Application No. 2 of 2020

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under section 194 of the Securities and Futures Ordinance, Cap. 571

AND IN THE MATTER OF section 217 of the Securities and Futures Ordinance, Cap. 571

BETWEEN

LAI VOON WAI	Applicant
and	
SECURITIES AND FUTURES COMMISSION	Respondent

Tribunal: Mr. Michael Lunn, Chairman

Date of Hearing: 1 & 2 September 2020

Date of Determination: 29 September 2020

DETERMINATION

The application for review

1. By a Notice to the Securities and Futures Appeals Tribunal (the "Tribunal"), dated 5 May 2020, Mr. Lai Voon Wai (the "applicant") gave notice in writing, pursuant to section 217(1) of the Securities and Futures Ordinance, Cap. 571 (the "SFO"), of his application for a review of the decision of the Securities and Futures Commission (the

"SFC"), dated 14 April 2020, in a Decision Notice, pursuant to sections 194 of the SFO, prohibiting the applicant for five years from doing all or any of the following in relation to any regulated activities:[1]

(a) applying to be licensed or registered;

(b) applying to be approved under section 126(1) of the SFO as a responsible officer of a licensed corporation;

(c) applying to be given consent to act or continue to act as an executive officer of a registered institution under section 71C of the Banking Ordinance; and

(d) seeking through a registered institution to have his name entered in the register maintained by the Hong Kong Monetary Authority under section 20 of the Banking Ordinance as that of a person engaged by the registered institution in respect of regulated activities.

2. The applicant stated in terms in the Notice that he "does not challenge the Respondent's findings on liability" and that application "...is concerned only with the sanction imposed on him."[2] Nevertheless, in order to identify the findings of the SFC, and the context in which they were made, it is necessary to refer in some detail not only to the Decision Notice, but also to the Notice of Proposed Disciplinary Action ("NPDA") and the applicant's written representations to the SFC in response.

BACKGROUND

I. Notice of Proposed Disciplinary Action

3. By the NPDA, dated 15 August 2019, the SFC informed the applicant that it had conducted investigations into his conduct and the conduct of CCB International Capital Limited ("CCBIC"), in relation to the listing application of Fujian Dongya Aquatic Products Co., Ltd. ("Fujian Dongya") on the Main Board of the Stock Exchange of Hong Kong Limited ("SEHK"), and into his conduct and the conduct of BOCOM International (Asia) Limited ("BIAL") in relation to the listing application of China Huinong Capital Group Company Limited ("China Huinong") on the Main Board of the SEHK.[3]

[1] Decision Notice, paragraph 58. (Agreed Bundle ["AB"]-A/3/A136-A137.)
[2] Notice of Application for Review, paragraph 4. (AB-A/4/A144.)
[3] NPDA, paragraph 4. (AB-A/1/A1.)

Fujian Dongya

4. The SFC noted that Fujian Dongya and its subsidiaries procure raw seafood from suppliers, process it at their processing facilities in the PRC, and sell the processed seafood to overseas and PRC customers.

5. On 16 May 2013, Fujian Dongya appointed CCBIC as its sole sponsor. On 21 March 2014, Fujian Dongya submitted its Application Proof, including a draft Prospectus to the SEHK through CCBIC.[4] For the purposes of its listing application, Fujian's Dongya's 'track record' were the years which ended 31 December 2011, 2012 and 2013. The SFC noted that during that period around 90% of Fujian Dongya's sales were made to overseas customers and that around 90% of the resulting payments due from those overseas customers were paid through "third-party payers" (the "TPP Arrangement").[5]

China Huinong

6. On 8 September 2014, China Huinong appointed BIAL as its sponsor. On 10 November 2014, BIAL submitted China Huinong's listing application to the SEHK, including its Application Proof Prospectus[6]. Six months having elapsed since the filing of that application, on 18 May 2015 BIAL filed a renewed listing application to the SEHK on behalf of China Huinong, which addressed an updated 'track period' for the three years which ended 31 December 2014.[7] Beginning on 12 December 2014, BIAL submitted five different revised versions of China Huinong's Prospectus to the SEHK, culminating in the version dated 7 September 2015 (the "AP5 Prospectus").[8]

7. Persons who fell to be regarded as a "connected person", as defined in the Rules Governing the Listing of Securities on the SEHK (the "Listing Rules"), of China Huinong had provided guarantees ("Connected Guarantees") for short-term loans advanced by China Huinong's subsidiary Danyang City Tiangong Huinong Small Loan Company Limited ("Tiangong Huinong") during the initial 'track period'. However, that information was not disclosed in the Application Proof Prospectus or any other material provided to the

[4] NPDA, paragraph 10. (AB-A/1/A3.)
[5] NPDA, paragraph 9. (AB-A/1/A2.)
[6] NPDA, paragraph 16. (AB-A/1/A4.)
[7] NPDA, paragraph 18. (AB-A/1/A4.)
[8] NPDA, paragraph 19. (AB-A/1/A4-A5.)

SEHK until the revised Prospectus dated 7 September 2015 and then only after a series of queries and comments from the SEHK and the SFC.[9]

8. On 24 September 2015, the SEHK returned China Huinong's application (the "Return Decision")[10] on the ground that the disclosure of information in the Application Proof was not complete in all material respects to enable a reasonable investor to make an informed investment decision, as required by the Listing Rules.[11] After a hearing on 8 October 2015, on BIAL's application for a review of that decision, the Listing Committee of the SEHK (the "Listing Committee") upheld the Return Decision. After a hearing on 27 October 2015, on BIAL's application to review the decision of the Listing Committee, the Listing (Review) Committee of the SEHK upheld the Return Decision.[12]

The roles of the applicant

9. The SFC noted that the applicant was a licensed representative and responsible officer of CCBIC on and between 20 June 2006 and 27 June 2014, whereas he was a sponsor principal from 1 January 2007 until the latter date. The applicant was a licensed representative of BIAL from 9 July 2014 and a responsible officer and sponsor principal from 20 October 2014, all of which positions were terminated on 13 March 2017.[13]

10. At the time when CCBIC had acted as the sole sponsor of Fujian Dongya's listing application, the applicant was CCBIC's responsible Officer, Managing Director of Corporate Finance and sponsor principal in charge of the supervision of the transaction team, which conducted due diligence on Fujian Dongya,[14] and, at the time when BIAL acted as the sole sponsor of China Huinong's listing application, the applicant was BIAL's responsible Officer, Managing Director and Head of Investment Banking Division and sponsor principal in charge of the supervision of the transaction team which conducted due diligence on China Huinong.[15]

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[9] NPDA, paragraph 20. (AB-A/1/A5.)
[10] Non-Agreed Bundle ["NAB"]-E/30/E474-E478.
[11] NPDA, paragraph 21. (AB-A/1/A5.)
[12] NPDA, paragraphs 22-3. (AB-A/1/A5.)
[13] NPDA, paragraph 2. (AB-A/1/A1.)
[14] NPDA, paragraph 5. (AB-A/1/A2.)
[15] NPDA, paragraph 6. (AB-A/1/A2.)

SFC's Decisions in respect of CCBIC and BIAL

11. On 9 July 2018 and 15 March 2017, the SFC found that CCBIC and BIAL respectively had failed to discharge their sponsor duties in relation to those respective listing applications and were in breach of various provisions of the *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission* (the "Code of Conduct"), details of which breaches and failures were set out in Appendices 1[16] and 2[17], attached to the NPDA, of which the SFC noted in particular that:

(a) CCBIC, in respect of its conduct of due diligence of Fujian Dongya, was in breach of:[18]

(i) paragraph 17.4 (a)-Reasonable due diligence;

(ii) paragraph 17.6 (b)-Professional scepticism;

(iii) paragraph 17.6 (c)-Appropriate verification;

(iv) paragraph 17.6 (f)-Interview practices; and

(v) paragraph 17.10-Proper records.

(b) BIAL, in respect of its conduct of due diligence of China Huinong, was in breach of:[19]

(i) paragraph 17.4 (a)-Reasonable due diligence;

(ii) paragraph 17.6 (c)-Appropriate verification; and

(iii) paragraphs 17.9 (a)-Communications with the regulators.

12. The SFC reprimanded and fined CCBIC $24 million and BIAL $15 million. The SFC noted that each company had not disputed the SFC's findings and had accepted its disciplinary actions.[20]

The SFC's preliminary view of the applicant

13. The SFC said that it was of the preliminary view that the breaches/failures committed by CCBIC and BIAL were attributable to the applicant's neglect, in his capacities as a sponsor principal, a responsible officer and member of the senior management of CCBIC and BIAL, of his supervisory and managerial duties. In particular, it was asserted that it appeared that the applicant had failed to:[21]

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[16] AB-A/1/A35-A56.
[17] AB-A/1/A57-A72.
[18] NPDA, paragraph 25. (AB-A/1/A5-A6.)
[19] NPDA, paragraph 26. (AB-A/1/A6.)
[20] NPDA, paragraph 28. (AB-A/1/A6.)
[21] NPDA, paragraph 29. (AB-A/1/A7.)

(a) exercise due skill, care and diligence, in taking due diligence steps in respect of the listing applications of Fujian Dongya and China Huinong, in breach of General Principle 2, paragraphs 17.2 and 17.6 of the Code of Conduct;

(b) ensure the maintenance of appropriate standards of conduct and adherence to proper systems, controls and procedures by CCBIC and BIAL to govern sponsor work, in breach of General Principle 9 and paragraphs 17.11(d) and 17.11(e) of the Code of Conduct; and

(c) diligently supervise his subordinates and the sponsor work undertaken by CCBIC and BIAL, in breach of paragraph 4.2 of the Code of Conduct and paragraph 1.3.3 of the *Additional Fit and Proper Guidelines for Corporations and Authorized Financial Institutions applying or continuing to act as Sponsors and Compliance Advisers* ("Sponsor Guidelines").

The Applicant's failures

14. Of the applicant's failures in his role as sponsor principal in relation to the listing applications, the SFC asserted that he had not:[22]

(a) adequately turned his mind to what reasonable due diligence inquiries should be conducted by the transaction team of:

(i) CCBIC in relation to the TPP Arrangement; and

(ii) BIAL in relation to the Connected Guarantees;

(b) provided sufficient instructions, guidance and supervision to the transaction teams of CCBIC/BIAL in relation to the TPP Arrangement/Connected Guarantees; and

(c) critically assessed the results of the due diligence performed by the transaction teams of CCBIC/BIAL in relation to the TPP Arrangement/Connected Guarantees.

15. Further, the SFC asserted that the applicant had failed to:[23]

(a) properly supervise the transaction team of CCBIC to conduct due diligence interviews with Fujian Dongya's customers; and

(b) ensure the maintenance of proper due diligence records for the listing application of Fujian Dongya.

Fujian Dongya

(i) Deviation from the 11 Steps Due Diligence Plan

16. The SFC asserted that the failure of CCBIC to conduct due diligence enquiries on the TPP Arrangement in accordance with the 11 Steps Due Diligence Plan was attributable to the applicant's neglect of his duties as sponsor principal, a responsible

[22] NPDA, paragraph 38. (AB-A/1/A9.)
[23] NPDA, paragraph 39. (AB-A/1/A9.)

officer and a member of the senior management of CCBIC. Only six of the steps were completed. [24] Those not completed were material to the operation of the TPP Arrangement.[25] The independence of the third-party payers, relevant to an assessment of the genuineness of the transactions, was a key issue. However, no independent confirmation was obtained from them (Step 3); they were not interviewed to confirm why they could not terminate the TPP Arrangement (Step 4); and no third-party payer was interviewed (Step 6). Those failures suggested that the applicant had not exercised proper supervision of the transaction team or had done so inadequately.[26]

(ii) Failure to address the 'red flags' raised by the due diligence

17. The SFC said that the applicant had failed to identify and/or instruct the transaction team to conduct further due diligence, the need for which was apparent by the 'Red Flags' which were raised by the available material:[27]

- *Red Flag 1*-the use by customers of Fujian Dongya of multiple third-parties from different countries to make payment due to Fujian Dongya;
- *Red Flag 2*-the evidence that persons who acted as third-party payers for customers, themselves used third-party payers to make payments due by them to Fujian Dongya;
- *Red Flag 3*-indemnity agreements which bore different versions of the signature, although they were stated to be by the same person; and
- *Red Flag 4*-why the TPP Arrangement could not be terminated, in particular in face of the explanation from Fujian Dongya that the practice was explained by currency exchange and remittance costs, when it was apparent that in some cases the customer and the third-party payer were in the same jurisdiction?

(iii) Failure to escalate matters to the management

18. In compliance with CCBIC's Operation Manual, the approval of the CCBIC's Commitment Committee had been sought prior to submission of the listing application for Fujian Dongya and a Memorandum, reviewed by the applicant, circulated prior to the meeting of the Committee on 19 March 2014. The meeting was attended by the applicant and the transaction team. The SFC noted that nevertheless none of the issues

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[24] NPDA, paragraphs 43-4. (AB-A/1/A11-A12.)
[25] NPDA, paragraph 46. (AB-A/1/A12.)
[26] NPDA, paragraph 51. (AB-A/1/A15.)
[27] NPDA, paragraphs 52-7. (AB-A/1/A15-A18.)

raised by the Red Flags nor the fact that only 6 of the 11 Steps Due Diligence Plan had been completed were drawn to the attention of the Committee.[28] On the contrary, the Memorandum concluded by asserting, "We have not discovered any material issues in the due diligence process."[29]

(iv) Failure to supervise the due diligence interviews of overseas customers

19. The SFC said that it had found that CCBIC had failed to conduct proper due diligence interviews with the overseas customers of Fujian Dongya, noting that of the 22 interviews, although 12 were conducted face-to-face, 11 of those interviewed were conducted in the presence of representatives of Fujian Dongya. Of the 10 customers interviewed by telephone, there was no record as to why they could not attend face-to-face interviews. There was no record of the interviewee's telephone number in the interview records nor any evidence of any steps taken to verify that they had the appropriate authority and knowledge to participate in the interview.[30] Further, the SFC noted that the applicant acknowledged that not only was he aware of the discrepancies in the amounts stipulated as sales by Fujian Dongya and the amounts stipulated as sales in the records of interview conducted of two of Fujian Dongya's top customers, Yow Xin Trading Company and Sigma International Inc., but also he had discussed the discrepancies with the transaction team and understood that the discrepancies were explained on the basis that some purchases were made directly and some through third party payers. However, the SFC observed that there were no written records of any such clarifications with either Fujian Dongya or its customers. In those circumstances, the SFC found that the applicant could not have checked and ensured that those discrepancies had been addressed by the transaction team, as a result of which there was no evidence that the applicant had critically assessed the results of the due diligence conducted by the transaction team.[31]

(v) Failure to maintain a proper audit trail in relation to due diligence

20. The SFC said that it had found that CCBIC had failed to keep a proper audit trail/written record of the work done in relation to the due diligence for the listing application of Fujian Dongya, contrary to paragraph 17 (10) (c) of the Code of Conduct, in particular as to:

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[28] NPDA, paragraphs 58-66. (AB-A/1/A18-A20.)
[29] NAB-A/2/A71.
[30] NPDA, paragraphs 67-70. (AB-A/1/A20-A21.)
[31] NPDA, paragraphs 73-4. (AB-A/1/A21.)

(i) why CCBIC had not completed the 11 Steps Due Diligence Plan;

(ii) why CCBIC did not follow its customer interview plan;

(iii) the telephone numbers used for the telephone interviews of customers;

(iv) the full names of the persons interviewed by telephone or face- to-face; and

(v) the Internet searches conducted by CCBIC on the overseas customers of Fujian Dongya.

21. The SFC said that, as sponsor principal, the applicant had failed to ensure that the transaction team maintained such records, as a result of which there was no evidence that the applicant had critically assessed the results of the due diligence conducted by the transaction team.[32]

China Huinong

22. On 8 September 2014, China Huinong had appointed the BIAL as its sponsor. From that date up and until 30 October 2014, Mr. Griffin Tse had been the sole sponsor principal. On or around 31 October 2014, the applicant had been appointed joint sponsor principal. The applicant only became the sole sponsor principal on 7 November 2014, on the resignation of Mr. Griffin Tse. In that context, the SFC acknowledged that the applicant was not a sponsor principal during eight out of the nine weeks when BIAL performed due diligence on China Huinong prior to submitting its listing application on 10 November 2014.[33]

(i) The decision to submit the listing application

23. In those circumstances, having noted that the applicant had said in records of interview conducted of him by the SFC that he had taken a "hands off" approach to supervising the transaction team, the SFC said that it was of the view that the applicant did not have sufficient time and capacity to properly review the due diligence documents in support of China Huinong's listing application and to provide appropriate instructions or supervision to the transaction team as required of a sponsor principal.[34]

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[32] NPDA, paragraphs 75-6. (AB-A/1/A21-A22.)
[33] NPDA, paragraphs 77-8. (AB-A/1/A22-A23.)
[34] NPDA, paragraph 80. (AB-A/1/A24.)

(ii) The applicant's failure to assess the results of BIAL's due diligence

24. The SFC said that its investigations revealed that, prior to the submission of the listing application on 10 November 2014, the transaction team had discovered the existence of Connected Guarantees, namely that:[35]

(i) Danyang City Tiancheng Tools Manufacturing Company Limited ("Tiancheng Tools"), a connected person of the Company, had guaranteed loans that Tiangong Huinong advanced to its customers during the Initial and second track record periods;

(ii) Tiancheng Tools had also obtained a number of loans from Tiangong Huinong during the Initial track record period; and

(iii) on 30 October 2014, Mr. He Rui Rui, the Executive Director and Chief Executive Officer of China Huinong, confirmed in a record of interview that he had guaranteed loans that the China Huinong Group advanced to its customers during the Initial and second track record period.

25. The SFC noted that in an email, dated 28 October 2014, from Mr. Terry Tam circulated to BIAL's Project Group working on China Huinong, including the applicant, the issue of Connected Guarantees had been specifically flagged.[36] In records of interview conducted of him, the applicant had said that he could not remember whether, prior to the submission of the listing application, he knew that connected persons of China Huinong had guaranteed loan advanced by the Group to its clients nor if he had reviewed the transcript of the record of interview of Mr. He Rui Rui.[37] In that context, the SFC pointed to an email, dated 24 September 2015, from the applicant to Mr. Terry Tam after receipt of the Return Decision of the SEHK in which he asked:[38]

"Why didn't we discover these connected guarantees previously?"

Having suggested that was clear evidence that the applicant did not know about the existence of the connected guarantees prior to the submission of the listing application, the SFC asserted that, in those circumstances, he could not have made a proper assessment before deciding to submit the application.[39] Similarly, the applicant could not remember if he had reviewed the 28 October 2014 email, prior to doing so in seeking to review the SEHK's Return Decision, dated 24 September 2015.[40]

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[35] NPDA, paragraph 82(a) and (c). (AB-A/1/A25.)
[36] NPDA, paragraph 82(b). (AB-A/1/A25.)
[37] NPDA, paragraph 83. (AB-A/1/A25-A26.)
[38] NAB-F/25/F72.
[39] NPDA, paragraph 86(c). (AB-A/1/A28.)
[40] NAB-F/4/F10.

(iii) Failure to ensure that all information provided to the SEHK/SFC was accurate and complete

26. The SFC noted that, in response to a specific enquiry by the SFC, in a reply to the SFC/SEHK, dated 12 December 2014, BIAL had said incorrectly that during the Initial track period none of the loans granted by the Group were guaranteed by the Group or any of its related parties.[41] However, in response to a further enquiry from the SFC, in replies dated 17 and 21 August 2015, BIAL informed the SFC/SEHK that stipulated percentages of loans in the 3 ½ year track period had been guaranteed "by our related parties" and in a further reply, dated 7 September 2015 said that those loans had been guaranteed by "our connected persons". The SFC asserted that, in those circumstances, the applicant had failed to give adequate instructions and supervision to the transaction team to ensure that the information so supplied was properly verified.[42]

The SFC'S Preliminary Conclusion

27. In the result, the SFC said that it was its preliminary conclusion that the applicant had been guilty of misconduct[43], as a result of which it said that the applicant's "fitness and properness to carry on regulated activities is called into question."[44] In consequence, the SFC stated that it proposed to prohibit the applicant for 6 years from doing all or any of the regulated activities set out earlier at paragraph 1 of this Determination.[45]

28. In reaching that preliminary conclusion the SFC said that it had regard to the multiple factors it stipulated, including: the expectation of regulators and the public that sponsors and their principals exercise a high standard of professionalism when assessing the listing suitability of a company and "verifying the information disclosed in the prospectus"; the fact that the applicant had failed to properly supervise two listing applications within a period of eight months; that the applications had either lapsed or been returned by the SEHK, so that "no harm has been caused to members of the investing public"; and that the applicant had a "clean disciplinary record."[46]

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[41] NPDA, paragraph 87. (AB-A/1/A28-A29.)
[42] NPDA, paragraph 92. (AB-A/1/A30.)
[43] NPDA, paragraph 30. (AB-A/1/A7.)
[44] NPDA, paragraph 100. (AB-A/1/A31.)
[45] NPDA, paragraph 102. (AB-A/1/A32.)
[46] NPDA, paragraph 103. (AB-A/1/A32-A33.)

II. The applicant's representations to the SFC

(i) The applicant's acceptance of the SFC's preliminary conclusions

29. In his written representations to the SFC, dated 15 October 2019, the applicant objected to the proposed disciplinary action, but said that he did so, "without disputing the preliminary conclusions that are set out in Item 100." The latter phrase was a reference to the paragraph number in the SFC's Decision Notice. It is to be noted that, immediately before the reference in paragraph 100 of the NPDA to the SFC's "preliminary conclusion", reference was made to its "preliminary view" of the applicant's breaches of various provisions as set out in paragraph 29."

(ii) The applicant's clarifications/explanations

30. Nevertheless, the applicant went on to say, "I would however like to clarify and/or provide additional information on the following items as I believe they may not accurately reflect the state of affairs at the time." Whilst accepting his failures to supervise and review the conduct of due diligence in both applications to list[47], the applicant repeatedly asserted that had come about because of the failings of his subordinates, in particular Mr. Terry Tam, but also Mr. Griffin Tse in performing their duties. For example, he asserted:[48]

> "...my failure in both cases were the result of me trusting and over-relying on Terry Tam to assist me to forming (sic) my views on the completeness of the due diligence carried out on both Fujian Dongya and China Huinong, which unfortunately were not subsequently properly executed or documented as required by the relevant transaction team."

31. Of the issue of Connected Guarantees that arose in the listing application for China Huinong, the applicant asserted that he had placed:[49]

> "...too much reliance on the then Sponsor Principal Griffin Tse and the transaction team to independently handle the transactions. In so far as I can remember, none of Griffin Tse, Terry Tam or the transaction team members had raised issues with Connected Transactions when I took over from Griffin Tse as sponsor principal prior to the submission. I proceeded with the signing of the application as Sponsor Principal as I trusted Terry Tam's confirmation that the deal was ready for filing."

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[47] The Applicant's written representations to the SFC: page 3, second paragraph; page 3, fourth paragraph; page 4, first and fourth paragraphs; page 6, second and fourth paragraphs; and page 7, second and third paragraphs. (AB-A/2/A86-A90.)

[48] The Applicant's written representations to the SFC; page 3, second paragraph. (AB-A/2/A86.)

[49] The Applicant's written representations to the SFC; page 2, third paragraph. (AB-A/2/A85.)

32. Subsequently, the applicant asserted of Griffin Tse:[50]

> "I had asked him before he left, and the transaction team, whether the transaction was ready for submission. As I did not receive any comments to the contrary and based on their confirmations, I agreed to submit the application as Sponsor Principal…I truly regret my decision and should have taken more time to review the due diligence process with the transaction team before submitting the application especially when it is clear I was not the Sponsor Principal supervising the deal throughout the due diligence process."

33. The applicant submitted that his failures to ensure that the due diligence processes were executed as required were unintentional and certainly not done "to hide facts from the SEHK or SFC."[51]

(iii) The proposed sanctions

34. In addressing the proposed disciplinary action identified by the SFC, the applicant invited the SFC to have regard to the fact that, since he had left the employment of BIAL in March 2017 to date, he had been unemployed. That, he described as being "financially devastating." Of those circumstances, he asserted:[52]

> "Prior to me leaving BIAL, I was informed by BIAL that it was the intention of the SFC to keep me out of the industry for two years. Whilst I have never had any direct confirmation or otherwise from the SFC on this, I believed BIAL and voluntarily and patiently waited for over two years before making a real attempt to getting back into the licensed industry by getting a job with Sunfund Capital Limited ("SCL") as their CEO. Unfortunately, with the prolonged delay in the license application, I've recently mutually agreed with SCL to terminate my employment as CEO at SCL."

III. The Decision Notice

(i) The applicant's acceptance of the SFC's preliminary conclusions

35. In the Decision Notice, the SFC observed that the applicant had accepted the SFC's preliminary conclusions, articulated in paragraph 100 of the NPDA, that he had failed to properly supervise the respective transaction teams of CCBIC and BIAL in performing due diligence on Fujian Dongya and China Huinong.[53] Specifically, it was noted that applicant accepted that the due diligence plan for Fujian Dongya was "not

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[50] The Applicant's written representations to the SFC; page 6, second paragraph. (AB-A/2/A89.)
[51] The Applicant's written representations to the SFC; page 4, second paragraph. (AB-A/2/A87.)
[52] The Applicant's written representations to the SFC; page 11, fourth paragraph. (AB-A/2/A94.)
[53] Decision Notice, paragraphs 10 and 12. (AB-A/3/A121.)

properly executed and/or documented by the transaction team" and that, in not giving the process sufficient oversight, he had "failed to appreciate in time that there were material lapses in the due diligence process." Furthermore, the applicant accepted that "failure to complete the due diligence on the independence of the third-party payers were regrettable and as a result of my failure to supervise properly." Of the due diligence process conducted in respect of China Huinong, it was noted that the applicant accepted that his decision to file the listing application "without having reviewed the whole file with the transaction team" was "a big mistake" which he regretted.[54]

36. In the result, the SFC concluded that the applicant's admissions supported their findings that the breaches/failures committed by CCBIC and BIAL in the two listing applications were attributable to the applicant's neglect of his duties as a sponsor principal and, a responsible officer and a member of the management of the respective sponsors in performing his supervisory and managerial duties.[55]

(ii) The applicant's roles and duties

37. In determining the applicant's responsibility for his conduct, the SFC said that they had regard to the fact that the applicant was:[56]

- a responsible officer of Type 6 (advising on corporate finance) regulated activity;
- a member of the senior management of both CCBIC and BIAL, to whom both Mr. Terry Tam and Mr. Griffin Tse reported; and
- a sponsor principal in charge of supervising the respective transaction teams.

(iii) The duties of a sponsor principal

38. Having said that, in discharging his duties of supervising a transaction team, a sponsor principal bore primary responsibility for supervising the sponsor work and ensuring their compliance with the applicable regulatory standards", the SFC adverted to the specific duties of a sponsor principal set out in paragraph 1.3.3 of the Sponsor Guidelines, including:[57]

> "…. in respect of conducting due diligence review on a listing applicant, the sponsor should ensure that the Principal is involved in determining the breadth and depth of the due diligence review, the amount of resources to

[54] Decision Notice, paragraph 13. (AB-A/3/A121-A122.)
[55] Decision Notice, paragraph 14. (AB-A/3/A122.)
[56] Decision Notice, paragraph 18. (AB-A/3/A123-A124.)
[57] Decision Notice, paragraph 20. (AB-A/3/A124.)

be deployed for carrying out such work, making a critical assessment of the results of the due diligence and overall assessment of the adequacy of the due diligence review, and ensuring that steps have been taken to properly resolve all issues arising out of such review."

(iv) The applicant's failures

39. The SFC said that it was clear from its own investigations, together with the applicant's representations, that he had failed to adequately supervise the due diligence work of the transaction teams in both listings, in particular in that he had not:[58]

- in relation to the TPP Arrangement/Connected Guarantees, provided sufficient instructions, guidance and supervision or critically assessed the results of the due diligence;
- in relation to the TPP Arrangement, ensured that the transaction team had conducted reasonable due diligence in accordance with the due diligence plan, in particular supervising the conduct of due diligence interviews with Fujian Dongya's customers and ensuring maintenance of proper due diligence records, and escalated the issues arising to the Commitment Committee of CCBIC; and
- in relation to the Connected Guarantees, adequately considered what reasonable due diligence enquiries should be made.

The context in which the SFC made those findings was the fact that the applicant was not only copied in the emails relating to both listing applications but also had signed correspondence and documents submitted to the SEHK by CCBIC/BIAL, including the Sponsor's Undertaking to the SEHK.[59]

(v) The applicant's reliance on Tam and Tse

40. The SFC said that, whilst the applicant's assertions that he had over-relied on Mr. Terry Tam and Mr. Griffin Tse might explain the applicant's failures, it did not "justify or lessen the seriousness" of his conduct. In rejecting the applicant's submissions, the SFC determined:[60]

> "It was unacceptable for you to delegate your duties to your subordinates to the point of disregarding/neglecting your own responsibilities as a sponsor principal in reviewing, assessing and supervising the due diligence work.
>
> In particular, it was unreasonable for you to rely your subordinates to report matters or highlight outstanding work to you, given you did not provide

[58] Decision Notice, paragraph 23. (AB-A/3/A124-A125.)
[59] Decision Notice, paragraph 18(c). (AB-A/3/A123-124.)
[60] Decision Notice, paragraphs 26-7. (AB-A/3/A125.)

them with sufficient instructions, guidance and supervision of the due diligence work."

China Huinong

41. Furthermore, in rejecting the applicant's submissions that his failures lay in the failures of his subordinates to draw his attention to relevant matters, the SFC cited a supporting example in respect of each listing. Of the China Huinong listing, the SFC adverted to the email from Mr. Terry Tam, dated 28 October 2014, in which he highlighted issues concerning Connected Guarantees and noted that the applicant admitted that he had not applied his mind to the matters raised there, asserting that was a matter with which Mr. Griffin Tse was dealing. In its rebuttal of the applicant, the SFC noted that, following the applicant's own appointment as a joint-sponsor principal and the resignation within days thereafter of Mr. Griffin Tse, the applicant was the sole sponsor principal at the time the listing application was filed. Of the applicant's decision to file the listing application as the sponsor principal, the SFC said:[61]

> "...you did not properly review the due diligence files or consider whether issues that had previously been flagged for your and BIAL's Transaction Team's attention (including the Connected Guarantees) had been resolved. Instead, you relied on the Transaction Team's confirmation that the file was ready and proceeded to sign and file the A1 on that basis."

42. Also, the SFC noted that there was other material in the due diligence documents, including a record of interview of the management of the company, which would have alerted the applicant to the issue if he had conducted a proper review of the material.[62] That was a reference to the record of interview on 30 October 2014 of Mr. He Rui Rui, the chief executive officer of China Huinong, who had admitted that he had guaranteed loans that the Group had advanced to its customers in both the first and second track periods.[63]

43. Of the immediate circumstances in which the applicant had filed the listing application on 10 November 2014, the SFC adverted to an exchange of emails with the applicant that afternoon. The applicant had replied to an email from the BIAL Compliance Team, in which the latter had noted that the SFC had asked for "quite detailed due diligence

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[61] Decision Notice, paragraph 28(a). (AB-A/3/A126.)
[62] Decision Notice, paragraph 39. (AB-A/3/A129.)
[63] NPDA, paragraph 82(c). (AB-A/1/A25.)

exercise documentation", as a result of which the Compliance Team requested the applicant, to provide "your verification notes for review before submission of A1"[64], by asserting:[65]

> "As I have been principally involved in the transaction, I have gone through the due diligence process, the work done and the verification process for the transaction and believe that the work we have done to date is sufficient and will meet the standard required for the submission."

44. The SFC noted that, on the contrary, in his written representations the applicant had asserted that he had "...not been involved in the due diligence process throughout and proceeded to sign as sponsor principal on the transaction without having fully reviewed the due diligence files."[66]

45. In the result, the SFC concluded:[67]

> "Given the timing and unexpected nature of Griffin Tse's resignation, and your passive involvement in supervising the transaction prior to his resignation, it was all the more important for you to take proper steps to ensure that the due diligence work was compliant with the relevant regulatory requirements before signing and submitting the A1. There was simply no room for you to rubber stamp what others had done."

Fujian Dongya

46. Of the issue of the different versions of signatures of the same person made on different indemnity agreements arising in the Fujian Dongya listing, the SFC noted that, although Ms. Yu Pung Yet, Cherry, a member of the CCBIC transaction team, had raised the matter with the applicant and although he contended that he had asked the transaction team to raise the matter with Fujian Dongya, the applicant "had not taken any steps to confirm whether they had properly addressed this issue." The SFC said that in the result the obvious "red flags" raised of different versions of the signature of the same person on indemnity documents signed in different countries on the same day was "left unnoticed."[68]

47. Of the applicant's submission that he had put in place a due diligence plan for the TPP Arrangement, but that the plan had not been properly executed or documented, the SFC found:[69]

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[64] NAB-F/13-15/F23-F24.
[65] Decision Notice, paragraph 36. (AB-A/3/A128-A129.)
[66] Decision Notice, paragraph 37. (AB-A/3/A129.)
[67] Decision Notice, paragraph 38. (AB-A/3/A129.)
[68] Decision Notice, paragraph 28(b). (AB-A/3/A126.)
[69] Decision Notice, paragraphs 47-8. (AB-A/3/A131.)

> "As a sponsor principal, it was not sufficient to you to have been only involved in due diligence planning. You should also have taken appropriate steps to ensure the proper implementation of the due diligence plan...the fact that 5 out of the 11 planned due diligence steps on the TPP Arrangement were not completed suggests that you had either failed to ensure that the Transaction Team had completed the planned due diligence or agreed not to complete those due diligence steps. In either case, you failed to discharge your duties as a sponsor principal."

48. Of the applicant's submission that he understood that the reason for the TPP Arrangement in Taiwan was the difficulty of making payments from there to Fujian Dongya and the transaction costs, the SFC noted not only that those reasons were advanced by Fujian Dongya, and not by their customers and their third-party payers, but also that documents evidenced that there were various Taiwanese parties making third-party payments on behalf of overseas customers. In those circumstances, the SFC said that the applicant ought to have instructed the transaction team to follow up the issue. However, it noted that there was no follow-up action.[70]

(vi) The sanctions to be imposed on the applicant

49. In determining the appropriate sanction to impose on the applicant, the SFC said it had regard to the submissions made by the applicant, including: [71]

- the applicant's clean disciplinary record, of which the SFC said regard had been made in the NPDA;
- the fact that the applicant's failures did not lead to investor loss, because the listing application in question either lapsed or was returned by the SEHK, of which the SFC considered that it was not a significant mitigating factor given that it seemed fortuitous;
- the fact that the applicant did not dispute the SFC's preliminary conclusions and appeared to be remorseful; and
- that no allegation of dishonesty was made against the applicant.

50. Of the applicant's "voluntary decision to stay out of the industry until May 2019", the SFC said:[72]

(i) As evident from the press release publicizing our resolution with BIAL, the resolution was only concerned with our disciplinary action against the firm

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[70] Decision Notice, paragraphs 50-2. (AB-A/3/A132.)
[71] Decision Notice, paragraph 55. (AB-A/3/A134-A136.)
[72] Decision Notice, paragraph 55(e). (AB-A/3/A134-A135.)

and not any individuals (including yourself) who were involved in China Huinong's listing application.

(ii) After your departure from BIAL in March 2017, you were at liberty to apply for a transfer of your accreditation or, 180 days after your departure, to apply for a new licence, but you chose not to do so.

(iii) Your decision to stay out of the industry from March 2017 to May 2019 (**26-Month Period**), when you applied for a new licence, was made without consulting us or there being any interference on our part and, as you repeatedly emphasised in the Representations, voluntary.

(iv) Based on the Honorary (sic) Mr. Justice Hartmann's decision in *Sun Xiao and Securities and Futures Commission* (SFAT Application No. 3/2014), the application of the *de facto* suspension principle is limited to circumstances where an individual can show that he has obtained new employment but by reason of an SFC investigation, has been shut out of the industry. The principle does not, however, apply where the individual is not in the industry because he had voluntarily decided not to make an application for transfer of accreditation and/or a new licence.

(v) As your decision to stay out of the industry during the 26-Month Period was voluntary, we do not consider that you were under a "*de facto* suspension" during this time.

51. Of the applicant's complaint in his submissions of the "prolonged delay in the licence application" that he had made on obtaining employment with Sunfund Capital Limited and in order to return to the "licensed industry", in consequence of which delay the applicant asserted that by mutual agreement the employment had been terminated, the SFC said:[73]

> "We note, however, that the processing of your licence application dated 23 May 2019 with SCL might have taken longer than usual in light of the present disciplinary proceedings and it was eventually withdrawn in October 2019. This is one of the factors that we have taken into consideration in deciding to give you a 12-month reduction in the final sanction."

Subsequently, the SFC identified two other factors as being the fact that the applicant did not "dispute our preliminary conclusions and appear remorseful".[74] In the result, the SFC imposed on the applicant the prohibitions set out in paragraph 1 of this Determination.

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[73] Decision Notice, paragraph 55(f). (AB-A/3/A135.)
[74] Decision Notice, paragraph 57. (AB-A/3/A136.)

IV. The Notice of Application for Review

Summary of the grounds

52. As noted earlier, in addressing the grounds of review in the Notice of Application for Review it was stated at the outset that no challenge is made to the SFC's "findings on liability". Rather, it was asserted that "the review is concerned only with the sanction" imposed on the applicant. Of that issue, it was submitted that, "a 5-year prohibition is excessive and unfair taking into account all the circumstances of this case and the penalties imposed by the respondent in other disciplinary cases."[75] Of the circumstances relevant to the determination of the appropriate period of prohibition, Mr. Linning invited the Tribunal to have regard to four separate areas:

(i) the applicant's candid admissions in his written representations to the SFC of his failures, evidencing his remorse;
(ii) the delay by the SFC in taking disciplinary proceedings against the applicant;
(iii) the applicant's absence from the industry from March 2017 to May 2019; and
(iv) the length of prohibitions imposed on other sponsor principals.

Evidence at the hearing

53. At the hearing the Tribunal was provided with Hearing Bundles, which included a selection of documents which had been provided to the SFC by various parties and which were described in the List of Documents attached to the NPDA. They included documents and emails from CCBIC and BIAL together with documents from the SEHK relating to the listing application. None of the voluminous records of interview, including those of the applicant, were included in the Hearing Bundles. In addition, the Tribunal was provided with a witness statement of the applicant, dated 4 June 2020, and two witness statements of Mr. Hui Sai Lok, an Associate Director of the Enforcement Division ("ENF") of the SFC, dated 26 June and 2 July 2020 respectively, which addressed the circumstances in which the applicant was absent from the industry from March 2017 to May 2019. The Tribunal was informed that the parties had agreed that there was no need for cross-examination of those witnesses.

The applicant's evidence

54. In his witness statement, the applicant adverted to the assertion that he had made in his written representations to the SFC, namely that he had "stayed out of the

[75] Notice of Application for Review, paragraphs 4-5. (AB-A/4/A144.)

licensed industry for over two years on a voluntary basis because Mr. Tan Yueheng, the President of BOCOM…had told me that the SFC intended to keep me out of the industry for two years."[76] He went on to explain the context of that conversation as being the progress of the application made by BOCOM International Holdings Company ("BOCOM") for listing on the SEHK, which had been made in 2016 and of which BIAL was a joint sponsor. BOCOM was BIAL's parent company. In about the third Quarter of 2016, Mr. Tan had asked him to assume the leadership of the BIAL's sponsor team for that application. Thereafter, he was "immersed" in all aspects of the application. He said that there was "immense pressure" for the listing to be achieved by the end of March 2017, failing which BOCOM would have to provide audited financial figures for the financial year ending 31 December 2016. Delay in listing would ensue as a result.[77]

55. The applicant said that, in about February 2016, BIAL had received the first investigation Notice from the SFC in relation to China Huinong. On 17 January 2017, the first submission proof of BOCOM's Prospectus was filed with the SEHK. BIAL had informed the SEHK that "there were a number of ongoing investigations", the status of which the SEHK ought to check with the SFC.

56. The applicant said that the SEHK indicated to BIAL that BOCOM's application could not be heard by the Listing Committee until BOCOM had received "clearance from the SFC regarding the ongoing investigations".[78] He understood that "clearance" was critical to getting a listing hearing. ReedSmith Richards Butler ("RSRB") had been retained by BOCOM in respect of several SFC investigations of companies in the BOCOM Group and he worked with RSRB in formulating responses to the SFC.

57. In about February 2017, RSRB was tasked with approaching the SFC to seek to resolve its ongoing investigations in respect of companies in the BOCOM Group. In about mid-February 2017, he attended an initial meeting with the SFC in his capacity as head of the BIAL team. In consequence, there were internal discussions in BIAL about how to address the SFC's concerns about internal controls.[79]

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[76] The applicant's witness statement, paragraph 4. (AB-A/8/A187.)
[77] The applicant's witness statement, paragraph 8. (AB-A/8/A188.)
[78] The applicant's witness statement, paragraph 10. (AB-A/8/A188.)
[79] The applicant's witness statement, paragraph 12. (AB-A/8/A189.)

6 and 7 March 2017

58. On 6 March 2017, Mr. Tan informed him that the SFC wanted to meet Mr. Tan, with his working team:

> "…to discuss the prospects of a settlement with BOCOM, and that the SFC had specifically asked for me to be excluded from this meeting. Also, Mr. Tan said the SFC had indicated that it wanted to suspend my license for one year."

59. The applicant said that on 7 March 2017 Mr. Joe Chan, the head of Legal and Compliance at BIAL, told him in a telephone call that a meeting had been arranged between the SFC and BOCOM's senior management the following day.

8 March 2017

60. At about 5:30 p.m. on 8 March 2017, the applicant met Mr. Tan in the latter's office. Although he was not certain, he believed Mr. Chan was present. Mr. Tan told him that BOCOM would be settling the China Huinong investigation with the SFC by admitting their failures, for which they would be fined $15 million. Moreover, Mr. Tan added that the SFC had asked that the new controls to be put in place by BOCOM, as part of the settlement, include the removal of the applicant from his management position and that the SFC had added that it "wanted me to stay out of the industry for 24 months."[80] Mr. Tan apologised for having to remove the applicant and asked him to understand the company's object of listing BOCOM as soon as possible. For his part, the applicant said that he was left in no doubt that "the SFC wanted me out of BIAL and out of the industry."[81]

9 March 2017

61. In the early evening of 9 March 2017, whilst on business in Singapore, the applicant received an email in which he was informed that his management role as General Manager and Head of the Investment Banking Division of BIAL had been terminated with immediate effect and that BIAL had submitted a notification to the SFC to withdraw his license. Following his departure from BIAL, he had not retained a copy of the email. Having been informed by a WhatsApp message from Mr. Joe Chan that the email had been sent, there followed an exchange of WhatsApp messages between the two of them. Mr. Joe Chan said that the SFC had been informed that the applicant "cease to carry on regulated

[80] The applicant's witness statement, paragraph 14. (AB-A/8/A189-A191.)
[81] The applicant's witness statement, paragraph 15. (AB-A/8/A191.)

activity", but explained to the applicant that was "not termination nor resign". In a telephone conversation, Mr. Joe Chan explained those actions further by saying that either BOCOM agreed to remove the applicant or BOCOM would not get clearance from the SFC for its listing application.[82] The applicant said that at the same time he also engaged in an exchange of WhatsApp messages with Ms. Lily Yi, the personal assistant of Mr. Tan. In response to his observation that the withdrawal of his license had happened "so quickly", she had said that they were "under immense pressure". [83]

62. The applicant said that his exchanges with Mr. Joe Chan and Ms. Lily Yi re-affirmed what he had been told by Mr. Tan on 8 March 2017, namely that BOCOM was pressured by the SFC to remove the applicant from his management position.[84] For his part, the applicant said that:[85]

> "I wanted to do the right thing by BIAL and, at the same time, I wanted to avoid upsetting the SFC. I accepted what Mr. Tan had told me about the SFC wanting me to stay out of the industry for 24 months. As a result, I did not apply again for a license from the SFC until May 2019."

The SFC's evidence

63. In his witness statement, Mr. Hui said that, together with other colleagues, he had the conduct of the disciplinary action taken by the SFC against CCBIC, BIAL and the applicant. He addressed what he identified to be the "causal connection" asserted by the applicant between, on the one hand, his departure from BIAL in March 2017 and his decision not to apply for a licence until May 2019, and on the other hand, the listing application of BOCOM and the resolution of the SFC's disciplinary action against BIAL.

64. Having noted that BOCOM had submitted its listing application in about January 2017, at which time he was reviewing the evidence that had been obtained in the SFC's investigation into BIAL, Mr. Hui said that to the best of his knowledge ENF:[86]

> "...was not involved in reviewing BOCOM's listing application, nor has it sought the Applicant's removal from his positions at BIAL and/or BOCOM in the context of BOCOM's listing application (or otherwise for the purpose of the disciplinary action against BIAL...)"

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[82] The applicant's witness statement, paragraphs 16-7. (AB-A/8/A191-A192.)
[83] The applicant's witness statement, paragraphs 18-9. (AB-A/8/A192.)
[84] The applicant's witness statement, paragraph 21. (AB-A/8/A192.)
[85] The applicant's witness statement, paragraph 22. (AB-A/8/A192-A193.)
[86] Mr. Hui's witness statement, paragraph 7. (AB-A/9/A206.)

65. Further, he said that his colleagues in the Dual Filing Team of the Corporate Finance Division of the SFC, who were responsible for vetting BOCOM's listing application, "have confirmed that they have not requested BOCOM to remove the Applicant from its management team."[87]

66. Mr. Hui said that by the end of February 2017 his review of the evidence had led him to conclude that, in its conduct of the China Huinong listing application, BIAL had committed failures which warranted disciplinary action. In consequence, he recommended to the management of ENF that the SFC initiate "without prejudice" discussions with BIAL with a view to reaching an agreement, pursuant to section 201(3) of the SFO, to resolve the disciplinary action against BIAL. As a result, in early March 2017, he contacted Mr. Desmond Yu, a partner of RSRB who acted for BIAL, to arrange a without prejudice meeting. In the course of the discussions, in response to Mr. Yu's enquiry as to whether it would be appropriate for the applicant to attend the proposed meeting, Mr. Hui told Mr. Yu that, since the applicant had acted as the sponsor principal in the listing application, there might be a conflict of interest between the applicant and BIAL. For his part, Mr. Yu said that he would discuss the matter with BIAL.

8 March 2017

67. Mr. Hui said that the without prejudice meeting between the parties took place on 8 March 2017. Given the nature of the meeting, he said that he would not refer to what was discussed. However, he said that the applicant did not attend the meeting and asserted that:[88]

> "…the SFC has not, whether during the WP meeting or otherwise, requested the applicant to be removed from his management position at BIAL and/or BOCOM and that he stay out of the industry for 24 months (or for any period), or his employment with BIAL and/or BOCOM be terminated (let alone making any such request as a term or condition upon which the SFC would resolve its disciplinary action against BIAL."

15 March: BIAL- SFC's Press Release and Statement of Disciplinary Action

68. Mr. Hui said that the SFC and BIAL reached agreement on the terms on which the disciplinary action was resolved "shortly following" the without prejudice

[87] Mr. Hui's witness statement, paragraph 8. (AB-A/9/A206.)
[88] Mr. Hui's witness statement, paragraphs 13(a) and (b). (AB-A/9/A207.)

meeting. Then, on 15 March 2017 the SFC published a Press Release and a Statement of Disciplinary Action in respect of BIAL. He invited the Tribunal to note that it was apparent from those documents that the disciplinary action was confined to BIAL and that the sanction imposed by the SFC did not include: [89]

> "any term or condition pertaining to the termination, removal or suspension of the Applicant's management position, employment and/or licence (let alone the imposition of such term or condition, whether for a duration of two years or otherwise)."

The alleged delay by the SFC in commencing proceedings against the applicant

69. Of the statement made on behalf of the applicant in the Notice of Review that, given that BIAL and CCBIC had been publicly disciplined in March 2017 and July 2018 respectively, there was no explanation for the delay in commencing proceedings against the applicant until August 2019 and the concern expressed that the commencement of proceedings might have been "triggered" by the applicant's re-application for a licence in 2019, Mr. Hui said the latter concern was not justified. The issuance of the NPDA was not triggered by the applicant's re-application.[90]

70. Of the fact that the NPDA had not been issued until August 2019, Mr. Hui said that following the completion of the disciplinary actions against BIAL and CCBIC, the latter in July 2018, in order to determine the applicant's liabilities for the failures there identified and to determine the appropriate sanctions it had been necessary to re-examine the evidence from the perspective of the applicant. The material was voluminous. As evidence of that, he invited the Tribunal to note the ambit of the material identified in the List of Documents attached to the NPDA. Furthermore, he said that:[91]

> "The fact that the Applicant's failures span across two listing applications also had an impact on the time taken to prepare the NPDA. That differentiated the consideration of his liability and the appropriate sanction from our previous disciplinary actions against sponsor principals who were involved in only one listing application, as it required deliberations on the Applicant's liability and the appropriate sanction in totality."

71. In addition, Mr. Hui said that, in the period July 2018 to May 2019, he and his colleagues, who shared the conduct of the disciplinary proceedings against the applicant,

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[89] Mr. Hui's witness statement, paragraph 13(c). (AB-A/9/A207.)
[90] Mr. Hui's witness statement, paragraph 18. (AB-A/9/A208.)
[91] Mr. Hui's witness statement, paragraph 22. (AB-A/9/A209-A210.)

were also involved in handling other cases of "comparable importance and priority", involving a total of six sponsor firms and three sponsor principals who had been involved in the listing applications of China Forestry, China Metal and Tianhe Chemicals Group Limited. As evidencing the significance of those cases, he said that the aggregate total fines imposed by the SFC were in excess of $800 million.[92]

V. The applicant's submissions

(i) The applicant's candour and contrition

72. Mr. Linning invited the Tribunal to note that in his written representations to the SFC, having acknowledged that the information set out in the NPDA was "extensive and in-depth", the applicant made it clear that he did not dispute "the preliminary conclusions as set out in item 100." In its Decision Notice, the SFC described that concession of the applicant as an acceptance that he was "guilty of misconduct" and that the issue of whether he was fit and proper to carry on regulated activities was called in to question. In his oral submissions, Mr. Linning invited the Tribunal to note that paragraph 100 of the NPDA made specific reference to the SFC's "preliminary view that you are in breach of the applicable provisions as set out in paragraph 29 above". That paragraph asserted that the breaches/failures committed by CCBIC and BIAL "are attributable to the neglect on your part, in your capacities as a sponsor principle, a responsible officer and senior management of CCBIC and BIAL" of his "supervisory and managerial duties" and stipulated his failures (See paragraph 13 of this Determination.) Mr. Linning suggested that the applicant was being forthright in admitting some very serious allegations.

73. Then, Mr. Linning suggested that, by admitting that he had failed in his duties as a sponsor principal in a number of significant respects, the applicant took personal responsibility for his actions. For example, the applicant accepted that in the Fujian Dongya listing application the failure to complete due diligence on the independence of third-party payers was "a result of my failure to supervise properly".[93] Also, the applicant accepted that he had "failed to ensure that the due diligence processes were executed according to plan and documented as required."[94] In similar vein, the applicant said of his decision to submit the listing application for China Huinong, "I truly regret my decision and should have taken more time to review the due diligence process with the transaction team before

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[92] Mr. Hui's witness statement, paragraph 23. (AB-A/9/A210.)
[93] AB-A/2/A88.
[94] AB-A/2/A87.

submitting the application especially when it is clear I was not the Sponsor Principal supervising the deal throughout the due diligence process."[95] Mr. Linning suggested that it was clear that the applicant was genuinely remorseful for his failures. In those circumstances, he invited this Tribunal to consider whether adequate weight had been given by the SFC to the applicant's acceptance of culpability and his remorse in determining the appropriate sanction to be imposed, in particular the length of the prohibition.

(ii) Delay in taking disciplinary proceedings against the applicant

74. Of the delay in bringing and concluding the proceedings against the applicant, the Tribunal was reminded that, in respect of the latter, there had been a delay of 3 ½ years from the time that the applicant received the first Notice from the SFC, pursuant to section 182(1) of the SFO, dated September 2016, until he received the Decision Notice, dated 14 April 2020. In the meantime, on 15 March 2017 BIAL had been reprimanded and fined $15 million by the SFC, for failing to discharge its duties as a sponsor in relation to the listing application of China Huinong and, on 9 July 2018, CCBIC had been reprimanded and fined $24 million, for failing to discharge its duties as a sponsor in relation to the listing application of Fujian Dongya. Only after the applicant had applied for the issue of a regulatory licence, on 23 May 2019, was the applicant served with the Notice of Proposed Disciplinary Action, dated 15 August 2019. There was no explanation for the delay in bringing the proceedings against the applicant. The delay caused the applicant unnecessary mental suffering by leaving him anxious and uncertain as to what might happen to him.[96]

75. In his written submissions, dated 18 August 2020, Mr. Linning submitted that, having resolved the disciplinary concerns with BIAL on 15 March 2017, there was no reason why the SFC could not have proceeded against the applicant for his role in the listing application of China Huinong then, or at least sooner than August 2019. There was no apparent necessity to await the resolution of disciplinary concerns with CCBIC arising out of the listing application of Fujian Dongya. In his oral submissions, Mr. Linning suggested that it was apparent from the List of Documents (China Huinong) attached to the NPDA that, save for the record of interview conducted of the applicant by the SFC on 3 May 2018, by 15 March 2017 the SFC had assembled all information relevant to its proceedings against the applicant arising out of his conduct in the listing application of China Huinong.

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[95] AB-A/2/A89.
[96] Notice of Application for Review, paragraph 6. (AB-A/4/A147.)

He pointed out that the SFC's Press Release, dated 15 March 2017, reprimanding BIAL stated, "Due to negligence on the part of BIAL's transaction team, BIAL did not disclose the existence of the Connected Guarantees or that parties related to China Huinong had guaranteed its short-term loans."[97] The applicant was the sponsor principal in charge of supervision of the transaction team. By 15 March 2017, the SFC had available to it evidence to support proceedings against the applicant, but chose not to initiate proceedings until 15 August 2019.

76. Mr. Linning acknowledged that it was apparent from the List of Documents (Fujian Dongya) that the SFC was still gathering evidence generally until July 2017 and accepted that interviews had been conducted by the SFC of the applicant and Mr. Terry Tam as late as 3 and 8 May 2018 respectively. In his oral submissions, Mr. Linning acknowledged that the uncertainty as to what was to become of him suffered by the applicant was in a lesser category than a person waiting to find out if criminal proceedings were to be initiated against him, rather than proceedings in the Market Misconduct Tribunal only. The applicant's concerns were as to his standing in the community and his livelihood.

(iii) The applicant's absence from the industry from March 2017 to May 2019

77. Of the fact that the applicant had been absent from the industry for more than two years from March 2017, when BIAL removed the applicant from his positions as General Manager, Managing Director and Head of Investment Banking Division on 9 March 2017 and surrendered the applicant's licence to the SFC with effect from 13 March 2017, it was asserted that the applicant had conducted himself in that way because of what he had been told on or about 8 March 2017 by the Chairman of BIAL, Mr. Tan Yueheng, namely that the SFC wanted him removed from those positions and what he had been told "by members of senior management" of BIAL at that time, namely that the SFC "either intended to ban him for two years or at least wanted him to stay out of the market for two years on a voluntary basis." It was contended that it was in those circumstances that the "applicant accepted what BIAL had told him" and, in consequence, "did not apply for a licence again until May 2019."[98]

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[97] AB-A/9/A212.
[98] Notice of Application for Review, paragraph 7-7.5. (AB-A/4/A147-A149.)

78. In that context, Mr. Linning submitted that, in determining the appropriate sanction to be imposed on the applicant, the SFC had not given sufficient consideration to the "circumstances of the applicant's removal from his senior position at BIAL, which led to his subsequent absent from the market for over two years" and the impact that had on his income and reputation in the industry.[99]

79. In his written submissions, dated 18 August 2020, Mr Linning said that he did not submit that the applicant's absence from the industry for the period of more than two years from March 2017 occurred because "the SFC's processing time resulted in a *de facto* suspension." Rather, it came about "as a result of his reliance on information given to him by his then employer, BIAL", so that it was the applicant's "honest belief" that the SFC had "told his employer that it wanted him out of the industry for two years." It followed that the applicant's absence from the industry was not "voluntary", in the sense discussed in the SFAT's determination in *Sun Xiao v SFC*.[100] Mr. Linning submitted that the SFC ought to have given the applicant "some credit" for the period that he was out of the industry.

80. Of the applicant's assertion that he honestly believed what he had been told by Mr. Tan, in particular that the latter had been told that the SFC wanted him out of the industry for two years, in an exchange with the Chairman, as to whether such a belief was reasonable, Mr. Linning acknowledged, "Perhaps not". Nevertheless, he reiterated that was the applicant's belief, inviting the Tribunal to note that this was a time of "great personal turmoil."

(iv) The length of prohibitions imposed by the SFC in other cases

81. In support of his submission that the prohibitions imposed on the applicant were excessive in length, having regard to all the circumstances and, in particular, to the penalties imposed on other individual sponsor principals in other cases Mr. Linning drew the Tribunal's attention to a number of other cases:[101]

- *SFAT v Wan Ten Lok and Yan Kwok Ting, Sunny*[102], in which Mr. Wan and Mr. Yan had been prohibited by the SFC from re-entering the financial services industry for 6 and 4 years respectively. Mr. Wan had been found

[99] Notice of Application for Review, paragraph 7.6. (AB-A/4/A150.)
[100] SFAT 3 of 2014, 22 May 2015.
[101] Notice of Application for Review, paragraph 8-8.7. (AB-A/4/A150-A152.)
[102] SFAT 8 & 9 of 2009, 7 October 2011.

culpable of providing the SEHK with misleading and inaccurate submissions, in response to their enquiries, giving the unjustified impression that Core Pacific-Yamaichi Capital Limited ("CPYC"), had performed sufficient due diligence on Tungda Innovative Lighting Holdings Limited ('Tungda"), whose listing it successfully sponsored on the Growth Enterprise Market ("GEM,") of the SEHK. It was also alleged that Mr. Wan, with the assistance of Mr. Yan, produced to the SFC a substantial volume of documents, which purported to be the records of CPYC, but were in fact fabricated.

- On 7 June 2012, the SFC revoked the licence of Mr. Hong Hui Lung, the former managing director of Mega Capital (Asia) Company Limited ("Mega"), to act as a representative and approval for him to act as a responsible officer of Mega for failing to discharge his duties in that latter capacity and as a sponsor principal in the listing application of Hontex International Holdings Co Ltd ("Hontex"), which had resulted in the latter's listing on the SEHK on 24 December 2009.[103] Hontex's shares were suspended from trading on 30 March 2010 on the direction of the SFC and on 20 June 2012 Hontex offered to repurchase shares subscribed for in the IPO or purchased in the secondary market, acknowledging that it was reckless in allowing materially false and misleading information to be included in its Prospectus. Amongst the main findings of the SFC was that Mr. Hong refused to accept his responsibilities as a sponsor principal for the supervision of the transaction team, which responsibility he tried to shift to another sponsor principal/responsible officer, Mr. Wong Tak Chung. On 20 November 2012, the SFC banned Mr. Wong Tak Chung for 3 years from re-entering the industry for his failures in relation to the Hontex listing.[104]
- On 16 September 2014, the SFC suspended Mr. Eric Shum Kam Chi, from all regulated activities and withdrew approval for him to act as a responsible officer for three years for serious deficiencies in the sponsor work relating to the listing of Sino-Life Group Limited ("Sino-Life") on the GEM board of the SEHK by Sun Hung Kai International Limited, in respect of which application he was sponsor principal. The SFC found that Mr. Shum was responsible for failing to conduct proper due diligence on Sino-Life's business and had placed undue reliance on work delegated to external experts.[105]
- China Forestry Holdings Company Ltd ("China Forestry"), was listed on the SEHK on 3 December 2009. Trading in the shares of China Forestry was suspended on 26 January 2011 and, having been wound up, listing of its shares was cancelled on 24 February 2017. Standard Chartered Securities (Hong Kong) Limited and UBS AG and UBS Securities Hong Kong Limited ("UBS") were joint sponsors of the listing application of China Forestry. On

[103] SFC Press Release, 7 June 2012.
[104] SFC Press Release, 20 November 2012.
[105] SFC Press Release and Statement of Disciplinary Action, 16 September 2014.

17 July 2018, the SFC prohibited Mr. Joseph Hsu Kar Hing,a former responsible officer and sponsor principal of Standard Chartered Securities, in charge of China Forestry's listing application in 2009, from re-entering the industry for 3 years for failing to discharge his duties in those capacities.[106] On the same date, the SFC suspended Mr. Cen Tian, an executive officer of UBS AG and a sponsor principal in the supervision of the China Forestry listing application, for two years for failing to discharge his supervisory duties in the latter capacity.[107]

- China Merchants Securities (HK) Company Limited ("CMS") acted as a joint sponsor, together with UBS AG and UBS Securities Hong Kong Limited, in the listing application of China Metal Recycling (Holdings) Limited ("China Metal"). On 22 June 2009, China Metal was listed on the Main Board of the SEHK. Trading in its shares was suspended from 20 January 2013. On 26 February 2015, on the SFC's petition, the Court of First Instance ordered China Metal to be wound up in the public interest. On 27 February 2019, the SFC suspended the licence of Mr. Wu Yinong for 18 months for his failure to discharge his duties as a responsible officer and sponsor principal of CMS in the listing application of China Metal.[108]

82. Mr. Linning asserted that all of the companies concerned in the cases to which he had drawn the Tribunal's attention had been listed either on the Main Board or GEM of SEHK. In so far as they had failed, that was because of shortcomings in respect of due diligence undertaken by the respective sponsors and their sponsor principals. In the cases of China Forestry and China Metal, members of the public, who had bought their shares, held shares which were now worthless. Holders of Hontex shares had been able to recover the equivalent of their initial investment only because of the intervention of the SFC.[109] In that context, Mr. Linning reminded the Tribunal that neither Fujian Dongya or China Huinong had been listed, the former's application having lapsed on 22 September 2014 and the latter's application having been refused by the SEHK in October 2015. No harm was caused to the public.[110]

83. The Tribunal was invited to note that, with the exception of Mr. Wan of CYPC, who had been banned for 6 years, and of Mr. Hung of Mega, no sponsor principal has been banned or suspended for a period of more than three years. He submitted that Mr. Wan's conduct was more serious than that of the applicant, in that it involved the creation

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[106] SFC Press Release, 17 July 2018.
[107] SFC Press Release and Statement of Disciplinary Action, 14 March 2019.
[108] SFC Press Release, 27 February 2019.
[109] Notice of Application for Review, paragraph 8.8. (AB-A/4/A152.)
[110] Notice of Application for Review, paragraph 8.11. (AB-A/4/A153.)

of fabricated documents. His conduct was dishonest. Yet, in the NPDA, the SFC had indicated that it was minded to ban the applicant for 6 years.

84. Mr. Lininng suggested that the revocation of Mr. Hung's licence, arising from his conduct in the Hontex listing, was to be viewed as an outlier: he played a central role in the listing, denied all responsibility as a sponsor principal; and regard was to be had to the necessity of the SFC to rescue the interests of the minority shareholders.

85. The Tribunal was reminded that the SFC acknowledged specifically that it did not allege that the applicant had acted dishonestly.[111] Mr. Linning submitted that the distinction between dishonest conduct and conduct which, whilst it falls below the standards of the Code of Conduct, is a difference that must be reflected in the sanctions imposed.

86. In the result, whilst he acknowledged that the applicant's failures were serious, nevertheless Mr. Linning contended that they were less serious than the conduct of those reprimanded in the listing applications of Tungda, China Forestry and China Metal.

VI. The SFC's submissions

(i) The seriousness of the applicant's conduct

87. Mr. Suen S.C. submitted that in determining the seriousness of the applicant's conduct regard was to be had to the roles he played in each listing application and to the diverse and serious breaches of his duties in those applications. The applicant played a pivotal role: he was the sponsor principal, representative officer and a member of the management of each sponsor. He signed all the key documents, including the Sponsor's Undertaking, submitted to the SEHK and SFC. The two listing applications were separate and discrete, involving different clients, sole sponsors and transaction teams.

(ii) Regulatory objective

88. Mr. Suen suggested that, in determining the appropriate sanction to be imposed on the applicant, it was necessary to recognise the regulatory objective of regulating sponsors and their principals in protecting the integrity of the market and safeguarding the interests of the investing public. Sponsors played a pivotal role in bringing

[111] Decision Notice, paragraph 55(h). (AB-A/3/A136.)

listing applications to market and in carrying out due diligence to provide investors with accurate information about companies to be listed. Regulatory sanctions serve to deter sponsors and their principals from falling below the requisite standard and thereby protected the investing public. In his oral submissions, Mr. Suen relied on the observations of this Tribunal in *Peter Leung v SFC*[112], of which Hartmann NPJ was Chairman, cited by the SFC in its Decision Notice[113], in submitting that in determining the appropriate sanction to impose, the public interest was greater than the personal interests of a person participating in the industry.

(iii) The duties of a sponsor principal

89. In the context of determining the applicant's culpability for his conduct in the two listing applications, Mr. Suen drew the attention of the Tribunal in particular to paragraph 1.3.3 of the Sponsor Guidelines, the nub of which is set out at paragraph 38 of this Determination.[114]

(iv) The role of the applicant in the listing applications

Fujian Dongya

90. Of the role and involvement of the applicant in the listing application of Fujian Dongya, Mr. Suen pointed out that the applicant had been involved from the outset, when the Engagement Letter was signed by Fujian Dongya and CCBIC on 18 May and 26 June 2013 respectively,[115] until he left employment with CCBIC on 27 June 2014. The issue of conducting due diligence in respect of payments received by Fujian Dongya from its customers was raised in emails circulated to the applicant as early as 20 June 2013.[116] In an email, dated 28 September 2013, circulated amongst those working on the transaction, the applicant was provided with a "draft DD plan in relation to third party payment and receipt arrangement".[117] Similarly, in an email, dated 28 October 2013, a "revised

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[112] *Peter Leung v SFC* (SFAT 7 of 2013; 23 May 2014) at paragraph 43:
"... the essential issue is the need to maintain among members of the investing public a well-founded confidence in the securities industry. That being the case, the reputation of the securities industry in Hong Kong is more important than the fortunes of one individual member. It is not the purpose of the suspension to bring hardship to an individual and his family. But if such hardship is likely, it does not make an order of suspension a wrong order if in all other respects it is the correct order to make."

[113] Decision Notice, paragraph 55(g). (AB-A/3/A135-136.)

[114] AB-B/2/B17.

[115] CCBIC letter to the SFC, 27 May 2016. (NAB-A/4/A88.)

[116] NAB-C/3/C5-C14.

[117] NAB-C/6/C80-C81.

confirmation letter", in which overseas customers were to be asked to confirm that they were "independent from the company", was circulated between those parties.[118]

11 Steps Due Diligence Plan

91. By an email, dated 23 December 2013, the parties were provided with the '11 Steps Due Diligence Plan', which was to be provided to Fujian Dongya for them to provide information in respect of the due diligence work on the third party payment arrangements.[119] In an email circulated to the parties, dated 22 January 2014, Mr. Terry Tam described the third party payment arrangement as a "critical topic" and expressed concern that it might "make the case not suitable for submission of A1."[120] Of one of the explanations advanced by Fujian Dongya for the existence of the arrangement, Mr. Terry Tam said that in "places like Vietnam or Taiwan, it is simply impossible or very costly to make overseas direct payment." However, as Mr. Suen pointed out, the plausibility of that explanation was undermined by an Excel spreadsheet provided by Fujian Dongya to Mr. Terry Tam in an email, dated 18 January 2014, which evidenced Taiwanese third-party payers making payments to Fujian Dongya for other overseas customers.[121] In reprimanding CCBIC, the SFC identified the failure of CCBIC to follow up on the conflict between the explanation of Fujian Dongya and the evidence available to them as a 'Red Flag' which required a follow-up.[122] In the NPDA, the SFC addressed that issue under the rubic 'Red Flag 4'.[123]

92. The SFC had noted that three of the proposed steps in the 11 Steps Due Diligence Plan had not been conducted (Step 3: arranging all customers and third-party payers to sign a letter of confirmation; Step 4: interviewing those customers who could not terminate the third-party payment arrangement; and Step 6: interviewing third-party payers) and two of the steps of had only been partially completed (Step 5: arranging customers who could not terminate the third-party arrangement to sign an indemnity agreement, of whom only 111 of 205 had done so; Step 7 performing independent background checks on

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[118] NAB-C/9/C146.
[119] NAB-C/10/C185-C206.
[120] NAB-C/11/C207-C208.
[121] NAB-C/13/C213 and following.
[122] AB-A/1/A52-A53.
[123] NPDA, paragraphs 53 and 56. (AB-A/1/A16-A17.)

selected third parties, which checks did not include a company search on shareholders and directors".)[124]

93. Mr. Suen pointed out that, notwithstanding that state of affairs, the applicant had signed the Memorandum, dated 19 March 2014, sent to CCBIC's Transaction Approval Committee, in which he sought their approval to submit to the SEHK the A1 application on behalf of Fujian Dongya, stating that in the opinion of the Deal Team the basic requirements for submission were met. Further, the Memorandum asserted "We have not discovered any material issues in the due diligence process".[125] There is no dispute that the applicant attended the meeting of the Transaction Approval Committee on 21 March 2014. Of the issue of third-party payments to Fujian Dongya, the minutes noted that CCBIC explained, "this payment method is because of the foreign exchange controls on payments for overseas businesses and to improve payment efficiency."[126]

94. The applicant signed the letters in which CCBIC submitted the Form A1 and other documents to the SEHK on behalf of Fujian Dongya, dated 21 March 2014, including the Sponsor's Undertaking, in which CCBIC undertook to use all reasonable endeavours to ensure that all information provided to the SEHK and SFC "it is true, accurate, complete and not misleading and all material respects." [127]

95. Finally, Mr. Suen invited the Tribunal to note that in a letter to the SFC, dated 18 October 2016, CCBIC described the applicant's role in the Fujian Dongya listing application as being, "the Principal and key decision maker in the project", who was "responsible for client relationship, overall planning in supervision including reviewing of the standard and extent of due diligence ..."[128]

China Huinong

96. Of the applicant's involvement in the listing application of China Huinong, Mr. Suen acknowledged that, although BIAL had been appointed its sponsor on 8 September 2014, the applicant had not been appointed a joint sponsor until on or around 31 October 2014. Nevertheless, Mr. Suen invited the Tribunal to have regard to the

[124] AB-A/1/A11 (paragraph 44); and AB-A/1/A38-A39 (paragraph 5).
[125] NAB-A/2/A34 and A71.
[126] NAB-A/3/A82-A85.
[127] NAB-B/2/B3-B5 and NAB-B/2/B18-B20.
[128] NAB-A/6/A149.

applicant's involvement with the matter in early September 2014. By an email, dated 2 September 2014, the applicant informed Ms. Lisa Lim that he was to meet with China Huinong that afternoon, whom he described as "looking for an accelerated A1 submission". Whilst acknowledging that it was very difficult to sell micro-finance transactions, he said that BIAL might take them on if the Company "agrees to a minimum", adding "it will be purely for league table and income purposes. Hope to frontload the sponsor fee for this year." For her part, Ms. Lisa Lim said that she had met the company previously but had "turned them down due to size and the business." She added, that "First Shanghai is the sponsor and were supposed to submit A1 yesterday but backed down."[129] In an email copied to Ms. Lisa Lim, dated 3 September 2014, the importance of which was stipulated to be "High", the applicant stated "minimum fee HK $10 million. Don't forget this most important clause."[130]

97. Mr. Suen invited the Tribunal to note that the applicant had signed and filed with the SEHK the Form A1 application on behalf of China Huinong on 10 November 2014, notwithstanding that he had only been a joint sponsor principal with Mr. Griffin Tse for the week from 31 October until 7 November 2014, when the latter resigned leaving the applicant as the sole sponsor principal.

98. Of the statement by the SFC in the NPDA that there was evidence that BIAL had won the China Huinong mandate because it held out that it could file the A1 within eight weeks[131], in its Decision Notice, the SFC noted that the applicant acknowledged in his written representations to the SFC[132] that BIAL had represented that it would do so, but asserted that was only if the due diligence process could be completed and that he had not made such a promise.[133]

99. Mr. Suen reminded the Tribunal that the issue of Connected Guarantees, relevant to the listing application, had been flagged in an email, dated 28 October 2014, from Mr. Terry Tam and circulated to those working on the listing application, including the applicant. Also, Mr. Suen pointed to an exchange of emails on the afternoon of 10 November 2014 between the applicant and the Compliance Department of BOCOM, in

[129] NAB-F/1/F1-F2.
[130] NAB-F/2/F3.
[131] AB-A/1/A22 at paragraph 77(a).
[132] AB-A/2/A89.
[133] AB-A/3/A130 at paragraph 44.

which the former had been asked in an email sent at 16:16 to provide "your verification notes for review before submission of A1". In a reply by email sent at 5:47 p.m., having adverted to an earlier discussion in which he had said that it was not typical for such material to be available for inspection at the time of submission of the Form A1 and that he understood "your concerns in light of recent questions from the SFC in relation to the quality of due diligence and verification work", the applicant went on to say that he had been "principally involved in the transaction" and had "gone through the due diligence process, the work done and the verification process for the transaction", asserting that the work done "will meet the standard required."[134](See paragraph 43 of this Determination.) The SEHK acknowledged receipt of the A1 submission at 5:38 p.m. on 10 November 2014.[135]

100. Mr. Suen pointed out that in its Decision Notice, the SFC had rejected that account as being contradicted by what the applicant had said in his written representations as to his other commitments, namely that he was "more than fully occupied and travelling extensively"[136] during the time the transaction was being executed, but that nevertheless he had "proceeded to sign as sponsor principal on the transaction without having fully reviewed the due diligence files."[137]

101. Mr. Suen suggested that an email, dated 20 November 2014, from the applicant to Mr. Terry Tam, evidenced the applicant's real priorities, namely boosting revenue. The applicant asked the latter to take up responsibility for a new project and inviting him to shift additional responsibilities for the China Huinong application to others, acknowledging that BIAL were a bit "short handed at the moment". Nevertheless, he described the new project as a "possible high revenue and profile deal for us".[138]

(v) Grounds relied on by the applicant

(i) The applicant's candour and contrition

102. Of the submission on behalf of the applicant that in determining the appropriate sanction the SFC had failed to give sufficient weight to the applicant's frank acceptance that he had been negligent, failed to meet his professional obligations and that

[134] NAB-F/18/F26.
[135] NAB-F/19/F31.
[136] AB-A/2/A92.
[137] AB-A/3/A129 at paragraph 37.
[138] NAB-F/20/F32.

he expressed remorse, Mr. Suen that the SFC had taken remorse into account. It said as much in the Decision Notice, noting that the applicant did "not dispute our preliminary conclusions and appear remorseful". The SFC said that having regard to those factors, together with the delay in processing the applicant's licensing application, dated 23 May 2019, it reduced the proposed period of prohibition by 12 months.[139] Secondly, Mr. Suen submitted that the applicant was not accepting full responsibility. The applicant had repeatedly blamed Mr. Griffin Tse and Mr. Terry Tam for their failures, suggesting that his own failure lay in trusting in and over-relying on them. The SFC rejected that submission, "...it does not justify or lessen the seriousness of your conduct. It was unacceptable for you to delegate your duties to your subordinates to the point of disregarding/neglecting your own responsibilities as a sponsor principal in reviewing, assessing and supervising the due diligence work."[140] Thirdly, the SFC rejected the clarifications and explanations advanced by the applicant in respect of his own conduct, noting that "some of your clarifications are either inconsistent with or not supported by the contemporaneous evidence."[141] Fourthly, the applicant's acceptance of his culpability was made in the face of "overwhelming evidence" against the applicant. There was no reason to afford more weight to the applicant's frankness and remorse.

(ii) Delay in bringing disciplinary proceedings against the applicant

103. Mr. Suen submitted that there was no unreasonable delay by the SFC in bringing disciplinary proceedings against the applicant. The SFC's investigations concerned two separate listing applications. Of the fact that, although SFC reached a settlement with BIAL announced on 15 March 2017, proceedings against the applicant for his conduct at BIAL in the listing application of Fujian Dongya had not been initiated until service of the NPDA on 15 August 2019, Mr. Suen invited the Tribunal to note that the SFC's investigations in respect of CCBIC were ongoing until a settlement was reached and announced on 9 July 2018. He suggested that it was better for the SFC not to have "vexed" the applicant with two separate disciplinary actions. In his oral submissions, Mr. Suen suggested that it was "not unreasonable" for the SFC to determine that it was more appropriate to present allegations of the applicant's failures in the two listings at the same time, so that regard could be had to the totality of the misconduct in determining the appropriate sanction to be imposed.

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[139] Decision Notice, paragraph 57. (AB-A/3/A136.)
[140] Decision Notice, paragraph 26. (AB-A/3/A125.)
[141] Decision Notice, paragraph 30. (AB-A/3/A127.)

104. Of the delay, from 9 July 2019 to the serving of the NPDA on the applicant on 15 August 2019, Mr. Suen invited the Tribunal to note that the settlements reached with BIAL and CCBIC did not require the SFC to condescend with particularity to identifying the evidence of liability of any individual. By contrast, that process was necessary in formulating the NPDA. Further, it involved doing so in respect of two separate listing applications. In addition, Mr. Suen pointed to the fact that in doing so the SFC had regard to the multiple interviews conducted of the applicant, the last of which was conducted on 3 May 2018, in identifying what it determined to be inconsistencies in his accounts.[142] However, he conceded that whilst there were multiple references in the NPDA[143] to the record of interview conducted on 3 May 2018 in relation to Fujian Dongya, there was no such reference in respect of China Huinong. Finally, Mr. Suen relied on the explanations advanced by Mr. Hui, namely that he and his colleagues, who were involved in the investigations of the applicant, were also involved in other investigations of comparable importance and priority.

(iii) The absence of the applicant from the industry for two years

105. Mr. Suen submitted that, even on his own case, the applicant's absence from the industry for over two years until May 2019 was voluntary. He invited the Tribunal to note that the applicant accepted that his removal by BIAL in March 2017 "did not form part of the disciplinary action taken against BIAL" and that he had no communication with the SFC about his removal.[144] Further, the applicant acknowledged that he was "not privy to discussions" the SFC had with CCBIC and BIAL.[145] The SFC's Press Release, which set out the reasons for its reprimand of BIAL, made no reference to the applicant, let alone that it was required he be removed from BIAL. Mr. Suen suggested that the applicant knew that, although a settlement had been reached between the SFC and BIAL, there was no settlement deal for him. That much was apparent from the applicant's witness statement, in which he asserted that in their conversation on 8 March 2017 Mr. Tan had answered in the negative his enquiry as to whether the SFC had offered to settle with the applicant.[146]

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[142] NPDA, paragraphs 85-6. (AB-A/1/A26-28-9.)
[143] NPDA, paragraph 40, footnotes 26,27,29 and 33; paragraph 46, footnote 48; paragraph 53, footnotes 53, 56, 57, 60, 61 and 64; paragraph 59, footnote 67; paragraph 60, footnote 69; paragraph 62, footnote 71; paragraphs 68-70, footnotes 74 -77; and paragraph 73, footnote 79. (AB-A/1/A10-A21.)
[144] Notice of Review, paragraph 7.4. (AB-A/4/A149.)
[145] The applicant's written representations to the SFC, paragraph 1. (AB-A/2/A84.)
[146] The applicant's witness statement, paragraph 14. (AB-A/8/A190.)

Given that, following an initial interview by the SFC on 30 September 2016, the applicant had been interviewed again on 17 and 20 February and 8 March 2017, Mr. Suen submitted that it must have been obvious to the applicant that the SFC was continuing its investigations into the applicant's conduct in respect of both listings and that the SFC might bring disciplinary action against him. In any event, settlement by the SFC with BIAL did not preclude disciplinary action against CCBIC or against the applicant.

106. In addition, Mr. Suen drew attention to the exchange of WhatsApp messages on 9 March 2017 between the applicant and Mr. Joe Chan, described in the applicant's witness statement, in which the applicant said of his removal from BIAL, "This won't have happened if the company weren't going for listing. At least would have been later",[147] adding in a subsequent message on 13 March 2017 "My license has been terminated by the company, not suspended by the SFC."[148]

107. Mr. Suen invited the Tribunal to note the evidence of Mr. Hui that the SFC had never requested the removal of the applicant in the context of BOCOM's listing application or otherwise for the purposes of disciplinary action against BIAL.[149] Of the applicant's assertion that it was his "honest belief" that the SFC wished him to stay out of the industry for two years, Mr. Suen pointed to the concession made by Mr. Linning that it was "perhaps not" reasonable to hold such a belief. The SFC's Press Release in respect of BIAL stated that the initial failure to disclose the Connected Guarantees relevant to China Huinong "was due to negligence on the part of BIAL's transaction team". So, as head of the transaction team, the applicant knew the SFC were "coming after him". In any event, he knew the SFC's separate investigation into CCBIC was ongoing. Moreover, there was no dispute that the applicant had not communicated with the SFC on that issue at all. In those circumstances, the applicant was acting voluntarily and not in response to any action by the SFC.

(iv) The length of the prohibitions imposed by the SFC in other cases

108. Of the submission that the five-year prohibition imposed on the applicant was excessive having regard to previous disciplinary decisions, Mr. Suen invited the Tribunal to note that the prohibition imposed on the applicant resulted from his conduct in

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[147] AB-A/8/A197.
[148] AB-A/8/A198.
[149] Mr. Hui's witness statement, paragraphs 7-14. (AB-A/9/A206-A208.)

two separate and discrete listing applications. The previous disciplinary decisions relied on by the applicant concerned conduct in respect of one listing application only. Nevertheless, in some of those cases prohibitions of three years had been imposed.[150] In any event, he suggested that each of those cases turned on their own facts. Mr. Suen submitted that it was misconceived for the applicant to draw the attention of the Tribunal to the prohibition of 6 years imposed on Mr. Wan Ten Lok, inviting the Tribunal to note that a six-year prohibition of the applicant was the initial starting point identified by the SFC in the NPDA. Mr. Wan's misconduct arose in one listing application only.

109. Mr. Suen suggested that the fact that Fujian Dongya and China Huinong were not successful in their respective listing applications, so that in the event no harm was caused to the investing public, was entirely fortuitous. The failure of those applications was the result of actions of the SFC/SEHK, not because the deficiencies had been remedied by the applicant or the respective sponsor. As a result, the applicant was entitled to little credit.

110. In the result, Mr. Suen invited the Tribunal to dismiss the application for review.

A CONSIDERATION OF THE SUBMISSIONS

The nature of the proceedings

111. There is no dispute that the Tribunal is required to make a full merits review.[151] Section 218(7) of the SFO provides that the civil standard of proof shall apply in review proceedings. The burden is on the SFC to establish its case.

The seriousness of the applicant's conduct

112. I am satisfied that the multiple failures and breaches of duty that the SFC found against the applicant as evidenced in the Decision Notice, in which the SFC affirmed in many respects its preliminary view taken in the NPDA, evidence repeated serious, negligent misconduct by the applicant over a sustained period of time in both listing applications.

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[150] Mr. Wong Tang Chung; SFC Press Release, 20 November 2012. Mr. Eric Shum Kam Chi; SFC Press Release and Statement of Disciplinary Action, 16 September 2014. Mr. Joseph Hsu Kar Hing; SFC Press Release, 17 July 2018.

[151] *Tsien Pak Cheong, David v SFC* [2011] 3 HKLRD 533, at paragraph 32.

The Grounds of Review

(i) The applicant's candour and contrition

113. In the NPDA, the SFC said that it proposed to prohibit the applicant for 6 years in relation to various regulated activities.[152] It is clear that, in having regard to the fact that the applicant did not dispute its preliminary conclusions and that he appeared remorseful, the SFC did so in determining the appropriate discount to be afforded to the applicant from the starting point it had stipulated as the proposed sanction. Those two factors, together with the fact of the delay in processing the applicant's licence application, from 23 May 2019 until its withdrawal in October 2019, were the grounds on which the SFC reduced the proposed sanction by 12 months.

(a) No challenge to the SFC's preliminary conclusions

114. The obvious justification for a reduction in the proposed sanction to reflect the fact that the applicant did not dispute the SFC's preliminary conclusions is purely utilitarian. In consequence of the applicant's admissions, having summarised the applicant's acceptance of the SFC's findings of those failures to properly supervise due diligence in the two listing applications in its Decision Notice, the SFC was able to state simply that the admissions "support our findings that the respective breaches/failures…are attributable to the neglect on your part, in your capacities as a sponsor principal, a responsible officer and a member of senior management…and performing your supervisory and managerial duties."[153]It was not necessary for the SFC to expend its time and resources to consider and resolve any accounts of the applicant advanced in written submissions to the SFC, which challenged its own findings.

115. I am satisfied that it was and is appropriate to have regard to this discrete factor in affording the applicant a discount from the proposed disciplinary sanction. I do not accept Mr. Suen's submission that, in having regard to the fact that the applicant accepted the SFC's preliminary conclusions, regard is to be held to what he called the "strength" of the SFC case. As noted earlier, the essence of this mitigating factor was that the SFC did not have to expend its time and resources to consider and resolve accounts of the applicant which challenged its own findings.

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[152] AB-A/1/A32, paragraph 102
[153] AB-A/3/A122, paragraph 14.

116. By contrast, the SFC was required to engage in such an exercise in respect of what it described as "Your key explanation for your misconduct-your reliance on Terry Tam and others" [154] and in addressing what it described as "Your clarifications/ explanations on various issues in the NPDA".[155] Of the applicant's over-reliance on Mr. Terry Tam and Mr. Griffin Tse, as noted earlier, the SFC concluded, "...it does not justify or lessen the seriousness of your conduct. It was unacceptable for you to delegate your duties to your subordinates to the point of disregarding/neglecting your own responsibilities..."[156] Further, the SFC said "...the evidence suggests that even though your Transaction Team members had drawn your attention to a number of issues arising out of the due diligence exercise, you failed to take adequate steps to ensure that such issues were properly addressed."[157] Similarly, having engaged in a lengthy consideration of the applicant's "clarifications and explanations", the SFC reaffirmed its findings, "...we do not find that your clarifications/explanations affect our assessment of the seriousness of your conduct. Further, we note that some of your clarifications are inconsistent with or not supported by the contemporaneous evidence."[158]

(b) Remorse

117. Although there may seldom be any sure criterion for assessing whether a person is truly remorseful for his conduct, nevertheless the SFC said that it found the applicant appeared remorseful, which factor it took into account in the affording the applicant a discount in the proposed period of the disciplinary sanction.

118. I am satisfied that it was and is appropriate to accept that the applicant was remorseful for his conduct and to have regard to that fact in determining the appropriate discount from the length of the proposed disciplinary sanction.

(c) Delay in processing the applicant's licence application

119. The third factor to which the SFC said that it had regard to was that, "in light of the present disciplinary proceedings", it "might have taken longer than usual" to process the applicant's licensing application from when it was filed on 23 May 2019 to when it was withdrawn in October 2019. The Tribunal has been provided with no evidence

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[154] AB-A/3/A123-A126, paragraphs 15-29.
[155] AB-A/3/A126-A132, paragraphs 30-52.
[156] AB-A/3/A125, paragraph 26.
[157] AB-A/3/A125, paragraph 28.
[158] AB-A/3/A127, paragraph 30.

of the usual processing time or what might have been the unjustified delay in processing the applicant's licensing application. However, it is to be noted that the overall period in which the licensing application was extant was no more than four to five months.

120. In its Determination in *Chan Pik Ha Jenny v SFC*[159] this Tribunal, of which Hartmann NPJ was the Chairman, noted that there had been a delay of 4 ½ months in the processing by the SFC of the applicant's application to transfer her licence to a new employer, following her departure from her employer ICBC International Securities Limited ("ICBC") with whom she held a licence to conduct Type I and Type II regulated activities. At the time of the processing of the application the SFC was in receipt of a report from ICBC detailing possible breaches of the SFC's rules and regulations by the applicant. In its Decision Notice, the SFC declined to take into account the time taken in processing the application, described as a period of *de facto* suspension, saying that on receipt of the report the SFC was required to make further enquiries before approving the application. This Tribunal disagreed. It acknowledged that, if the processing of the application takes place whilst investigations into alleged regulatory misconduct are taking place, delays may be inevitable. Nevertheless, the Tribunal reduced the six-month period of suspension by two months to take into account the period of *de facto* suspension.[160]

(d) Discount from the starting point for mitigating factors

121. In determining to afford the applicant a discount of 12 months from the proposed length of the disciplinary sanction the SFC said that it considered the three mitigating factors together, without condescending to stipulating a specific discount for each of the three factors. I am satisfied that such unjustified delay as there might have been in processing the applicant's licensing application, being at most a matter of several months, is clearly the least significant of the three factors of mitigation. The other two factors are of greater substance. Having regard to all the circumstances, I am satisfied that the discount of 12 months from a starting point for the proposed length of the disciplinary sanction of six years was and is appropriate.

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[159] SFAT 8 of 2013, 9 June 2014.
[160] *Chan Pik Ha Jenny v SFC*, paragraphs 68-9.

122. The denial by Mr. Hui in his witness statement that the service of the NPDA on the applicant on 15 August 2019 was in any way linked to the applicant's licensing application is not challenged by the applicant.

(ii) Delay in bringing disciplinary proceedings against the applicant

123. Although the List of Documents attached to the NPDA indicates that the first notices served in the SFC's investigations of BIAL's conduct in the listing application of China Hinong and CCBIC's conduct of the listing application of Fujian Dongya were served on the two sponsors on 26 February and 21 April 2016, the investigations reach their conclusions with settlements disclosed in SFC Press Releases at widely separated dates, namely 15 March 2017 and 9 July 2018 respectively.

124. It is clear from the List of Documents that, apart from the record of interview of the applicant on 3 May 2018, the SFC had gathered all the evidence in its investigations of BIAL's conduct prior to the announcement of the settlement on 15 March 2017. As noted earlier, there was no reference at all in the NPDA to the record of interview of the applicant by the SFC on 3 May 2018 in respect of the conduct of BIAL. The fact that the investigation had reached an advanced stage was evidenced by a statement made in the SFC's Press Release, dated 15 March 2017, which identified negligence in the conduct of the transaction team:[161]

> "During the listing application, the SEHK and the SFC asked about the independence of the persons who guaranteed the loans advanced by China Huinong. Due to negligence on the part of BIAL's transaction team, BIAL initially did not disclose the existence of the Connected Guarantees or that parties related to China Huinong had guaranteed its short-term loans, but only did so until after rounds of queries from the SEHK/SFC."

125. As noted earlier, in his submissions, Mr. Linning suggested that in those circumstances the SFC ought to have been able to formulate its case against the applicant in a NPDA within six months of 15 March 2017. Mr. Suen did not demur.

126. By contrast, it is clear from the List of Documents that the SFC was engaged in collecting evidence in its investigation into the conduct of CCBIC until 14 July 2017 and that it conducted interviews of the applicant and Mr. Terry Tam on 3 and 8 May 2018

[161] AB-A/9/A212.

respectively. As noted earlier, there were multiple references in the NPDA, in the context of the conduct of CCBIC, to that record of interview of the applicant. Clearly, that interview was relied on by the SFC against the applicant, as it did to two parts of the interview of Mr. Terry Tam on 8 May 2018.[162] The SFC settlement with CCBIC was announced in a Press Release, dated 9 July 2018. But, the NPDA was not served on the applicant until 15 August 2019.

127. I am satisfied that, if it had chosen to do so, the SFC would have been in a position to initiate disciplinary proceedings against the applicant in respect of his conduct at BIAL in the listing application of China Huinong within six months of 15 March 2017.

128. As noted earlier, it was Mr. Suen's submissions that the SFC had proceeded as it did because it had determined that it was better to present the evidence of the applicant's overall culpability in one NPDA to better enable the determination of the imposition of an appropriate overall sanction and not to "vex" the applicant with sequential or overlapping disciplinary actions. He said that was not unreasonable.

129. Relevant to that submission is a consideration of the chronology of events concerning the applicant and the two listing applications.

Chronology

(i) The applicant

June 2006 - 27 June 2014, the applicant was a licensed representative and responsible officer at CCBIC;

January 2007 - 27 June 2014, the applicant was a sponsor principal at CCBIC;

9 July 2014 - 13 March 2017, the applicant was a licensed representative at BIAL;

27 June 2014, the applicant ceased employment with CCBIC and began employment with BIAL;

20 October 2014 - 13 March 2017, the applicant was a responsible officer and sponsor principal at BIAL;

31 October 2014, the applicant became a joint sponsor principal of China Huinong's listing application;

7 November 2014, the applicant became the sole sponsor principal of China Huinong's listing application.

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[162] AB-A/1/A21.

(ii) The listing applications

16 May 2013, CCBIC was appointed by Fujian Dongya as its sole sponsor;

21 March 2014, CCBIC filed Form A-1 and accompanying documents with the SEHK;

8 September 2014, BIAL was appointed by China Huinong as its sole sponsor;

22 September 2014, Fujian Dongya's listing application lapsed;

10 November 2014, BIAL filed Form A-1 and accompanying documents with the SEHK;

12 December 2014 - 7 September 2015, BIAL filed five different revised version of China Huinong's Prospectus, revealing the 'Connected Guarantees' only on 7 September 2015;

18 May 2015, renewal of the listing application by BIAL;

24 September 2015, SEHK's 'Return Decision', rejecting the application.

130. It follows that the applicant was involved with the Fujian Dongya listing application at CCBIC for the 13 months, from 16 May 2013 to 27 June 2014, whereas he was involved with the China Huinong listing application for over one year, from 8 September 2014 until 24 September 2015, when it was returned by the SEHK. The applicant was sole sponsor principal in the former listing application throughout the period. He was a joint sponsor principal in the latter application from 31 October 2014 and its sole sponsor principal from 7 November 2014 onwards.

131. Very obviously, the focus of the allegations against the applicant in both investigations were strikingly similar, namely his failure to discharge his duties in particular, as a sponsor principal as articulated in paragraph 1.3.3. of the Sponsor Guidelines. Those failures/breaches of duty occurred over a total of about two years in an overall period of about 30 months. Although those failures/breaches of duty concerned two different sponsors, two different listing applications with two different transaction teams, nevertheless there is substance in Mr. Suen's submission that presentation of the evidence of the overall conduct of the applicant was merited, in particular in that it enabled a better assessment to be made of the appropriate total disciplinary sanction to be imposed on the applicant.

Prejudice to the applicant

132. Balanced against those considerations was a consideration of the prejudice to the applicant in delaying the commencement of disciplinary proceedings in the case of

BIAL, so that it might be presented together with the disciplinary proceedings in the case of CCBIB. I am satisfied that it would have been perfectly obvious to the applicant from the terms of the SFC's Press Release, dated 15 March 2017, that, as the sponsor principal in charge of the transaction team found to have been negligent in failing to disclose the existence of the Connected Guarantees or that parties related to China Huinong had guaranteed its short-term loans, there was an overwhelming likelihood that disciplinary proceedings would be commenced against him by the SFC. It is to be remembered that it was his evidence that he had been told by Mr. Tan that the SFC was not offering him a settlement in respect of BIAL. In those circumstances, realistically the only issue was when those proceedings might be commenced. Having been interviewed on 3 May 2018 by the SFC, the applicant was fully aware that both investigations were live and ongoing. Given that the SFC had reached a settlement with BIAL on 15 March 2017, it would have been obvious to the applicant that the investigation related to prospective proceedings against employees of BIAL. Similarly, although the record of interview of the applicant of 3 May 2018 has not been put into evidence, it is apparent from the multiple references to it in the NPDA, that the investigation was of a similar ambit in respect of conduct at CCBIC in respect of the Fujian Dongya's listing application.

133. I am satisfied that Mr. Linning was correct to concede that such prejudice as the applicant might have suffered in being caused to wait for a lengthy period of time before disciplinary proceedings were initiated is quite different from waiting to learn whether or not criminal proceedings are to be commenced.

134. I do not accept the submission made by Mr. Suen, supporting the statement to the same effect made by Mr. Hui, that an element of the delay in initiating proceedings against the applicant was justified by the fact that Mr. Hui and his colleagues were involved in other disciplinary investigations of equal importance. Those circumstances may explain but they do not justify such delay. If more resources were required, they ought to have been deployed.

135. I am satisfied for the reasons advanced earlier that it was not unreasonable for the SFC to choose to proceed to serve a single NPDA against the applicant in respect of his conduct and the two separate listings. Similarly, I am satisfied that the complexity of the two investigations to a very large extent explain and justify not only the length of

the investigations but also the time taken to formulate the disciplinary proceedings against the applicant. In respect of the latter factor, whilst acknowledging the drafting the NPDA was clearly an onerous task, in my judgment it was a task that could have been completed before 15 August 2019. Nevertheless, I am not satisfied that, having regard to all the circumstances, such element of unjustified delay in drafting and serving the NPDA that there might have been is of a magnitude that merits a discount of the length of the prohibition imposed on the applicant.

(iii) The absence of the applicant from the industry for over two years

136. In *Sun Xiao v SFC*[163], this Tribunal, of which Hartmann NPJ was the Chairman, rejected the submission that the applicant was entitled to a discount from the 13 months prohibition imposed on the applicant by the SFC in its Decision Notice, dated 22 October 2014, to reflect the fact that the applicant had been out of the industry from the termination of her employment by Mount Kellett Capital (Hong Kong) Limited in October 2013 until the hearing before the Tribunal on 18 March 2015. The applicant was licensed to carry on Type 9 regulated activities, but was no longer so licensed on termination of her employment. In its Determination, this Tribunal noted that there was no evidence that the applicant had obtained employment, which had been frustrated by reason of delay by the SFC in its investigatory process. The Tribunal rejected the submission that, whether or not there had been an application to move to a new employer, regard was to be had to the fact that the applicant was out of the industry and that the principle of regard to *de facto* suspension, identified by this Tribunal in *Chan Pik Ha Jenny v SFC,* was to be extended, saying:[164]

> "...what, for example, is to be done if an applicant, rather than seeking and gaining new employment, decides to take a sabbatical? How can that sabbatical be described as a period of *de facto* suspension? In the judgment of the Tribunal, the principle is only to be applied in the circumstances in which it was applied in *Chan Pik Ha Jenny v SFC;* that is, if an applicant can show that he has obtained new employment but, by reason of the SFC investigations, has been shut out of that employment."

137. The circumstances in which the applicant came to be out of the industry from 13 March 2017 until he applied for a licence from the SFC on 23 May 2019 are addressed in the witness statements of the applicant and Mr. Hui. The parties having

[163] SFAT 3 of 2014, 22 May 2015.
[164] *ibid,* paragraph 54.

informed the Tribunal that they did not wish to cross-examine the other party's witness, their evidence is unchallenged. The Tribunal has not received evidence from Mr. Tan. Accordingly, the Tribunal knows nothing of what his account of events would be.

138. The nub of Mr. Hui's evidence is that neither he nor his colleagues in the ENF of the SFC, or his colleagues in the Dual Filing team of the Corporate Finance Division, asked BOCOM or BIAL that the applicant be removed from his positions at BOCOM/BIAL. Further, at the meeting of 8 March 2017, which he attended, or otherwise the SFC did not ask that the applicant stay out of the industry for 24 months, or for any period.

139. For his part, the applicant said that on 6 March 2017, having been told by Mr. Tan that the SFC wished him to be excluded from the prospective meeting with BIAL, Mr. Tan told him that the SFC wanted to suspend the applicant's licence for one year. Further, in the late afternoon of 8 March 2017, having been told by Mr. Tan that BOCOM would settle the China Huinong case with the SFC, Mr Tan went on to tell him that as part of the settlement the SFC asked that the applicant be removed from his management position and said that they wanted the applicant to stay out of the industry for 24 months. The applicant said that he accepted what Mr. Tan had told him about the SFC wanting the applicant to stay out of the industry for 24 months. As a result, he did not apply for a licence from the SFC until May 2019.

140. On the unchallenged evidence of Mr. Hui there simply was no basis for Mr. Tan to have told the applicant that the SFC wanted to suspend the applicant's licence for one year or that they wanted the applicant to stay out of the industry for 24 months. That was not true. I am acutely conscious that the Tribunal has not received any account of events from Mr. Tan. Nevertheless, it is the unchallenged account of the applicant that Mr Tan did make those statements to him and that he accepted that the SFC wanted him to stay out of the industry for 24 months.

141. Regard is to be had to the other evidence to give context to the applicant's evidence. First, he was told by Mr. Tan that the SFC were not offering any settlement to the applicant in their investigations into BIAL's listing application of China Huinong. Secondly, the applicant did not seek confirmation from the SFC of what he said Mr. Tan

told him. Thirdly, The SFC Press Release, dated 15 March 2017, clearly attributed culpability in BIAL for its breaches of its duties as sponsor for in the listing application of China Huinong to the negligence of the transaction team, of which the applicant was the sole sponsor principal. Clearly, the applicant must have realised that the prospect of disciplinary proceedings against him loomed large. Fourthly, having being interviewed by the SFC in early March 2017, the applicant was aware that there were ongoing investigations into the role of CCBIC in the listing application of Fujian Dongya. The SFC's interview of the applicant on 3 May 2018, reminded him that the SFC's enquiries into both listings were still underway. Clearly, in all those circumstances the applicant's acceptance that the SFC wanted him out of the industry for 24 months and, as is to be inferred, that the underlying concerns of the regulator about the applicant's conduct would be assuaged by an informal 'nod and a wink' arrangement in which the applicant stayed out of the industry was not reasonable. It was wholly unreasonable.

142. I am satisfied that the applicant's absence from the industry from March 2017 until he applied to the SFC for a license on 23 May 2019 was voluntary. It is to be noted that in his witness statement, the applicant said that he "wanted to avoid upsetting the SFC."[165] Perhaps, he was motivated by the unduly optimistic hope that by keeping a low profile the prospect of disciplinary proceedings being brought against him might be reduced. His voluntary absence from the industry fell to be regarded in the same category as the example posited by Hartmann NPJ of an applicant determining to take a sabbatical from the industry. It does not afford the applicant a ground for contending that he ought to be afforded a discount from the length of the prohibition imposed on him.

(iv) The length of prohibitions imposed by the SFC in other cases

143. Whilst regard is to be had to the penalties imposed on others in other cases in an endeavour to ensure that there is a broad equality of treatment meted out to those culpable of similar misconduct, it is a truism to observe that no two cases are the same. Care has to be taken to ensure that this factual similarities and dissimilarities in different cases are noted and considered. There is a limit to the usefulness of such a comparison exercise.

[165] The applicant's witness statement, paragraph 22. (AB-A/8/A192.)

144. Mr. Linning was correct in stating that in three of the previous cases to which he referred the Tribunal in which the sponsors were reprimanded in respect of listing applications, including in respect of failures in performing due diligence, three sponsor principals were suspended or prohibited from entering the industry for periods of three years. They were: Mr. Wong Tang Chung, formally a sponsor principal of Mega Capital, in respect of the listing application of Hontex; Mr. Eric Shum Kam Chi, formally a sponsor principal of Sun Hung Kai International Limited, in respect of the listing application of Sino-Life; and Mr. Joseph Hsu Kar Hing, formally a sponsor principal of Standard Chartered Securities (Hong Kong) Limited, in respect of the listing application of China Forestry. In two other cases to which the Tribunal was referred and in which the sponsors were reprimanded in respect of listing applications, including in respect of failures in performing due diligence, two sponsor principals were suspended for lesser periods of time. They were: Mr. Wu Yinong, a former sponsor principal of CMS, in respect of the listing application of China Metal, who was suspended for 18 months: and Mr. Cen Tian, a former sponsor principle of UBS AG, who was suspended for two years.

145. Without becoming involved in an unnecessary consideration of the details of the particular cases, the obvious point of distinction in all five cases from that of the applicant is that each of those cases involved one listing application only. By contrast, the applicant has been found culpable of failures and breaches in respect of two separate and distinct listing applications, involving different sponsors and different transaction teams.

146. The case of *SFAT v Wan Ten Lok and Yan Kwok Ting, Sunny* also involved only one listing application, that of Tungda on the GEM. Mr. Wan Ten Lok, Philip, the Head of Corporate Finance and an executive director of CPYC was the sponsor principal, who had signed the Sponsor's Declaration that Tungda was suitable for listing. He had been found culpable by the SFC of providing three misleading and inaccurate submissions to the SEHK, in response to their inquiries arising from complaints that Tungda had falsified invoices and overstated sales figures in its IPO Prospectus, and, together with Mr. Sunny Yan Kwok Ting, of having misled the SFC by providing false or misleading information and documents in interviews conducted by the SFC and in supplemental statements.[166] The SFC found Mr. Yan culpable of the latter misconduct. The three submissions gave the false impression that CPYC had conducted sufficient due diligence,

[166] SFC Press Release, dated 11 October 2011.

when it was in fact severely limited and deficient. Mr. Yan was a manager in the Corporate Finance Department and assistant to Mr. Wan. Mr. Wan and Mr. Yan were prohibited by the SFC from re-applying to be licensed persons for 6 and 4 years respectively.

147. Both Mr. Wan and Mr. Yan filed Notices of Application for Review to this Tribunal of the SFC's decisions in respect of their culpability. In relation to the allegations against Mr Wan in respect of false documents, in its Decision this Tribunal said that in essence it was "an allegation of fabrication of documents, forgery of Ms Tsang's signature and acts tending to pervert the course of justice". The allegations against Mr Yan were described as being "in essence an allegation of acts tending to pervert the course of justice."[167] Having found that Mr. Wan had fabricated the documents[168] and that in advancing the documents Mr. Yan was aware of the fabrication[169], this Tribunal said that the false documentation charge against Mr. Wan and the false information charge against Mr Yan were proved.[170]

148. Although this Tribunal noted that in the two separate NPDAs served on Mr. Wan and Mr. Yan they were informed that the SFC proposed to impose prohibitions of 10 years and 8 years respectively, the issue of the appropriateness of the length of the prohibition imposed on the two applicants was not addressed in the Decision of this Tribunal. Given the considerably reduced lengths of the prohibitions actually imposed, namely six and four years respectively, and in light of the findings of the SFC, let alone the findings of this Tribunal, it would have been astonishing if applications had been pursued in respect of the length of the sanctions imposed by the SFC.

149. In those circumstances, there is insufficient information available to this Tribunal to explain what on their face appear to be the unduly lenient sanctions imposed by the SFC on Mr. Wan and Mr. Yan. In the result, in my judgment a comparison with the circumstances of this applicant with that case is of no assistance to the applicant.

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[167] SFAT 8 & 9 of 2009, paragraph 44.
[168] *ibid*, paragraph 174.
[169] *ibid*, paragraph 181.
[170] *ibid*, paragraph 182.

Conclusion

150. Notwithstanding Mr. Linning's valiant efforts to persuade the Tribunal otherwise, I am satisfied that, in all circumstances, the prohibition imposed on the applicant for a period of five years is appropriate and, pursuant to section 218(2)(a) of the SFO, I confirm that decision.

Costs

151. As presently informed, I can see no reason why costs should not follow the event. Accordingly, there will be an order *nisi* that the costs of the SFC are to be paid by the applicant, such order to be made final unless application is made for a different order within 14 days of the handing down of this Determination.

Michael Lunn
(Chairman)

Mr. Alan Linning, instructed by Mayer Brown
for the Applicant

Mr. Jenkin Suen SC, instructed by SFC
for the Respondent