a guidance note cannot derogate from a statutory obligation, the statutory obligation is to comply with the listing rules. The listing rules do not expressly preserve the obligation to make continuous disclosure during an administration under Part 15A. As noted, by contrast,

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[26] ASX Listing Rules Guidance Note 8 (2018) at 4.23.

they do expressly preserve the position in the case of a trading halt or suspension. On the second point, there is no evidence to support the submission of an additional requirement. The wording of the guidance note is more consistent with it providing an alternative form of disclosure rather than imposing an additional obligation. The note makes a distinction between stock exchange suspensions and longer term suspensions such as voluntary administration. That interpretation is also consistent with the experience of members of Mr Jackson's firm as administrators in Australia.

[62] The administrators raise a further argument in support of their interpretation. It is that the definition of "material information" required to be disclosed under the continuous disclosure rules is, when the issuer is in administration, limited to the information required to be provided under the administration.

[63] Material information is defined as information that a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of Quoted Securities. Mr Farmer emphasised that the definition of "quoted" in the Act included the explanation "… to avoid doubt, financial products do not cease to be quoted merely because trading on those products are suspended."

[64] While the securities may still be "quoted", they cannot be traded. I consider there is force in the argument for the administrators that where a company is in administration a reasonable person would not expect information from the company to effect the price of the quoted shares, given that shares are unable to be traded. The information may enable analysts to review the value they place on shares as opposed to the price the shares are frozen at on the market but as noted previously that is not the purpose of continuous disclosure. Again, the reference to continuous disclosure provisions in the Act refers to the information being made available to participants in the market. During the freeze, there are no participants in the market for the issuer's shares. The analysts will in any event have the information provided by the administrators in accordance with Part 15A. By contrast the administration regime under part 15A requires disclosure (reposting) at certain defined statutory timeframes.

[65] Next, it is relevant that the administrators' interpretation is consistent with the position adopted in Australia. As noted the provisions in Part 15A are derived from

the provisions of the Corporations Act 2001 (Commonwealth). Similarly, continuous disclosure rules in r 10.1.1 are materially identical to the similar rules of the ASX Listing Rules.

[66] The ASX interprets the Listing Rules to require only the more limited disclosure. An entity that fails voluntarily to make such disclosures at least quarterly may be required by ASX to provide such information to ASX for release to the market.

[67] There is force in there being comity between the Australian provisions and New Zealand provisions in this area particularly with cross-border insolvency a reality in a number of cases. The uniformity principle with Australian decisions and commercial cases has been noted as desirable in a number of cases.[27]

[68] For the above reasons, I find that the disclosure/reporting obligations of an issuer in voluntary administration are contained within Part 15A of the Companies Act and that while the issuer is in administration, the continuous disclosure obligations are suspended.

Result

[69] The questions stated are answered:

(a) No, the disclosure obligations do not continue to apply for a listed issuer (whether a debt or equity securities) that has been placed into voluntary administration under Part 15A of the Act.

(b) In light of the answer to (a), question (b) is not applicable. The continuous disclosure obligations of an issuer are suspended during its voluntary administration. The disclosure/reporting obligations of an issuer in administration are the disclosure/reporting obligations imposed by Part 15A of the Companies Act.

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[27] *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA) at 36.

[70] Given the nature of the application and the need to clarify the position, I consider costs should lie where they fall. If the parties take a different view they may file memoranda. If no memoranda are filed within 15 working days costs will lie where they fall.

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Venning J