**SUPPRESSION ORDERS IN ACCORDANCE WITH PARAGRAPHS [174] TO [175]**

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

**CIV 2010-404-8082**

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| UNDER | THE SECURITIES ACT 1978 AND PART 18 OF THE HIGH COURT RULES 2009 |
| IN THE MATTER OF | AN APPLICATION UNDER SECTION 65A OF THE SECURITIES ACT 1978 |
| BETWEEN | THE FINANCIAL MARKETS AUTHORITY (FORMERLY THE SECURITIES COMMISSION)<br>Plaintiff |
| AND | MARK STEPHEN HOTCHIN<br>First Defendant |
| AND | KA NO 4 TRUSTEE LIMITED<br>Second Defendant |
| AND | KA NO 3 TRUSTEE LIMITED<br>Third Defendant |
| AND | TONY JOHN THOMAS<br>Fourth Defendant |

Hearing: 14 & 15 February 2011

Appearances: P Courtney, G Allan, J Kerr for plaintiff
R B Stewart QC and N Gedye for first defendant
J A Farmer QC, J Long, I Hikaka and J Wach for second, third and fourth defendants

Judgment: 6 May 2011

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**JUDGMENT OF WINKELMANN J**
**[with suppressed material redacted]**

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*This judgment was delivered by me on 6 May 2011 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/ Deputy Registrar*

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**Introduction**

[1] The Financial Markets Authority (the Authority) is investigating suspected breaches of the Securities Act 1978 (the Act) by the first defendant, Mr Mark Hotchin, in his capacity as director of companies within the Hanover Finance group. In December 2010 the Authority commenced these proceedings for the purpose of obtaining asset preservation orders pending the outcome of its investigations. Section 60G of the Act provides that asset preservation orders may be made in respect of the assets of a "relevant person" in certain circumstances. The definition of relevant person includes a person being investigated by the Authority in relation to an act or omission that may constitute a contravention of the Act. Orders may be made if the court considers it "necessary or desirable" for the purposes of protecting the interests of persons to whom the relevant person is or may be liable in respect of those breaches (defined as "aggrieved persons").

[2] The second and third defendants are joined in their capacity as corporate trustees of trusts associated with Mr Hotchin. The second defendant, KA No 4 Trustee Ltd (KA4 Trustee), is the corporate trustee of the Kelly-Ashley No 4 Trust (KA4 Trust). The third defendant, KA No 3 Trustee Ltd (KA3 Trustee), is the corporate trustee of the Kelly-Ashley No 3 Trust (KA3 Trust). The KA3 and KA4 Trusts are trusts settled by Mr Hotchin and are family type trusts. The fourth defendant Mr Thomas is joined as the sole shareholder and director of both KA3 Trustee and KA4 Trustee.

[3] On 10 December 2010 the Authority applied, ex parte, for interim asset preservation orders under s 60I, pending hearing of the application for orders under s 60G. I made interim asset preservation orders prohibiting Mr Hotchin from dealing with property held or controlled by him and located within New Zealand and prohibiting KA3 Trustee, KA4 Trustee and Mr Thomas from dealing with any property which they held on his behalf.

[4] To give effect to those orders, I directed that Mr Hotchin file affidavits detailing ownership of properties identified in a schedule to the order and listing

assets owned or controlled by him or in which he had any interest, whether legal or equitable. I directed that Mr Thomas file an affidavit describing the capacity in which he acted for Mr Hotchin and detailing any properties controlled by Mr Hotchin in respect of which Mr Thomas acted. I also directed that he disclose certain categories of documents in relation to KA3 Trustee and KA4 Trustee. These orders were subsequently varied by consent on 20 December 2010.

[5] Mr Hotchin now applies for orders rescinding or varying the interim preservation orders, on the grounds that they are neither necessary or desirable to protect the interests of aggrieved persons, that there is no risk of dissipation of assets and that the prospects of any successful claim against him in civil proceedings is remote. Mr Hotchin also points to what he characterises as non-disclosure on the part of the Authority when seeking the interim orders on a without notice basis.

[6] Mr Hotchin also applied in the alternative, for variation of the existing orders to enable him to pay a tax liability. That was dealt with on a consent basis and assets released from the asset preservation orders enabled that debt to be paid.

[7] KA3 Trustee and KA4 Trustee apply for summary judgment against the Authority on the ground that there is no proper factual basis for the Authority's allegation that they hold any property on behalf of Mr Hotchin, or that he is in control of any of the Trusts' property. Alternatively, KA3 Trustee and KA4 Trustee apply for orders that the claim against them be struck out as an abuse of process. Finally, they apply for orders revoking all existing orders against them.

[8] Mr Thomas applies for orders that the proceeding as against him be struck out and all orders against him be revoked, on the grounds that no cause or action or wrongdoing is pleaded against him, and he is not a necessary party to the proceeding. He says that he has no interest in or relationship to the dispute other than in his capacity as director and shareholder of both KA3 Trustee and KA4 Trustee.

## Background to the application for asset preservation orders

### *Statutory context for the investigation*

[9] These proceedings arise under the provisions of the Act. Sections 55A to 57 make it an offence to make an untrue statement in an advertisement or registered prospectus. Section 55 provides that a statement included in an advertisement or registered prospectus is deemed to be untrue if:

> (i) it is misleading in the form and context in which it is included; or
>
> (ii) it is misleading by reason of the omission of a particular which was material to the statement in the form and context in which it is included.

[10] It is a civil liability event for the purposes of the Act to distribute an advertisement or a registered prospectus that includes an untrue statement.[1] On an application by the Authority under s 55C, the court must determine whether there has been a civil liability event and whether the person is liable for a pecuniary penalty order for that civil liability. If satisfied of those matters, the court must make a determination of civil liability and may order the person to pay to the Crown a pecuniary penalty if satisfied that the civil liability event materially prejudiced the interests of subscribers for the securities involved, or was likely to materially damage the integrity or reputation of any New Zealand securities markets, or is otherwise serious.

[11] On the application of the Authority or a subscriber, the court may also order a liable person to pay compensation to all or any of the people who subscribed for any securities in reliance upon an advertisement or registered prospectus that contained an untrue statement, for the loss or damage sustained by reason of the untrue statement.

[12] Under s 56 of the Act the issuer and a director of the issuer may be liable for pecuniary penalty orders and for compensation for the distribution of an advertisement or a registered prospectus that includes an untrue statement. Any

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1 Securities Act 1978, s 55B.

person who signed the prospectus as a director of the issuer or is a director on whose behalf the prospectus has been signed, may be liable.

***Statutory provisions relating to asset preservation orders***

[13] Section 60G empowers the court to make preservation orders to restrict a liable person and third parties from dealing with a liable person's assets in certain circumstances.

[14] Section 60G(1) provides:

> (1) This section applies if—
>
> (a) an investigation is being carried out under this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act; or
>
> (b) a prosecution has begun against a person for a contravention of this Act; or
>
> (c) a civil proceeding has begun against a person under this Act.

[15] Section 60G(2) provides:

> The Court may, on application by the Authority or by an aggrieved person, make 1 or more of the orders listed in section 60H if the Court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person.

[16] The Act defines a relevant person as someone who is referred to in s 60G(1). As already noted, an aggrieved person is "any person to whom a relevant person is liable". Liable is defined in s 60G as meaning:

> Liable, or may be or become liable, to pay money (whether in respect of a debt, by way of damages or compensation, or otherwise) or to account for securities or other property.

[17] Section 60H sets out what orders may be made under s 60G. Section 60H provides:

> (1) The orders that may be made under section 60G are—

(a) an order prohibiting the relevant person from transferring, charging, or otherwise dealing with money, securities, or other property held or controlled by the relevant person:

(b) an order prohibiting a person who is indebted to the relevant person or to an associated person of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed:

(c) an order prohibiting a person holding money, securities, or other property, on behalf of the relevant person, or on behalf of an associated person of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the securities or other property, to, or to another person at the direction or request of, the person on whose behalf the money, securities, or other property, is or are held:

(d) an order prohibiting the taking or sending out of New Zealand by a person of money of the relevant person or of an associated person of the relevant person:

(e) an order prohibiting the taking, sending, or transfer by a person of securities or other property of the relevant person, or of an associated person of the relevant person from a place in New Zealand to a place outside New Zealand (including the transfer of securities from a register in New Zealand to a register outside New Zealand):

(f) an order requiring the relevant person, or any person holding money, securities, or other property on behalf of the relevant person or an associated person of the relevant person, to pay or transfer money, securities, or other property to a specified person to be held on trust pending determination of the investigation, prosecution, or civil proceeding:

(g) an order appointing,—

(i) if the relevant person is a natural person, a receiver or trustee, having any powers that the Court orders, of the property or of part of the property of that person; or

(ii) if the relevant person is a body corporate, a receiver or receiver and manager, having any powers that the Court orders, of the property or of part of the property of that person:

(h) if the relevant person is a natural person, an order requiring that person to deliver up to the Court his or her passport and any other documents that the Court thinks fit:

(i) if the relevant person is a natural person, an order prohibiting that person from leaving New Zealand, without the consent of the Court.

(2) A reference in subsection (1)(e) or (g) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example,—

(a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or

(b) in a fiduciary capacity.

(3) An order may be expressed to operate for a specified period or until the order is discharged by a further order under this section.

[18] The application for interim orders in December 2010 was made under s 60I. Section 60I provides that if an application is made under s 60G the court may:

> … if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.

[19] These provisions came into force on 25 October 2006 as part of the Securities Amendment Act 2006. They are modelled upon but do not exactly mirror provisions in the Australian Corporations Act 2001.[2] The material difference is that while s 1323 of the Corporations Act creates a power to appoint receivers of all or part of the property of a relevant person (a power of the type provided in s 60H(1)(g)) it does not contain express power to make an asset preservation order in the same terms as contained in s 60H(1)(a) of the New Zealand Act. However, Australian courts have held that there is a power to make less intrusive orders of the type contemplated by s 60H(1). The courts have said that even if a case has been made out for the appointment of a receiver, the court must go on to consider "whether a less drastic remedy will suffice".[3]

***The Authority's investigation in relation to the Hanover Group***

[20] It is a statutory pre-condition to the making of orders under s 60G or s 60I that one of the circumstances in s 60G(1) exist. In this case, the statutory pre-condition relied upon by the Authority is that there is an investigation under the Act

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2 Corporations Act 2001 (Cth), ss 1323-1324.

3 *ASIC v Burnard* [2007] NSWSC 1217 at [22].

in respect of the issue of registered prospectuses by Hanover Finance Ltd (Hanover Finance), Hanover Capital Ltd (Hanover Capital) and United Finance Ltd (United Finance), at a time during which Mr Hotchin was a director of these companies.

[21] At the relevant time these were companies involved in the provision of financial services and the offering of securities pursuant to registered prospectuses. Each of the three companies issued prospectuses dated 7 December 2007; Hanover Finance offered securities by way of secured deposits against subordinated notes; Hanover Capital offered securities by way of preferential bonds and United Finance offered securities by way of secured debenture stock. Each of the prospectuses was extended by way of a director's certificate dated 31 March 2008 and signed on behalf of all of the directors.

[22] On 23 July 2008, these three companies ceased offering securities under their prospectuses. Subsequently there have been two separate proposals by the three companies to re-structure their debt, both approved by investors. The last, approved in December 2009, involved Allied Farmers acquiring Hanover's loan assets, in exchange for the issue of Allied Farmers' shares. The shares were received by investors in full satisfaction of the then remaining Hanover debenture obligations to them. The three companies have subsequently been struck off the Company register.

[23] In support of its application for interim orders made in December 2010, the Authority filed an affidavit sworn by Ms Megan Blenkarne, a solicitor employed by the Authority. In her affidavit, Ms Blenkarne said that although the Authority's investigations were on-going, as a result of investigations to that date, the Authority reasonably apprehended the possibility of initiating litigation against the companies and the companies' directors on the basis of untrue statements contained in the December 2007 offer documents. She said that the investigation was focusing upon the accuracy of representations as to the financial status of the companies at the time of the issue of the prospectuses and at the time that the directors signed extension certificates.

[24] Ms Blenkarne said that the prospectuses each contained financial accounts to the year ended 30 June 2007. In the prospectuses, the directors stated that between

that year end and the date of the registration of the prospectuses, there had been "no circumstances that materially adversely affect" either the "trading or profitability of the company", the "value of its assets" or its ability to meet "liabilities due within the next 12 months".

[25] Each of the extension certificates contained the directors' certification that, in their opinion and after due inquiry by them, as at 31 March 2008 (1) the financial position shown in the prospectus (which was as at 30 June 2007) had not "materially and adversely changed" and (2) the prospectus was not "false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances". Accounts for the half-year to 31 December 2007 were signed by the directors on 28 March 2008 and accompanied the extension certificates.

[26] In her affidavit, Ms Blenkarne set out examples of the matters under investigation. These can be summarised as follows in respect of Hanover Finance. [Suppressed material].

[27] [Suppressed material].

[28] [Suppressed material].

[29] The Authority has documents which it says indicate that [Suppressed material].

[30] The focus of the Authority's investigations is whether the listed matters were material adverse changes in the trading, profitability and asset value of Hanover Finance between 30 June 2007 and 31 March 2008.

[31] The matters under investigation in relation to United Finance mirror quite closely those in relation to Hanover Finance. Again the Authority says that [Suppressed material].

[32] [Suppressed material].

[33] [Suppressed material].

[34] The Authority's investigations suggest that [Suppressed material].

[35] Ms Blenkarne said that the Authority had not concluded its investigation and no decision to commence proceedings would be taken until the investigation was completed. The Authority still wished to interview relevant persons and finalise other aspects of its investigation. It expected to conclude its investigations by the end of 2010, and file any proceedings, if that was the course of action resolved upon, by early 2011.

[36] Any proceedings brought against Mr Hotchin by the Authority would seek a declaration of civil liability under s 55C thereby enabling aggrieved persons to seek compensation without the need to prove liability. Ms Blenkarne referred to the defence available to a director to prove that he or she had reasonable grounds for belief, and did believe up to the time of subscription for the securities, that the statements in the prospectus were true.

[37] An affidavit was also filed by Mr David Crichton, a chartered accountant who has been engaged by the Authority to assist with their investigation. Mr Crichton listed the amounts invested pursuant to these prospectuses between December 2007 and July 2008 as follows: a net amount of $5,221,117.32 was invested in United Finance, a net amount of $21,539,440.12 was invested in term deposits in Hanover Finance, and a net amount of $5,656,051.08[4] was invested in call deposits in Hanover Finance between the relevant dates. He said that there was insufficient information held by the Authority in respect of Hanover Capital to allow him to estimate the net amount invested in it during the relevant period.

[4] In an affidavit sworn in January 2011, Mr Crichton corrected the figure provided for the net amount invested in call deposits in Hanover Finance to $5,245,465.28.

***Application for interim preservation orders in this case***

[38] The statement of claim with which this proceeding was commenced and memorandum accompanying the application for interim orders made a case for the making of orders as follows.

[39] Given the value of funds invested in the prospectuses which were the subject of the investigation over the relevant period, there is considerable public interest in ensuring that enforcement of any compensation orders or pecuniary penalty orders made against Mr Hotchin is not frustrated by the movement of assets outside the jurisdiction or beyond the reach of the Authority. The Authority contends that that interest is not outweighed by any interests of Mr Hotchin or third parties that might be affected by any order made against him.

[40] There is some risk of dissipation by Mr Hotchin in the absence of the making of preservation orders. Mr Hotchin has been residing predominantly outside New Zealand since April 2010 and since July 2010 a number of properties associated with him have been sold, including his principal place of residence. His home in Bridgewater Road, Parnell sold in July 2010 for a sum the Authority understood to be in the vicinity of $4 million. The three other properties which had sold were registered as being owned by KA4 Trustee prior to sale. Two of these three properties were located in Matapana Road, Waiheke Island. Statements reported in the media and attributed to a spokesman for Mr Hotchin were to the effect that a third property in Paratai Drive, which Mr Hotchin had planned to make his place of residence, was likely to be sold when completed.

[41] The Authority referred to other properties in respect of which it said there were grounds to believe that Mr Hotchin had an interest. In particular, there is another property in Matapana Road, registered in the name of KA3 Trustee, which the Authority said it believed had been pledged to support Mr Hotchin's obligation as part of the first debt re-structuring plan presented to investors.

[42] In its statement of claim, the Authority alleged that the KA3 Trust and KA4 Trust held the four properties, together with shares in a property owning company,

Queenstown Lot 16 Ltd, on behalf of Mr Hotchin. In its memorandum, filed in support of the application for interim preservation orders, the Authority expanded upon this allegation, submitting in the alternative that the Trusts held the properties as bare nominees for Mr Hotchin, or that the Trusts were shams, and the properties in reality owned by Mr Hotchin.

[43] The Authority submitted that the breaches under investigation were serious and the quantum of potential liability for Mr Hotchin large. Total investments deposited with Hanover Finance and United Finance over the relevant periods amounted to approximately $32 million, and the investors in Hanover Capital were likely to have suffered loss which would add to this potential liability. The Authority did however note that as a result of the agreement with Allied Farmers, investors no longer hold securities provided by the companies. The effect of the debt re-structuring associated with the Allied Farmers' deal was that for every dollar invested, the investor received a share in Allied Farmers. As at December 2010 Allied Farmers' shares were valued at $0.22. The Authority also noted that Mr Hotchin could be ordered to pay pecuniary penalties under s 55F of the Act which might amount to $3 million.

[44] The Authority said that given the seriousness of the breaches under investigation, the quantum of the potential liability, and the risk of asset dissipation, it was necessary and desirable that Mr Hotchin be prohibited from transferring, charging or otherwise dealing with money, securities or other property held or controlled by him.

***Orders made***

[45] Although an application was made for orders in respect of Mr Hotchin's assets wherever they were situated, I doubted my jurisdiction to make orders with likely extraterritorial effect, given Mr Hotchin's residence out New Zealand. The orders were made only in respect of Mr Hotchin's New Zealand based assets.

[46] Because the orders were made on a without notice basis I directed that the proceeding was to be called before the court on 14 December 2010 after the

intervening weekend. By consent, that date was further adjourned to 21 December 2010. On 21 December, Mr Hotchin made applications to vary some aspects of the existing orders. That application was declined. KA3 Trustee, KA4 Trustee and Mr Thomas said they would comply with the orders at that point, but all defendants indicated they would make applications to revoke or vary those orders.

**Relevant principles relating to asset preservation orders**

[47] This is the first proceeding in which these provisions have been considered in New Zealand. They have however, been the subject of ample judicial scrutiny in Australia. From the Australian cases, and the relevant provisions in the New Zealand legislation the following principles in relation to the application of ss 60G, 60H and 60I can be distilled.

[48] The purpose of sections 60G to 60I is to ensure that the rights of aggrieved persons to damages, compensation or restitution are not frustrated through the assets of a liable person being dealt with in a way that renders them unavailable to meet those claims. There is a public interest in ensuring that those who solicit public money through the use of untrue statements are brought to account.

[49] The provisions allow for such protection to be afforded to aggrieved persons even where breaches of the Act are not established and even where no decision has been taken to bring proceedings against the relevant person. Thus the power to make preservation orders extends to where an investigation is on foot, but no proceeding is yet commenced, and the definition of "liable" includes "may be or become liable." Investigations into suspected breaches of the Act are usually complex and take time – time during which assets that may have been available to satisfy a likely future claim may dissipate. These provisions enable the assets of the relevant person to be preserved pending the outcome of the investigation.[5]

[50] The remedies available under these provisions are dramatic. Even if made on an interim basis, preservation orders are a significant interference with property

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5 *Re Richstar Enterprises Pty Ltd; Australian Securities and Investment Commission v Carey* (No. 3) [2006] FCA 433.

rights, and the court should exercise care before making any orders. However, as was observed by Waddell CJ in *Corporate Affairs Commission NSW v Walker*:[6]

> The legislature clearly intended that drastic remedies should be available to protect the interests of persons who might have a claim in respect of such activity by freezing the assets of those responsible. In applying the section effect should be given to this legislative intention.

[51] Assuming one of the jurisdictional pre-conditions in s 60G(1) exists (in this case that an investigation is on foot), the issue for the court is whether it is "necessary or desirable" to make the orders for the purpose of protecting the interests of an aggrieved person. The focus at this point of the analysis is upon the interests of the aggrieved person. The impact of the proposed orders upon the relevant person, or any other party, does not feature at this stage of the court's consideration. It may weigh in the subsequent inquiry as to whether the discretion implicit in the words "may order" should be exercised in favour of the making of the orders.

[52] The circumstances in which the court may make orders are wide, as indicated by the words "necessary or desirable".[7] Thresholds and principles should not be developed that fetter that discretion in any way. It follows also that little reliance can be placed upon factual similarities between the present case and cases in which orders have previously been made or declined. Each case must be considered on its own facts.

[53] In determining whether it is necessary or desirable to make the orders sought, the court must undertake an evaluative exercise. It is left to the court to determine what matters to take into account but it is clear that there is an element of risk management or risk assessment involved in determining whether it is necessary or desirable that orders be made.[8]

[54] There is no requirement on the part of the Authority to demonstrate a prima facie case of liability on the part of the relevant person.[9] Nevertheless, in the case of an application brought on grounds of an existing investigation, I consider that the

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6 (1987) 11 ACLR 884 at 888.
7 *Re Richstar Enterprises*, above n 5, at [26].
8 *Re Richstar Enterprises*, above n 5, at [26].
9 Ibid.

Authority must at least show that good grounds exist for the investigation, and its continuation. After all, there can be little public interest in an investigation in the absence of such grounds.

[55] There is also no requirement that the Authority show that the persons assets are about to be dissipated. It is sufficient if there is the potential for dissipation of the assets.[10]

[56] Although a risk of dissipation of assets is not a pre-requisite to the making of orders, given the policy objectives of these provisions, the presence of such a risk is likely to be a powerful discretionary factor.

[57] I consider that also relevant to the evaluation to be undertaken is the nature and seriousness of the breach or breaches, the numbers of aggrieved persons and the quantum of the potential liability of the relevant person. It will also weigh in this assessment that the application for preservation orders is made on behalf of aggrieved persons by the Authority. Sprinkled through the Australian authorities is comment to the effect that the public interest role of the Authority may warrant an order in circumstances when it might be denied to a private litigant.[11] Care must be taken not to attach too much weight to this factor, as to do so risks effectively substituting the Authority's assessment of what is necessary or desirable for that of the judge. However it must at least be a relevant factor that the Authority brings the application of behalf of all aggrieved person's.

[58] In addition to the jurisdictional pre-conditions in s 60G there are further pre-conditions set out in s 60H which must be met before orders may be made. Asset preservation orders may only be made in respect of certain categories of property as described in s 60H(1)(a) to (i). At a final hearing of an application under s60G it will be necessary for the Authority to prove on the balance of probabilities that the property falls within one of these categories, for example, that it is property held or controlled by the relevant person (in which case an order can be made against the

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10 *Re Richstar Enterprises*, above n 5 and *Australian Securities and Investment Commission v Adler* [2001] NSWSC 451 at [7](c).

11 *Adler*, above n 10, at [7](c) affirmed in *Australian Securities and Investments Commission v Krecichwost* [2007] NSWSC 948 at [17].

relevant person), or that it is money held by a third party on behalf of the relevant person (in which case an order can be made against that third party in respect of that property). However, when an interim order is sought under s 60I, the court need only decide whether it is "desirable" that an interim order be made before considering the application. It may be desirable even if the Authority is not able to prove to the civil standard that the property falls within one of the categories.

[59] But even at the interim stage, the Authority still must show something to suggest that it is property falling within the relevant category. Bearing in mind my earlier comments I hesitate to propose a threshold, but it would be difficult to conclude that it is desirable that orders be made if there is nothing to tie the property in question into one of the categories in s 60H(1). I am attracted to the suggestion of Finkelstein J in *Australian Securities and Investments Commission v Lee*[12] that it will be enough if something like a possible or prima facie case is presented to show the property falls within one of the s 60H categories.

[60] It is also perhaps obvious, but worth recording nevertheless, that the jurisdiction is not to be exercised for a disciplinary purpose. Any orders made must be made for the purpose of preserving assets that could be available to meet any judgment ultimately entered against the liable person. For this reason, if orders are made, the court must ensure that the orders are no more intrusive than required to preserve the assets.

[61] The issue at the hearing on 14 February 2011 was whether the interim orders made under s 60I should be continued. It was common ground that the application fell to be determined under s 60I. Orders under s 60I may be made if, "in the opinion of the court it is desirable to do so" before considering the s 60G application. This suggests that the threshold under s 60I is different to that under s 60G as before an order will be made under s 60G, the court has to be satisfied that it is "necessary or desirable" to do so for the purpose of protecting the interests of an aggrieved person.

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12 *Australian Securities and Investments Commission v Lee* [2007] FCA 508 at [13].

[62] However, in this particular case there is no difference between the two thresholds, as the parties have placed a volume of evidence and argument before me with the effect that the application has been considered. Moreover the interim orders have already been in place for some months. As the Authority concedes, interim restraint cannot be desirable if there is no real prospect of restraint under s 60G. At the interim stage, it is the possibility or prospect of restraint under s 60G that is the critical aspect of the inquiry.[13]

[63] In relation to the principles set out at [54], Mr Hotchin argues that this is a late stage investigation which has been on-going for years. Given that background, he submits that the court is entitled to expect a substantial case on the merits before it exercises its discretion to make final orders or maintain the interim orders. He advances this argument, relying on *Walker*,[14] where Waddell CJ stated:

> In the case of an application made shortly after an investigation has begun, the evidence may be regarded as sufficient if it establishes the general circumstances, the nature of the investigation and the reason why it is thought that there may be some liability on the part of a relevant person. On a later application, where the question is whether or not orders already made should continue...Evidence might be required which goes some distance towards establishing liability or which establishes a prima facie case.

[64] For reasons I return to later I am satisfied that this is not an investigation that has been ongoing for years. In any case, the approach suggested for Mr Hotchin relies on a simplistic view of an investigation, which assumes that there will be a direct correlation between the length of an investigation and the substantive progress made in establishing a case for liability. There will be many cases, such as the present, where further investigation reveals further complexity and further issues for investigation. Moreover, in some cases it may be undesirable to require the Authority to make a case for liability when it has not yet resolved to commence proceedings, as to do so may prejudice a line of inquiry.

[65] For these reasons, I consider it fits better with the statutory framework if no threshold test is formulated for the strength of the Authority's case when the application is brought on the grounds of the existence of an investigation. It should

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13 *Lee*, above n 12, at [13].
14 *Walker*, above n 6, at 888.

be left to the case specific evaluative exercise what weight, if any, is attached to the strength of the case that there has been a contravention of the Act by the relevant person.

**Mr Hotchin's application that orders be revoked**

[66] Counsel for Mr Hotchin advanced many arguments as to why the existing orders should be revoked. These can be summarised as follows:

(a) The orders should be discharged on the grounds that in making the application for interim orders, on a without notice basis, the Authority failed to disclose material information known to it.

(b) The claims that Mr Hotchin breached the Act are under particularised and without merit. The prospects of a successful claim against Mr Hotchin are tenuous.

(c) There is no risk of dissipation of assets.

(d) There are other reasons why the court's discretion should be exercised to decline the orders.

***Should the orders should be discharged for lack of disclosure?***

[67] The first issue is whether the orders should be revoked because of material non-disclosure.

[68] As to the relevant principles, a useful summary of the relevant principles is set out in the English case *Brink's Mat Ltd v Elcombe*[15] as follows:

> (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex* v. *Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, *per* Scrutton L.J.

[15] [1988] 1 WLR 1350 at 1356.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 H Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd*. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch.° 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat* v. *Nikpour* [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v. Nikpour,* at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

> "when the whole of the facts, including that of the original nondisclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" *per* Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Pic,* ante, pp. 1343H—1344A.

*Grounds for revocation for non-disclosure in this case*

[69] It was argued for Mr Hotchin that there was material non-disclosure by the Authority in several respects. The Authority failed to disclose that it had been involved in investigating statements in Hanover's prospectus since July 2008. If it had disclosed the length of the investigation, it is argued that the court would likely have required a greater level of particularity as to the allegations against Mr Hotchin.

[70] Reliance was placed upon affidavits of Mr Roger Wallis, legal advisor to the Hanover group of companies. His first affidavit details correspondence between his firm and the Authority in relation to the Hanover group. In particular he attaches a letter dated 30 July 2008 from the Authority, written in connection with the "recently announced restructure of Hanover Finance Limited, United Finance Limited and Hanover Capital Limited". The letter requested copies of the two most recent investment statements and advertisements for the last twelve months, which were provided. Mr Wallis says that the next contact with the Authority was in February 2010. By letter dated 5 February 2010, Ms Blenkarne wrote again to Mr Wallis stating that the Authority was investigating finance companies that have collapsed, including those that had gone into moratorium and this included Hanover Finance. A request for further information was made, which was complied with.

[71] Ms Brown, Director of Investigations and Litigation for the Authority, says that a full investigation did not commence until 2010. Although the Authority did gather information in July 2008, she said that those requests had become standard practice in respect of finance companies which had collapsed and might require investigation in the future. She explains the delay in commencing the investigation. She says that the Authority has been involved in investigating the circumstances of each of the 51 New Zealand finance companies that have gone into liquidation or receivership or have frozen payments. Because of its limited resources, it has prioritised its investigations in terms of the timing of the failures, as the failure date may indicate when any breaches of the legislation occurred and because limitation periods apply to some civil and criminal proceedings.

[72] I am satisfied that the documentation supports Ms Brown's evidence that the Authority did not commence an in depth investigation of the Hanover Group until 2010, whatever information gathering was undertaken prior to that time. The letter from Ms Blenkarne in February effectively announced the commencement of a full scale investigation. The documents also confirm that an independent investigator was not appointed until March 2010. I therefore consider that there is nothing in this point.

[73] An additional allegation of non-disclosure is made. It is said for Mr Hotchin that although it knew that Chapman Tripp was actively engaged on behalf of the companies and on behalf of Mr Hotchin the Authority did not disclose this, nor that Chapman Tripp had communicated its instructions that the directors (including Mr Hotchin) wished to be helpful and responsive to any questions the Authority might have.

[74] I do not regard the Authority's failure to disclose the pre-existing dealings with the solicitors for Hanover Group and Mr Hotchin as particularly material. They evidence a level of co-operation on behalf of the Hanover Group with the Authority in relation to the investigation, but that was not and is not at issue in the application.

[75] The next matter raised by Mr Hotchin is whether there was a misstatement by the Authority as to how close to completion the Authority's investigations were. The without notice application for interim orders was significantly founded on the proposition that the investigation was nearing completion and that a decision would be made whether or not to commence proceedings before Christmas 2010. However that time frame has now extended indefinitely with Ms Brown describing a need to review extensive material received by the Authority and further information that has been requested but not yet received. She also refers to the need to review information now being gathered by the Serious Fraud Office in its own investigation into entities and individuals associated with the Hanover Group.

[76] Ms Brown explains that the investigation has developed with the collection of additional information and that the Authority has needed time to consider and analyse what are very complex matters. She sets out the nature of the investigations

the Authority has been involved in since December 2010 and explains, in effect that the investigation has become more complex than the Authority envisaged at the time of making the application, not least because of the investigation being undertaken by the Serious Fraud Office.

[77] From this material it is clear that the time frame the Authority initially gave in December 2010 for the making of the decision whether or not to commence proceedings was overly optimistic. However I do not consider that there was any intentional misstatement of the position by it. It is significant in this regard that the Authority's public announcements at the time were consistent with the information contained in the material provided to the court.

[78] The fact that there was no intention to mislead is not the end of the matter. Innocent non-disclosure or misstatement may be grounds for the discharge of an ex parte order. But I do not consider that the incorrect statement as to timing of the decision in relation to the commencement of proceedings is material. Orders of this nature may be made where there is an on-going investigation. Although any unjustifiable delay in the investigation could well be grounds for revocation of the order, here there is no evidence of such delay before me. I accept the inevitability of the Authority prioritising its case load, given the extraordinary level of failure within the finance company sector of the market in recent years. I am not therefore inclined to attach any weight to delays on the part of the Authority prior to the commencement of these proceedings

[79] Mr Hotchin also argues that the Authority at best failed to fully disclose information in relation to his asset situation, at worst misstated it, and that it failed to make adequate inquiries one might expect of it to check the accuracy of its information. Mr Hotchin says that in an attempt to establish dissipation, the Authority inappropriately packaged together three asset sales by KA4 Trust, with a single asset sale by him. Ms Blenkarne asserted in her affidavit that "several real estate properties associated with Mr Hotchin had been sold", and that the Authority had not been able to determine the whereabouts of the proceeds of those sales. She did not disclose that the Authority had failed to make inquiries to obtain this information.

[80] In relation to the one property sold by Mr Hotchin, the Bridgewater Road property, he emphasises that it was sold five months prior to the application, and that there was no suggestion that it was sold other than at an arm's length sale. Mr Hotchin's evidence is that the entire proceeds apart from the deposit of $246,000 were applied to repay a bank loan. The deposit was utilised by Mr Hotchin to pay various expenses and repay loans.

[81] In its submissions filed in support of the application for interim orders, the Authority submitted that while there was no requirement that it provide evidence of a risk of dissipation of assets, the evidence did suggest there was a real risk. Particulars provided to support this submission were as follows:

> 76.1 Mr Hotchin is believed to have been predominantly residing outside New Zealand since April 2010.
>
> 76.2 Since July 2010 there have been four sales of properties connected to Mr Hotchin, three of which were held in the same ownership structure as those the Commission [the Authority] has identified.
>
> 76.3 A spokesman for Mr Hotchin has been quoted as saying that when completed 56 Paratai Drive will be sold.

[82] The ownership structure identified was one the Authority argued evidenced either that the Trusts were a sham from the date of settlement, or that the Trusts, although valid, held the particular properties as bare nominees for Mr Hotchin. The Authority acknowledged it did not have enough evidence to plead a sham at that point, but it pointed to evidence that suggested that the Trusts' affairs were, at least at the time, apparently conducted for the benefit of Mr Hotchin.

[83] I do not regard the Authority's failure to make inquiry of KA4 Trustee in relation to the sales of the three properties as a breach of its duty to make all relevant inquiry. That lack of inquiry was plain on the face of the application. I was satisfied that given the material before me as to the Trusts apparently acting at Mr Hotchin's direction, such inquiry could precipitate dealing with those proceeds which would defeat any subsequent attempt to preserve the assets. However the order made against those Trusts was limited to assets held on behalf of Mr Hotchin.

[84] Nor do I consider that there was any material over-statement by the Authority in respect of the sale of the properties, or their ownership. The evidence offered by the Authority as to registered ownership of the properties and sales was in all material respects correct. Although fault can be found with some of the conclusions that Ms Blenkarne drew from that evidence in the course of her affidavit, those conclusions or hypotheses were more in the nature of submissions rather than evidence, and I treated them as such. I also note that the Authority was explicit that it did not have sufficient evidence to plead a sham at that point, and that further investigations were required.

[85] The central submission on risk of dissipation of assets was in effect that Mr Hotchin was now residing overseas, his home in New Zealand had been sold, and properties in which he may have some interest, were being sold or likely to be sold. Given this set of circumstances, I assessed there to be a risk that assets in which Mr Hotchin had some interest would be moved outside the jurisdiction, and that if Mr Hotchin was given notice of the application that might speed up the process.

[86] For these reasons I do not consider that there was any material non-disclosure by the Authority.

***Are the potential claims against Mr Hotchin without merit?***

[87] I turn next to the principal submission made by Mr Hotchin, that there is no proper basis for the continuation of the orders.

[88] Mr Hotchin argues that the orders should not be continued as the Authority has failed to establish that any potential claim against him has any prospect of success. Mr Hotchin denies any untrue statement was made in any of the prospectuses. Both he and Mr Wallis have filed affidavits responding to the detail provided in Ms Blenkarne's affidavit in support of the arguments that there were no untrue statements, and also that any action for compensation would ultimately be likely to fail. Mr Hotchin also says that because the investigation is, on the Authority's own case at a late stage, the Authority should have to present more than merely a prima facie case. It cannot do so.

[89] Mr Wallis takes issue with several of the statements made by Ms Blenkarne. He says that [Suppressed material].

[90] He says that [Suppressed material].

[91] He comments upon Ms Blenkarne's treatment of the statutory words that the directors were required to address in their statement in the prospectus to the effect that there has been "no material adverse effect" on "trading or profitability" of the company. Mr Wallis says that Ms Blenkarne did not refer to the exception to that statement in the second paragraph of the directors' certificate which states:

> Recent events in the finance company sector and the general credit markets have resulted in lower than forecasted levels of investment in the finance company sector, including the company. Whilst profitability on assets deployed is expected to remain comparable with previous years, as a natural consequence of the operation of the company's liquidity policy these circumstances have resulted in a decrease in the company's lending activities and associated interest and fee income.

[92] Finally he says, Ms Blenkarne did not mention the defence available to all directors of reasonable reliance on competent staff and external advisers.

[93] Counsel for Mr Hotchin makes additional points as to the merits of any potential claim. He stresses that aggrieved persons will need to establish loss or damage caused by reliance upon the allegedly untrue statements. It may be difficult for them to prove reliance. Moreover causation may be an obstacle, given the initial restructuring of debt and subsequent arrangement with Allied Farmers which resulted in investors accepting shares in Allied Farmers. The latter may be sufficient to break the chain of causation. Alternatively, deductions may have to be made for losses that the investors have elected to take by voting for the restructuring of the debt and later accepting shares of a lesser value in Allied Farmers.

[94] I have considered the material provided by Mr Hotchin to substantiate an argument that there were no untrue statements made, and that there is little prospect of succeeding against Mr Hotchin. I make the preliminary point, in accordance with the principles previously identified, that it cannot be contemplated that at either the s 60I or s 60G stage the court conduct a mini-trial as to the likely outcome of an on-

going investigation and ultimate prospects of success of a claim. Nevertheless, in this case, I am satisfied from the material put forward by Ms Blenkarne [suppressed material] that there are good grounds for the Authority to continue to investigate the statements made in the three prospectuses and extension certificates, [suppressed material]. It is also clear that these are matters of significant public concern affecting the interests of a significant group of aggrieved persons.

[95] The information provided by Mr Wallis does not, in my view, answer the concerns raised by the Authority. [Suppressed material].

[96] Finally, the point is made for Mr Hotchin that Ms Blenkarne did not mention the defence of reasonable reliance on competent staff and external advisers. I consider that she did, as this is subsumed within the defence of belief in the truth of the statements on reasonable grounds.

***Is there a risk of dissipation of assets?***

[97] The next issue raised for Mr Hotchin is the lack of evidence of a risk of dissipation of assets. Mr Hotchin denies that there has been any dissipation by him in any sense or degree which justifies continuation of the interim orders. There is no suggestion of recent or impending flight or abandonment of Mr Hotchin's New Zealand interests. Mr Hotchin has explained that he moved away from New Zealand in late 2009 when he began to receive death threats from some borrowers to whom Hanover group entities had advanced money and against whom enforcement action had been taken. Another factor in his decision to live outside New Zealand is the intensity of media coverage which means it is unsustainable for him to live in New Zealand with his young family. He says that when he and his family moved to Australia it was their intention to return to New Zealand once the media interest and emotion surrounding the recovery of debt had quietened down.

[98] As to the asset sales, although he did sell the family home in Bridgewater Road in June last year, all of the proceeds of that sale were paid to existing creditors. The other property sales referred to by the Authority were properties owned by KA4 Trustee and he had no interest in them when they were sold.

*Analysis*

[99] As previously discussed there is no requirement that the Authority establish a risk of dissipation of assets. The mere potential for dissipation of assets is enough. In any event, I consider that the Authority has established a risk of dissipation of assets in this case.

[100] Since the December orders, Mr Hotchin has provided a great deal more information as to his situation and his assets. That information confirms that Mr Hotchin and his family are now resident in Australia, and it would seem they have no immediate plans for return to New Zealand. They have sold their principal place of residence in New Zealand and abandoned plans to live in the property being developed in Paratai Drive. Even though Mr Hotchin has and maintains close family ties in New Zealand, it is an obvious inference that he will want some, if not all of his assets in the same jurisdiction as him, for use by him and his family. It is also a reasonable inference that he will want to use such assets as he has to pursue his business interests. I also weigh that, from the evidence I have seen, Mr Hotchin typically utilises complex ownership structures when conducting business, which would tend to make any attempt to recover assets from him more difficult. An example of this is the shares owned by interests associated with Mr Hotchin, in the three companies.

[101] During the hearing the Authority referred to statements made in a Price Waterhouse Cooper's report (provided to investors in connection with the debt restructuring proposal) to the effect that Mr Hotchin is one of the "ultimate shareholders" of the parent company of the Hanover Group, Hanover Group Holdings Ltd. In fact the "Hotchin" shares in that company are owned by Hotchin Investments Ltd, a company in turn owned by the Hotchin Trust. At the hearing the Authority relied on this to show that Mr Hotchin was the beneficial shareholder and was in the habit of using trusts to own his assets.

[102] After the hearing, Mr Hotchin sought leave to file further affidavits to explain the statements in the Price Waterhouse Cooper's report on the grounds that he was taken by surprise by the Authority's submission. I grant leave to file these affidavits

as I accept that the significance of this aspect of the Price Waterhouse Cooper report to the Authority's case was not apparent before the hearing.

[103] The two additional affidavits are from Mr Hotchin and Mr Wallis. Mr Hotchin says that he was not responsible for the content of the report and understood that the Hotchin shareholding was referred to in this way to simplify the explanation of the debt restructuring proposal. Mr Wallis says that the term ultimate shareholder is not a term of art, but in commercial usage refers to an entity or person that has practical control of a group of companies.

[104] Whatever the explanation for this expression, there is an inference available that Mr Hotchin has a personal interest in that shareholding and I note that he does not deny this in his affidavit. He says in his supplementary affidavit dated 18 February 2011:

> The "ultimate shareholders" included interests associated with me and those interests were providing substantial shareholder support, as was I (in the nature of my personal guarantee).

As I have mentioned, his use of complex ownership structures is also demonstrated.

[105] Returning to the issue of risk of dissipation of assets, there is also a risk of dissipation of assets that arises from the extent of the dealings that occur between Mr Hotchin and the many entities that he and his family are involved with, which include the KA 3 and 4 Trusts. These are dealings, that it seems are not conducted, or not always conducted on a commercial arms length basis. I also observe that since these are family trusts, the fact that the transactions are not conducted on a normal commercial arm's length basis is of itself not necessarily of any significance. But it has potential implications for aggrieved persons in the context of this application.

[106] The extent of these dealings between Mr Hotchin and the Trusts is apparent from the Statement of Assets and Liabilities provided by Mr Hotchin. This lists both assets and liabilities relating to advances to such entities. That these dealings sit outside commercial norms is most apparent in respect of the Paratai Drive property.

Mr Hotchin's Statement of Assets and Liabilities (which otherwise discloses liabilities that exceed his assets) includes an asset which is attributed an "unknown" value. This relates to the property in Paratai Drive. Mr Hotchin says that the Paratai Drive property was purchased by, and is owned by, KA4 Trustee for the KA4 Trust. However Mr Hotchin has paid construction costs for the house being built on the land totalling $12,227,786.56. Mr Hotchin's explanation is that he did so because he anticipated that he and his wife would receive a lease for the economic life of the building.

[107] Mr Radley who was trustee of the KA4 Trust at the time when the construction began says that there were discussions about the ownership of the house that Mr Hotchin was arranging to be built. Although the discussions were inconclusive, the construction continued. Ultimately it was agreed between the KA3 Trust and KA4 Trust that in return for the KA3 Trust advancing $2.5 million and any further funds required for construction, Mr Hotchin and his family would be granted a 10 year lease – if he wanted that – with two rights of renewal of 10 years each. This agreement is documented in minutes of a meeting of KA4 Trust, signed by both Mr Thomas and Mr Radley. The agreement records that Mr Hotchin and his family are to be granted the lease on terms that they pay outgoings and keep and maintain the house. The agreement also records that if, on completion, the value of the house is less than the total cost, the amount of the loan by KA3 Trust to the KA4 Trust will be reduced by the difference between the valuation and the cost.

[108] Mr Radley resigned as trustee of the KA3 Trust and the KA4 Trust when KA3 Trustee and KA4 Trustee respectively were appointed sole trustees of those Trusts.

[109] Mr Hotchin's evidence is that no agreement to lease was reached. He says that in March 2009 the KA4 Trust had to take over funding the construction of the house when he ran out of funds. In any event, he borrowed much of the cost of construction and he currently owes that debt to another family trust, the Kelly-Ashley No 2 Trust (KA2 Trust), to whom the debt was assigned. Mr Hotchin says:

> My expectation is that once the trust has recouped its costs, including the unforeseen costs of having to complete the house itself, the trust will apply

> any proceeds from sale to repay to me the total costs which I contributed to the construction costs.

He says that the KA4 Trust has so far invested $25 million in the property, but as at July 2008 the property only had a capital value of $18 million. That valuation pre dated much of the construction on the site.

[110] It is apparent that the investment by Mr Hotchin in the construction of the property is a substantial asset. There is some conflict in the evidence as to how that interest is to be reflected. From Mr Radley's evidence and the supporting minutes of the KA4 Trust it seems that Mr Hotchin has, or at least had, an option to take up a 30 year lease, which is arguably enforceable by him. If he no longer has that option, for whatever reason, then the amount invested in the construction of the land remains a significant asset, since it seems the KA4 Trust acquiesced in the expenditure knowing that Mr Hotchin expected to acquire some interest in the property (in the form of a long term lease) in return for that investment.

[111] From Mr Hotchin's evidence it seems likely that he intends to deal further with this asset to resolve matters between himself and the KA4 Trust in a manner which may see him receive back much less than he expected. There clearly is a risk that Mr Hotchin will substantially compromise his rights in an attempt to reach such an arrangement. Indeed the proposed resolution he suggests likely involves a relinquishing of a right to a 30 year lease, or perhaps comprising a claim for compensation for the enrichment his investment has bestowed upon the trust through constructing a multi-million dollar house on the site.

***Other factors relied upon by Mr Hotchin as favouring refusal of orders***

[112] Counsel for Mr Hotchin emphasises that there was and is no evidence of fraud, dishonesty, misappropriation or imminent dissipation of funds or assets of the company in which the public had invested, and that most of the cases in the Australian jurisdiction in which orders have been made involved such a situation. It is not contended that Mr Hotchin is holding or controlling investor monies. The only proceedings which are in prospect relate to allegedly untrue statements in prospectuses between December 2007 and July 2008. Mr Hotchin argues that the

absence of fraud or misappropriation of company funds, is a factor telling against the continuation of the orders.

[113] Although there might be a strong case for interim relief where a contravention of the Act involves fraudulent conduct, the jurisdiction created under s 60G is not limited to such a case. It expressly applies in situations where an investigation is being carried out into an act or omission that constitutes or may constitute a contravention of the Act. Of course, s 60G(1)(a) must be read within the context of the rest of that subsection, so that it is only investigation of a breach which may result in a prosecution or civil proceeding that can ground an application. In this case, the acts or omission under investigation could give rise to civil proceedings.

[114] It is also submitted that Mr Hotchin is being singled out. Given the extraordinarily broad criteria and low threshold for orders under s 60G, the Authority could potentially have sought preservation orders against the controllers of any of 50 finance companies which have been investigated in recent times and in respect of which 35 directors are currently being prosecuted. Of a potential pool of perhaps 100 or more individuals or entities involved in finance companies, the Authority has acted only against Mr Hotchin and the Trusts. I attach no weight to this submission in the absence of evidence of bad faith on the part of the Authority.

[115] Finally, in terms of the discretionary factors, Mr Hotchin argues that pecuniary penalty orders are not intended to be covered by the provisions of s 60G, so that in assessing the size of any potential liability that Mr Hotchin has to aggrieved persons, the potential for pecuniary penalty orders should be excluded. It is clear from the statutory provisions that Mr Hotchin is correct in this regard. The jurisdiction to make asset preservation orders is for the purpose of protecting the interests of aggrieved persons to recover debt, damages, or compensation from the relevant person rather than punishing "relevant persons". [16] Pecuniary penalty orders are not for the benefit of aggrieved persons and are payable only to the Crown, in accordance with s 55C(c) of the Act.

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[16] *Australian Securities and Investment Commission v Hawley* [2008] FCA 1423 at [11].

***Evaluation of the desirability and necessity for continuation of asset preservation orders***

[116] In this case, significant sums of money were raised pursuant to the prospectuses the subject of the investigation, and there is correspondingly a large potential pool of aggrieved persons. The Authority has provided sufficient material to satisfy me that it has good grounds to continue to investigate what would, if proved, amount to serious breaches of the Act. [Suppressed material].

[117] I also weigh however that, as Mr Hotchin has emphasised, there may be defences available to him to meet such claims, and that for aggrieved persons to succeed, they must prove not only an act of civil liability, but also reliance by the aggrieved person, and causation of loss.

[118] I also weigh that there is substantial potential for dissipation of assets, and, as identified above, a particular risk of dissipation in this case.

[119] Taking these matters into account I am satisfied that it is necessary and desirable that the orders made under s 60I continue for the purpose of protecting aggrieved persons. In respect of Mr Hotchin, there is no issue as to the existence of the pre-conditions which must be established under s60H. The assets are as listed in his Statement of Assets and Liabilities.

[120] The next issue is whether there are any factors weighing against the exercise of the discretion now enlivened. These orders undoubtedly limited Mr Hotchin's ability to enjoy the normal incidents of ownership, but that of course is their intended effect. The prejudice to Mr Hotchin can be mitigated by making appropriate allowance for reasonable expenses to be paid from available assets. One other matter was raised as weighing against the exercise of the discretion. It was argued that the preservation orders would prevent Mr Hotchin paying a debt to the Inland Revenue Department, exposing him to proceedings and bankruptcy. However the Authority consented to variation of the orders to enable this debt to be paid.

***What orders should be continued or made?***

[121] I am satisfied that orders should continue against Mr Hotchin, but with some alteration as follows. Mr Hotchin should continue to be restrained from dealing in any way with the assets listed in his Statement of Assets and Liabilities with the exception of his general household belongings (listed in his Statement of Assets and Liabilities as Item 1). It is unnecessarily intrusive to the family to retain those in New Zealand when the family now reside outside New Zealand. These are general household items of uncertain value and of a personal nature. Retaining them in New Zealand when the family is living outside New Zealand is harsh, and would likely produce little in the way of benefit for aggrieved persons should they ultimately succeed in a claim against Mr Hotchin.

**Applications by KA3 Trustee and KA4 Trustee**

***Relevant factual background***

[122] The KA4 Trust was created by a written Deed of Trust dated 1 May 2003. Mr Hotchin was the settlor. He has the power of appointment under the Trust Deed. Until 2005 he was sole trustee. From then until May 2009 he was co-trustee with Mr Radley. From May until the present, KA4 Trustee has been the sole trustee. Mr Thomas is the sole shareholder and director of KA4 Trustee.

[123] Mr Hotchin is not presently a discretionary beneficiary of the trust, but he has the power to nominate discretionary beneficiaries. He is not a final beneficiary of the trust.

[124] The KA3 Trust was created by a written Deed of Trust dated 23 December 1999. Mr Hotchin was the settlor and Mr Radley and Mr Michael Ward were the two initial trustees. The trustees have changed over time, but since 2003 the trustee has been KA3 Trustee. Since April 2010, the sole director and shareholder of KA3 Trustee has been Mr Thomas. Mr Hotchin is one of a number of discretionary beneficiaries of the trust, but is not the sole discretionary beneficiary, nor is he a final beneficiary.

*Application for preservation orders against KA3 Trustee and KA4 Trustee*

[125] In the statement of claim originally filed, the Authority listed a number of properties registered in the name of KA3 Trustee and KA4 Trustee. It pleaded that KA3 Trustee and KA4 Trustee held those properties on behalf of Mr Hotchin "in that the first defendant having purchased or contributed to the purchase price of these properties prior to their transfer to KA3 Trustee and KA4 Trustee, has an interest in the properties and, subsequent to their transfer to KA3 Trustee and KA4 Trustee, has retained control over them".

[126] In support of the application for interim preservation orders, the Authority put forward several alternative scenarios on which to base its assertion that Mr Hotchin had an interest in properties registered in the name of KA3 Trustee and KA4 Trustee. It said that the funds to purchase the properties seemed to have come from Mr Hotchin and he might have retained an interest in them. Alternatively, it said that there was evidence to suggest, at the times the properties were initially acquired, the Trusts were a sham (intended to shield assets from creditors) and so void from the time of their creation. The Authority pointed to a number of matters, including the transfer of the property at 46 Matapana Road to KA3 Trust, from what the Authority assumed was another trust associated with Mr Hotchin, and the subsequent use of that property to support obligations in the Hanover group debt restructuring programme. Alternatively, the Authority submitted that it was possible that the Trusts held the assets on a bare trust for Mr Hotchin.

[127] At the hearing in February, the Authority advanced a number of submissions as to the nature of the relationship between Mr Hotchin and the Trusts. Amongst arguments advanced were sham, emerging sham, resulting trust and that the Trusts held the assets on a bare trust for Mr Hotchin. I was not able to follow the Authority's argument. It appeared to shift and change through the course of exchanges with counsel. Counsel was unable to link the various tentative arguments identified with the available evidence. Although I had received several sets of submissions from the Authority which dealt with these issues it became clear that the current pleading no longer reflected the Authority's case, and more troubling, that the Authority was not itself clear as to how it could be said that KA3 Trustee and

KA4 Trustee held property on behalf of Mr Hotchin. Given these circumstances, I invited the Authority to file an amended claim setting out more clearly its case on this point, if it could.

[128] Following the hearing, the Authority filed an amended statement of claim on 16 February 2011. In it, the Authority asserts at paragraph [22] that:

> The second, third and fourth defendants hold money, securities or other property on behalf of the first defendant by virtue of control by the first defendant over the second, third and fourth defendants, including control arising from powers expressly vested in the first defendant.

[129] The particulars provided of this control are as follows;

> 22.1 The first defendant has power to remove and appoint trustees pursuant to deeds of trust relating to the second and third defendants.
>
> 22.2 The fourth defendant is the sole director and shareholder of the second and third defendants.
>
> 22.3 The first defendant has power to remove and appoint trustees pursuant to deeds of trusts relating to other companies in relation to which the fourth defendant is sole director and shareholder, namely:
>
> 22.3.1 HTL Trustee Limited;
>
> 22.3.2 KA No2 Trustee Limited.

[130] The Authority relies upon s 60H(1)(f) as the basis for the jurisdiction to continue the orders against KA3 Trustee and KA4 Trustee. Section 60H(1)(f) confers a discretion to make asset preservation orders against third parties in respect of assets they hold on behalf of the relevant person.

[131] Powers of appointment of trustees, and even of discretionary beneficiaries, are not sufficient to give Mr Hotchin control over the assets of the Trusts, because that control rests, at law, with the trustee once appointed. In any case, were the Authority to establish that Mr Hotchin had control of KA3 Trustee and KA4 Trustee through powers of appointment, that would not be sufficient for the purposes of s 60H(1)(f) to create jurisdiction to make an order against KA3 Trustee and KA4 Trustee. That provision only applies in respect of assets held on behalf of the relevant person, and not where the asset is controlled by the relevant person.

[132] It is noteworthy that s 60H does confer a discretion to make orders in respect of assets controlled but not beneficially owned by the relevant person, as follows:

> (a) S 60H(1)(a) enables orders to be made against the relevant person to prevent them dealing with property controlled by them.
>
> (b) S 60H(1)(e) and (g) enable other orders to be made in respect of property of a relevant person or an associated person or persons associated with each other.[17] Section 60H(2) provides that for the purposes of s60H(1)(e) or (g) the property of the relevant person or associated person includes property that the person holds otherwise as sole beneficial owner, such as a trustee or nominee for another, or in a fiduciary capacity.

[133] There is therefore express provision as to what orders may be made in relation to property controlled but not beneficially owned by a relevant person. None of those provisions apply to circumstances such as the present, where legal control is with a third party who does not, on the Authority's case it now seems, hold the property on behalf of the relevant person. The pleaded claim does not therefore provide any basis for continuation of the orders against KA3 Trustee, KA4 Trustee and Mr Thomas.

***Applications by KA3 Trustee and KA4 Trustee for summary judgment or alternatively, to strike out for abuse of process and related orders***

[134] KA3 Trustee and KA4 Trustee apply for summary judgment on the grounds that there is no proper factual basis for the claims against them. Alternatively, they seek an order striking out the proceeding against them on the grounds that it is an

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[17] Associated persons or persons associated with each other are defined under s 3 of the Act as:
(a) persons who are relatives within the meaning of the Income Tax Act 2007; or
(b) persons who are partners to whom the Partnership Act 1908 applies; or
(c) bodies corporate that consist substantially of the same members or shareholders or that are under the control of the same persons; or
(d) a body corporate and a person who has the power, directly or indirectly, to exercise, or control the exercise of, the rights to vote to 25 percent or more of the voting securities of the body corporate; or
(e) a body corporate and a person who is a director of the body corporate.

abuse of process brought by the Authority for the collateral purpose of engaging in a fishing exercise to attempt to build a case for relief against them. Mr Thomas applies for an order striking out the proceeding as against him on the grounds that there is no claim pleaded against him, and no reason for him to be joined into the proceedings.

*Applications by KA3 Trustee and KA4 Trustee for summary judgment*

[135] There is no disagreement between the parties as to the relevant principles governing a defendant's application for summary judgment. To succeed with its application, the defendant must show that none of the plaintiff's claims can succeed against the defendant, even if the case is re-pleaded.[18] The defendant must have a clear answer to the claim that cannot easily be contradicted.[19] It is not appropriate to decide by summary procedure the sufficiency of the plaintiff's claim except in clear cases because otherwise the defendant, in whose possession the facts might be, could force on the plaintiff's case before discovery and other interlocutory steps and assembling of the plaintiff's evidence has taken place.[20] Applications for summary judgment will be inappropriate where there are disputed issues of material fact or where the area of law concerned is novel or developing.[21]

[136] Even where the grounds are made out for summary judgment the court has a discretion to refuse to grant it to avoid oppression or injustice.[22]

[137] In this case, as appears from the earlier discussion of the amended pleading, the claim as presently formulated against KA3 Trustee and KA4 Trustee cannot succeed. That pleading is in a form the Authority settled upon after being given an opportunity to re-plead. Nevertheless I decline to grant summary judgment because there is a basis for the Authority to re-plead its case against KA3 Trustee and KA4 Trustee, in the light of the information that Mr Hotchin has now provided as to his assets and liabilities. In the case of KA4 Trustee, because of the dealings between

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18 *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58] – [59].
19 Ibid, at [60].
20 *Westpac Banking Corporation*, above n 18, at [62] - [63].
21 Ibid, at [62].
22 *Sayles v Sayles* (1986) 1 PRNZ 95 (HC) at 98.

KA4 Trustee and Mr Hotchin in relation to the Paratai Drive property, a pleading against KA4 Trustee under s 60H(1)(b) or (c) could disclose a reasonably arguable case against KA4 Trustee for interim relief.

[138] As to KA3 Trustee, Mr Hotchin lists a debt owing to him by the KA3 Trust as one of his assets. He estimates the amount due to him as approximately $105,000. Mr Thomas confirms that amount is due to him. It is possible for the claim against KA3 Trustee to be re-pleaded under s 60H(1)(b) in respect of this debt.

[139] In submissions presented at the hearing, the Authority said that it would seek leave to file an amended statement of claim including a pleading that the KA3 Trust and KA4 Trust are indebted to Mr Hotchin. Although the Authority was given the opportunity to re-plead at the conclusion of the hearing, this leave was granted within the context of my request that the Authority plead what its case was that the Trusts held assets on Mr Hotchin's behalf. I therefore consider it necessary to provide the Authority with the opportunity to re-plead in the light of the information it now has as to amounts due to Mr Hotchin by KA3 Trust, and in relation to the interest Mr Hotchin has in the Paratai Drive property.

*Applications by KA3 Trustee and KA4 Trustee to strike out for abuse of process*

[140] A claim may be struck out for abuse of process where it is shown that the process ancillary to a principal claim for relief has been used to effect an object not within the scope of that process and rather to seek a collateral advantage.[23] However, a proceeding will not be an abuse of process merely because it appears to lack merit or the defendant considers it has a complete defence to a claim.[24] Rule 15.1 provides that the court may strike out all or part of a pleading if it:

> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading, or
>
> (b) is likely to cause prejudice or delay, or

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[23] *Ullrich v Ullrich* (1996) 10 PRNZ 253 at 255-256; *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 112.

[24] *Geotherm Energy Ltd v Electricorp Ltd* (1991) 4 PRNZ 231 (CA).

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of process of the court.

[141] The defendants argue that the pleading as against them is an abuse of process because through it, the Authority seeks a collateral advantage that could not legitimately be gained. The collateral advantage is the ability the ancillary orders gives the Authority to conduct a fishing exercise, gathering information from KA3 Trustee and KA4 Trustee in the hope that it will enable the Authority to formulate a better pleading to found a claim for relief.

[142] There is no indication that the Authority sought to obtain a collateral advantage through its pleading against KA3 Trustee and KA4 Trustee. Ancillary disclosure orders are commonly obtained in support of asset preservation orders. They are granted for the purpose of identifying the identity and location of the assets subject to the orders. Here, the disclosure orders were made against Mr Thomas in his capacity as sole director of KA3 Trustee and KA4 Trustee. They were for the purpose of identifying and locating assets and were not for an ancillary purpose.

*Applications by KA3 Trustee and KA4 Trustee for revocation of orders and return of documents*

[143] KA3 Trustee and KA4 Trustee have applied for the existing asset preservation orders against them to be revoked. I am satisfied that it is appropriate to revoke the orders in respect of KA3 Trustee, as the Authority's case, as it is currently pleaded, provides no legal basis on which to continue these orders under s 60H(1)(c). There will however be an order in relation to KA3 Trustee in respect of its indebtedness to Mr Hotchin to maintain the status quo while the Authority amends its pleading against KA3 Trustee.

[144] Again in respect of KA4 Trustee the existing orders are revoked. But as I have discussed, Mr Hotchin's investment in the construction of the property represents, in one form or another, a substantial asset of Mr Hotchin. There should therefore be orders under s 60H(1)(b) & (c) in respect of this asset against KA4 Trustee.

[145] KA3 Trustee and KA4 Trustee have also applied for the return of the documents already disclosed. That application is properly addressed after the Authority has re-pleaded its case against the defendants.

**Application by Mr Thomas to strike out**

[146] Mr Thomas' application to strike out is brought on the basis that there is no pleading against him, and he is not otherwise a necessary party. He does not hold property on behalf of Mr Hotchin. He has no interest in, or relationship to the proceeding other than in his capacity as director of KA3 Trustee and KA4 Trustee.

[147] Rule 4.56 provides that the court may at any stage, of a proceeding, make an order striking out a defendant improperly joined to a proceeding. The court's jurisdiction in this regard must be exercised sparingly and reflects the approach adopted in relation to applications to strike out for no cause of action.[25]

[148] The Authority says that Mr Thomas is a proper party because he is directly affected by an order made in the proceeding. Moreover, the Authority has identified that some assets connected to Mr Hotchin appear to be held through corporate entities in respect of which Mr Thomas acts as director and/or shareholder. Rather than join multiple entities as parties to the proceeding, the Authority preferred to join Mr Thomas, as a director, to the proceeding. The Authority says there are eight entities that fall into this category.

[149] I accept the force of Mr Thomas' argument on this point. The proper parties are the entities which hold assets for or owe debts to Mr Hotchin. Where, as here, those entities are alleged to be corporate entities, the orders should be made against those entities. There is no need for the orders to be made against Mr Thomas. The alternative argument that joining him is a convenient way to effect a back door joining of multiple additional parties must also fail. If the Authority wishes to obtain orders against other entities, then it must join them. There is no short cut available. I note that the Authority currently has no pleaded case in respect of those additional

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[25] *CED Distributors (1998) Ltd v Computer Logic Ltd (in rec)* (1991) 4 PRNZ 35 (CA).

parties. For these reasons, I am satisfied that Mr Thomas should be struck out as a party to the proceeding, and all existing orders against him revoked.

**Application by the Authority for directions as to compliance with disclosure orders and for further disclosure**

[150] The Authority seeks orders that Mr Hotchin and Mr Thomas comply with the existing disclosure orders against them, and that Mr Hotchin and Mr Thomas provide further disclosure. As Mr Thomas is to be discharged as a party on the basis that the proper parties for any order are KA3 Trustee and KA4 Trustee, I deal with this application as if the orders sought were in respect of KA3 Trustee and KA4 Trustee only.

[151] The court has jurisdiction to make disclosure orders either under s 65C of the Act (s 65C authorises the making of ancillary orders to ensure compliance with the orders made under the Act), or pursuant to its inherent power to ensure the effectiveness of its own orders.

[152] The application for directions requiring compliance with existing orders does not provide detail of the respects in which the existing disclosure is inadequate. Nor is it apparent from the affidavit material that Mr Hotchin has failed to comply with the existing disclosure orders. This aspect of the application relied in large part on a perceived failure by Mr Hotchin to respond to a request for further information, but immediately prior to the hearing Mr Hotchin filed an additional affidavit attaching his solicitor's response to that request. His response cannot be described as delayed as it followed only 4 days after what was a very substantial request for information. The application for directions requiring compliance by Mr Hotchin with disclosure orders is therefore declined.

[153] I do not propose to consider the request for further disclosure relating to KA3 Trustee and KA4 Trustee in any detail. To the extent that it relates to KA3 Trustee and KA4 Trustee it assumes a pleading against those entities which has now been amended. Even if it were relevant to the amended pleading, I have held that

pleading discloses no reasonably arguable case against those defendants. I therefore decline to order further disclosure by KA3 Trustee and KA4 Trustee.

[154] The Authority also seeks further disclosure orders against Mr Thomas which relate to other entities not joined as parties. These it says, will assist it in identifying whether there are other entities associated with Mr Hotchin that hold assets on his behalf. This is on the basis that these other entities may hold or control assets not listed in Mr Hotchin's Statement of Assets and Liabilities, but in which Mr Hotchin, or entities controlled by him, retain a beneficial interest. It identifies these entities as KA No2 Trustee Ltd (as trustee of KA2 Trust), 520 Queen Street Holdings Ltd, Contact Capital Ltd, ABH Trustee Ltd, HL Trustee Ltd, HTL Trust Investment Ltd, KM Trustee Ltd and Karaka Holdings Ltd. The Authority seeks these disclosure orders in order to ascertain whether any of these entities are controlled by or are holding assets on behalf of Mr Hotchin, and to ascertain whether there may still be further entities associated with Mr Hotchin.

[155] Although these entities are not joined as parties, the Authority seeks disclosure orders in respect of them, by the device of seeking the orders against the director of each of these companies, Mr Thomas. This is a procedurally flawed approach. As already noted, if orders are sought in respect of these entities they must be joined to the proceedings.

[156] Insofar as the jurisdiction to make orders ancillary to asset preservation orders relates to parties other than the relevant person, I also do not consider that the jurisdiction extends as far as the Authority contends in this particular case. The Authority is proposing to utilise the information to conduct what will surely be a substantial investigation into the affairs of each of these entities. This goes beyond the intended scope of the legislation, and amounts to a full scale collection of information about all entities associated with Mr Hotchin. This occurs not only in advance of proceedings being commenced by the Authority, but also in advance of the Authority pleading on what basis it says that these entities have any involvement with his assets. I therefore decline all applications for further disclosure.

**Result**

*Orders affecting Mr Hotchin*

[157] Mr Hotchin's application to revoke or vary the asset preservation and ancillary orders, is declined. Those orders continue subject to an amendment to release from the effect of the preservation orders the "general household belongings" listed in the Statement of Assets and Liabilities as Item 1.

[158] The Authority's application for directions that Mr Hotchin comply with disclosure orders is declined.

*Orders affecting KA4 Trustee*

[159] KA4 Trustee's applications for summary judgment and to strike out the claims against it are declined.

[160] The claim against KA4 Trustee as currently pleaded discloses no reasonably arguable claim. The Authority has leave to re-plead against KA4 Trustee.

[161] KA4 Trustee's application for revocation of existing orders is granted. There will however be an order against KA4 Trustee in relation to the Paratai Drive property under s 60H(1)(b) prohibiting it, until further order of the court, from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of Mr Hotchin. There will also be an order against KA4 Trustee under s 60H(1)(c) prohibiting it, until further order of the court, from dealing with the Paratai Drive property in any way. "Dealing with" in relation to the Paratai Drive property means transferring, charging, leasing or otherwise disposing of the property.

[162] I do not decide KA4 Trustee's application for return of documents provided to the Authority. That application will be considered following receipt of the amended pleading.

[163] The Authority's application for further disclosure of documents by KA4 Trustee is declined.

*Orders affecting KA3 Trustee*

[164] KA3 Trustee's applications for summary judgment and to strike out the claims against it are declined.

[165] However, the claim against KA3 Trustee as currently pleaded discloses no reasonably arguable claim. The Authority has leave to re-plead against KA3 Trustee.

[166] KA3 Trustee's application for revocation of existing orders is granted. There will however be an order against KA3 Trustee under s 60H(1)(b) prohibiting it, until further order of the court from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, Mr Hotchin.

[167] I do not decide KA3 Trustee's application for return of documents provided to the Authority. That application will be considered following receipt of the Authority's amended pleading.

[168] The Authority's application for further disclosure of documents by KA3 Trustee is declined.

*Orders affecting Mr Thomas*

[169] Mr Thomas' application to be struck out as a party to the proceeding and for revocation of orders against him is granted.

*Leave*

[170] Leave is reserved to the Authority to file an amended statement of claim. That amended pleading must be filed and served within 15 working days.

[171] Given the nature of this proceeding, and in particular, the interim nature of the orders, all parties have leave to make further applications in relation to these orders, and the subject matter of the proceeding.

*Timetabling*

[172] These orders are interim in their nature only, and are issued to preserve the status quo whilst the Authority investigates suspected breaches of the Act. The Authority must move with all reasonable speed to conclude those investigations. I therefore require that the Authority file and serve a report as to progress with its investigations by 20 May 2011.

[173] This proceeding is to be listed before me for a telephone conference on the first available date after 3 June 2011 to review the progress of the investigations, to review the status of the orders, and to make any timetable orders necessary in relation to this proceeding.

**Suppression orders**

[174] The Financial Markets Authority (the Authority) has requested suppression of certain portions of the judgment on the grounds that it is desirable to maintain confidentiality in relation to the on-going investigation of Mr Hotchin and other directors of Hanover Finance Limited, United Finance Limited and Hanover Capital Limited. Further, publication of these portions of the judgment may prejudice any criminal or civil proceedings which may result from that investigation. All parties are in agreement that it is in the interests of justice that those portions of the judgment which describe the detail of those investigations, or make findings as to the merits of potential claims or proceedings, be suppressed whilst those investigations continue, in the light of the possibility that criminal or civil proceedings may result from those investigations.

[175] Having heard counsel, I am satisfied that it is in the interests of justice that there be suppression orders as sought, on grounds put forward by the Authority. Accordingly I make orders that there be no publication, nor distribution beyond the parties, of the following parts of the judgment:

1. That portion of paragraph [26] which follows after the second sentence.

2. The whole of paragraph [27].

3. The whole of paragraph [28].

4. That portion of paragraph [29] which follows after the word "that" in the first sentence.

5. That portion of paragraph [31] which follows after the words "again the Authority says that".

6. The whole of paragraph [32].

7. The whole of paragraph [33].

8. That portion of paragraph [34] which follows after the expression "The Authority's investigations suggest that".

9. That portion of paragraph [89] which follows after the words "He says that".

10. That portion of paragraph [90] which follows after the words "He says that".

11. In paragraph [94] in the sentence which begins "Nevertheless, in this case," suppress the two words which appear between the expression "Ms Blenkarne" and "that there are good grounds". Further on in the same sentence suppress the balance of the sentence after the words "extension certificates".

12. In paragraph [95] that portion of the paragraph which follows on from the first sentence is suppressed.

13. The last sentence of paragraph [116] is suppressed.

Winkelmann J