SFC obtains disqualification orders against former directors of Long Success International (Holdings) Limited

27 Apr 2020

The Securities and Futures Commission (SFC) has obtained disqualification orders in the Court of First Instance against the former vice chairman and executive director of Long Success International (Holdings) Limited (Long Success), Mr Victor Ng, the company's former non-executive director Mr Zhang Chi, and three former independent non-executive directors, Mr Winfield Ng Kwok Chu, Mr Robert Ng Chau Tung and Mr Tse Ching Leung (Notes 1 to 4).

They were disqualified from being a director or being involved in the management of any listed or unlisted corporation in Hong Kong, without leave of the court, for a period of two to five years effective from 22 April 2020 (Notes 5 & 6).

The orders were made by the Honourable Mr Justice Coleman after all of them admitted that they were in breach of their fiduciary duties and common law duties to act in the interest of Long Success and/or to exercise due and reasonable skill, care and diligence in the course of acting as directors of the company.

In particular, they admitted that they neglected or omitted to exercise their duties as directors of Long Success and had allowed Mr Wong Kam Leong, former chairman and executive director, to exercise domination and control of the affairs of the company and of its board of directors for his personal advantage or other ulterior purposes.

They also admitted that there was no or no effective system of internal controls in place to prevent the above from occurring.

The SFC's investigation found that Wong, on behalf of a wholly-owned subsidiary of Long Success, acquired a 51% equity interest in Jining Gangning Paper Co, Ltd (Jining Gangning) for HK$190 million in 2009 (Acquisition) (Note 7).

Under the terms of the Acquisition, Mr Chook Hong Shee, the seller, provided a profit guarantee that he would compensate Long Success if Jining Gangning failed to achieve a profit after tax of RMB60 million or recorded a loss for each of the two years ended 31 December 2010 and 2011, respectively. Jining Gangning failed to achieve the agreed profit in both years.

Between March 2011 and March 2012, Wong, on behalf of Long Success, signed three confirmation letters with Chook whereby it was agreed, amongst other things, that payment of the profit guarantee owed by him would be deferred.

In June 2012, Wong, on behalf of Long Success, signed another confirmation letter whereby it was agreed that Long Success would forfeit the profit guarantee amount of HK$30.1 million owed by Chook, but the decision to forfeit the profit guarantee was not approved by the board of directors of Long Success at the material time.

The SFC considered that there was no objective, rational or commercial reason for Long Success to agree to the terms of the confirmation letters which were plainly to the company's financial detriment. The harm to Long Success was compounded by its adverse financial position at the material time.

The SFC's proceedings against other former directors of Long Success are ongoing.

End

Notes:

1. Long Success was listed on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited (SEHK) since 17 August 2000 until its listing status was cancelled by the SEHK with effect from 19 October 2016. The company was principally engaged in paper manufacturing, biodegradable materials manufacturing, gaming and money lending services at the material time. Victor Ng, who was formerly

known as Wu Shaohong, was an executive director and vice chairman of Long Success from 15 December 2011 to 15 August 2012. Zhang was non-executive director from 18 January 2010 to 29 April 2011. Winfield Ng and Robert Ng were independent non-executive directors from 3 January 2006 to 6 October 2012, while Tse was independent non-executive director from 1 September 2009 to 15 January 2013.

2. The SFC commenced proceedings under section 214 of the Securities and Futures Ordinance (SFO) against 13 former directors of Long Success in May 2018. The SFC sought orders that these former directors be disqualified from being directors or being involved in the management of any listed or unlisted corporation in Hong Kong.
3. Under section 214 of the SFO, the court may make an order disqualifying a person from being a company director or being involved, directly or indirectly, in the management of any corporation for up to 15 years, if the person is found to be wholly or partly responsible for the company's affairs having been conducted in a manner, among other things, involving defalcation, fraud, misfeasance or other misconduct towards it or its members; resulting in its members or any part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect; or unfairly prejudicial to its members or any part of its members.
4. The orders were made following the Court's approval that the proceedings could be disposed of by the way of Carecraft procedure which requires the submission of an agreed statement of facts upon which the Court will determine the appropriate orders to be made.
5. Victor Ng is disqualified from being a director or being involved in the management of any listed or unlisted corporation in Hong Kong for five years, Winfield Ng and Robert Ng are each disqualified for 30 months, while Tse and Zhang are each disqualified for two years. Certain non-listed, private companies were excluded from the disqualification orders against Winfield Ng and Tse.
6. The judgment is available on the Judiciary's website (Court Reference: HCMP667/2018).
7. Glory Smile Enterprises Limited is the wholly-owned subsidiary of Long Success in the acquisition.

Page last updated : 27 Apr 2020

HCMP 667/2018

[2020] HKCFI 606

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 667 OF 2018

IN THE MATTER OF LONG SUCCESS INTERNATIONAL (HOLDINGS) LIMITED
and
IN THE MATTER OF SECTION 214 OF THE SECURITIES AND FUTURES ORDINANCE, CAP 571

BETWEEN

SECURITIES AND FUTURES COMMISSION	Petitioner
and	
WONG KAM LEONG (黃**錦亮**)	1st Respondent
WU BING XIANG (鄔炳**祥**)	2nd Respondent
VICTOR NG (formerly known as WU SHAOHONG) (吳**少洪**)	3rd Respondent
HU DONGGUANG (**胡東光**)	4th Respondent
GUO WANDA (**郭**萬**達**)	5th Respondent
NG KWOK CHU WINFIELD (吳**國柱**)	6th Respondent
NG CHAU TUNG ROBERT (吳**秋桐**)	7th Respondent
TSE CHING LEUNG (**謝正樑**)	8th Respondent
WANG QINGYI (王**慶義**)	9th Respondent

CHENG TZE KIT LARRY (鄭子傑)	10th Respondent
LI JIE YI (李潔移)	11th Respondent
YIP WAI KI (葉惠歧)	12th Respondent
ZHANG CHI (張翅)	13th Respondent

Before: Hon Coleman J in Court

Date of Submissions: 16, 20, 22, 23 and 24 March 2020

Date of Judgment: 22 April 2020

J U D G M E N T

Introduction

1. The Securities and Futures Commission ("SFC") commenced these proceedings by its petition dated 4 May 2018. By the proceedings, the SFC seeks disqualification orders against all 13 respondents, all of whom are former directors of Long Success (Holdings) Ltd ("Long Success") under section 214 of the Securities and Futures Ordinance Cap 571 ("SFO").

2. The current matter concerns only five of the respondents (together "Relevant Respondents"), being: (1) Victor Ng (formerly known as Wu Shaohong) (吳**少洪**) ("R3"); (2) Ng Kwok Chu Winfield (吳**國柱**) ("R6"); (3) Ng Chau Tung Robert (吳**秋桐**) ("R7"); (4) Tse Ching Leung (**謝正樑**) ("R8"); and (5) Zhang Chi (**張翅**) ("R13").

3. All of the Relevant Respondents have consented to dispose of the proceedings against them by way of the *Carecraft* summary procedure: see *Re Carecraft Construction Co Ltd* [1994] 1 WLR 172 and various Hong Kong cases adopting that procedure.

4. It is well-settled that, in deciding whether to make a disqualification order, the Court is not bound by any agreement reached by the parties. The Court must be independently satisfied, based on the agreed facts, that the business or affairs of the company have been conducted in a manner described in paragraphs (a), (b), (c) or (d) of section 214(1) of the SFO. If so satisfied, the Court must determine the scope and duration of the disqualification order. But it is equally well-settled that the Court is likely to be guided by the agreement that the SFC has reached.

5. The matter was listed for hearing on 26 March 2020, but that date fell within the General Adjournment of Proceedings, and so the hearing was automatically adjourned. At my invitation, the SFC and the Relevant Respondents consented to my dealing with the matter on the papers, including the skeleton arguments filed in advance of the listed hearing date.

6. Counsel for the SFC were Mr Victor Dawes SC and Ms Bonnie YK Cheng. Counsel for R3 was Mr Foster Yim. Counsel for R6, R7 and R8 were Mr Derek Chan SC and Ms Kristy KY Wong. Counsel for R13 was Mr Kevin Hon. In the light of their written submissions contained in their respective skeleton arguments, I have not found it necessary to raise any further questions or for any of the parties further to address me on any issue. This is my Judgment.

Factual Matters

7. As is typical in this type of procedure, there are *Carecraft* schedules, which set out the undisputed facts and the proposed orders as agreed between the SFC and each of the Relevant Respondents. Those schedules are included as Appendices to this Judgment, being: Appendix A (for R3), Appendix B (for R6, R7 and R8), and Appendix C (for R13).

8. In so far as it helps to give a broad summary of the factual background, against which the detail in the various Appendices can be considered, the following matters can be set out. Unless otherwise identified, and for ease of reference, the definitions and abbreviations adopted in the Appendices will also be adopted in this Judgment. Further, unless otherwise made clear, all references to dollar sums are denominated in Hong Kong Dollars.

9. Long Success was listed on the Growth Enterprise Market ("GEM") of The Stock Exchange of Hong Kong Limited ("SEHK") from 17 August 2000 until its listing status was cancelled by the SEHK with effect from 19 October 2016. The Group comprising Long Success and its subsidiaries was operating at a loss by 2007, and having liquidity problems by 2012. Its shares were suspended from trading on 3 December 2013, and trading did not resume before the listing status was cancelled.

10. Long Success had subsidiaries including: (1) Glory Smile Enterprises Ltd ("Glory Smile"); (2) Jining Gangning Paper Co Ltd ("Jining Gangning"); and (3) Zhonshan Jiu He Bioplastic Co Ltd ("Zhonshan Jiu He").

11. The Board of Long Success was at the material times until 17 April 2013 chaired by Wong Kam Leong (黃錦亮) ("R1"). The Relevant Respondents had the following positions and responsibilities:

(1) R3 was an Executive Director and Vice-Chairman, with responsibility for corporate finance activities, new project investment and business development. His term began on 15 December 2011 and ended on 15 August 2012.

(2) R6 was an Independent Non-Executive Director ("INED"), and a member of the audit committee and remuneration committee. His term began on 3 January 2006 and ended on 6 October 2012.

(3) R7 was an INED, and a member of the audit committee and remuneration committee. His term began on 3 January 2006 and ended on 6 October 2012.

(4) R8 was an INED, and a member of the audit committee and remuneration committee. His term began on 1 September 2009 and ended on 15 January 2013.

(5) R13 was a Non-Executive Director from 18 January 2010 to 29 April 2011.

12. The main complaints against the Relevant Respondents arise out of an acquisition agreement, certain profit guarantees, and other loan and guarantee agreements.

13. On or about 10 February 2009, R1 on behalf of Glory Smile entered into an acquisition agreement ("Acquisition Agreement") with a Mr Chook Hong Shee ("Chook"). Under the Acquisition Agreement, Glory Smile agreed to acquire from Chook the entire equity interest in Mega Bright Investment Development Limited ("Mega Bright"). Mega Bright had in turn a 51% interest in Jining Gangning, a company engaged in paper manufacturing.

14. Each of the Relevant Respondents agrees that the Acquisition Agreement was entered into by R1 on behalf of Glory Smile in the following circumstances:

(1) Long Success had been operating at a loss for at least two years prior to the acquisition under the Acquisition Agreement.

(2) Long Success was engaged in gaming and entertainment business in Macau, and it had no or insufficient experience or expertise in the paper manufacturing business.

(3) There was limited or insufficient due diligence conducted on Chook or Jining Gangning for the Board's consideration prior to the acquisition.

(4) The acquisition was a very significant transaction with substantial, and potentially long-term, impact on Long Success' financial position and operation.

15. Indeed, the consideration under the Acquisition Agreement was the sum of $190 million, and it was payable by cash and by convertible bonds and promissory notes

issued by Long Success.

16. The Acquisition Agreement also contained the following material terms:

(1) a profit guarantee clause ("Profit Guarantee"), by which Chook agreed to compensate Glory Smile if Jining Gangning failed to achieve a profit after tax of RMB60 million, or recorded a loss, for each of the two years ended 31 December 2010 and 2011 respectively; and

(2) a clause ("Force Majeure Clause") providing that a party that delayed in performing or failed to perform its obligations by reason of a force majeure event such as financial crises, war, earthquake, food, fire, blizzard, or others was not liable for breach of the Acquisition Agreement.

17. Jining Gangning did not meet the Profit Guarantee in either of the financial years ended 31 December 2010 or 2011. In that context, R1 on behalf of Long Success and/or Glory Smile entered into four confirmation letters with Chook (together, "Confirmation Letters") in March 2011, October 2011, March 2012 and June 2012 respectively. The primary effects of the Confirmation Letters were that:

(1) Under the March 2011 Confirmation Letter, Long Success and Glory Smile agreed to postpone Chook's payment of the Profit Guarantee shortfall by deferring the outstanding amount in 2010 and 2011 (together totalling approximately $10.88 million), without demanding any interest from Chook.

(2) Under the June 2012 Confirmation Letter, Long Success further agreed to forfeit Glory Smile's right to the Profit Guarantee shortfall balance due from Chook in the amount of $30,146,096. The forfeiture of that amount ("Forfeiture") was agreed without compensation, and was based on the parties' agreed position that Jining Gangning's profits for 2010 and 2011 were affected by certain "profit reduction factors" said to amount to force majeure events under the Acquisition Agreement. The "profit reduction factors" were an increase in the market price of raw materials due to the reduction and withdrawal of government subsidies provided to wastepaper suppliers, the reduction and withdrawal of purchase rebate, the increase in price of electricity and the cost of steam generation. Those factors were agreed to amount to force majeure events, notwithstanding that Long Success had obtained Counsel's Opinion that they would unlikely fall within the Force Majeure Clause.

18. I accept that there was no objective, rational or commercial reason for Long Success or

for Glory Smile to agree to the terms of the Confirmation Letters. The Confirmation Letters were plainly to the financial detriment of the companies, and the prejudice was compounded by Long Success' then adverse financial position.

19. The SFC has subsequently received confirmation from the current board of Long Success that in 2014 Glory Smile obtained default judgment for the remaining Profit Guarantee shortfall balance – that is, the shortfall after the Forfeiture – and a bankruptcy order against Chook. However, the amount recovered by Glory Smile from the Official Receiver's Office was the insignificant sum of $107,207 (rounded).

20. As to the other loan and guarantee agreements, they arose as follows.

(1) On 13 October 2011, Lai Sing Kit ("S Lai") as lender, Star Grace International Ltd ("Star Grace") as borrower, and R1 and Zhongshan Jiu He as guarantors entered into a loan agreement ("October 2011 Loan Agreement"). It is to be noted that R1 was the director of Star Grace. S Lai agreed to lend RMB3 million to Star Grace for short-term liquidity purposes, at a monthly interest rate of 2.5%. R1 and Zhongshan Jiu He undertook to be jointly liable for Star Grace's obligation to repay the principal and interest to S Lai.

(2) By an agreement with the same date 13 October 2011 ("Supplemental Agreement"), made between the same parties, Star Grace agreed to pay interest to S Lai at the daily rate of 2.5%.

(3) By a guarantee agreement also dated 13 October 2011 ("Guarantee Agreement"), made between Star Grace, Zhongshan Jiu He, Jining Gangning and another company as guarantors and S Lai as creditor, the guarantors guaranteed to pay on demand all indebtedness of R1 (as debtor) to S Lai up to RMB20 million. R3 signed the Guarantee Agreement as witness.

(4) By a loan agreement dated 18 November 2011 ("November 2011 Loan Agreement"), made between R1 as borrower and S Lai as lender, S Lai agreed to lend RMB20 million to R1 for three months (up to 17 February 2012) at the monthly interest rate of 2.5% and a defaulting fee of 3% per day on unpaid principal. Clause 6 referred to the Guarantee Agreement.

21. Again, I accept that there was no objective, rational or commercial reason for Long Success' subsidiaries Zhongshan Jiu He and Jining Gangning to guarantee R1's indebtedness, incurred in his personal capacity, rather than for any benefit of Long Success or its subsidiaries. I agree that in causing or allowing the subsidiaries to enter into the

Guarantee Agreement, R1 placed his interest over and above that of Long Success and the two subsidiaries.

22. The SEHK later investigated a complaint about the November 2011 Loan Agreement and the Guarantee Agreement. In response to the SEHK's request, the directors of Long Success, including R1, R3, R6, R7 and R8 each provided a signed "Confirmation by the Director", dated either 11 or 12 July 2012, confirming that, to the best of his knowledge and belief having made all reasonable, due and careful enquiries:

(1) neither Long Success nor any of its subsidiaries (in particular Jining Gangning and Zhongshan Jiu He) had acted as guarantor(s) for any of his or his associates' personal liabilities;

(2) he had not pledged any of Long Success' and/or its subsidiaries' shares/assets for any of his or his associates' personal liabilities;

(3) the contents of the confirmation were true, accurate and complete in all material respects and not misleading or deceptive, and there were no other matters the omission of which would make any statement therein misleading.

23. R1 subsequently admitted to Long Success' new Board that he borrowed RMB20 million from S Lai which he had not repaid, and that Long Success did not know about the Guarantee Agreement. Further, by a judgment dated 6 March 2014, the Intermediate People's Court of Zhongshan City of Guangdong Province held Jining Gangning and Zhongshan Jiu He were to bear joint responsibility for R1's obligation to repay the RMB20 million, together with interest and a defaulting fee. Appeals were unsuccessful.

24. After a disciplinary hearing into the conduct of Long Success and the former Board, the GEM Listing Committee of the SEHK publicly censured Long Success and, amongst others, R1, R3, R6, R7 and R8.

25. Those respondents had all resigned or retired as directors of Long Success within a year after their provision of the "Confirmation by the Director" to the SEHK.

Applicable Principles – Directors' Duties

26. The various duties owed by directors are well settled and accepted by each of the Relevant Respondents.

27. Fiduciary duties include the requirements to act honestly, in good faith and in the interests of the company; to act for proper purposes; to avoid situations where the director's

interests may conflict with that of the company; and not to obtain any undisclosed profit through his position.

28. There is a common law duty to exercise due and reasonable care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as carried out by the director in relation to the company, and with the general knowledge, skill and experience that the particular director has.

29. There is also a duty to ensure full compliance with the Rules Governing the Listing of Securities on the GEM of the SEHK ("GLR"), and a duty properly to supervise the affairs of the company's subsidiaries.

30. It is settled that executive directors and non-executive directors have the same responsibility in law as to the management of a company's business. But, in its application, the duty may and usually will differ. Whilst a non-executive director cannot place unquestioning reliance on others to do their job, the extent to which a non-executive director may reasonably rely on the executive directors and other professionals to perform their duties is fact-sensitive. A company may reasonably look to non-executive directors for independence of judgment and supervision of executive management. Further, whilst a proper degree of delegation and division of responsibility is permissible, and is often necessary, there cannot be total abrogation of responsibility. A board of directors must not permit one individual to dominate them and use them.

Applicable Principles – Section 214 Liability

31. It is not in dispute that for section 214 of the SFO to be engaged, three basic conditions need to be satisfied:

(1) The corporation in question is or was a listed corporation.

(2) The business or affairs complained of must be that of the corporation, though that can include the business or activities of a subsidiary when the Court will take a "realistic approach" in determining whether the affairs of the subsidiary are the affairs of the holding corporation.

(3) The conduct complained of must fall within one or more of the heads of misconduct specified in section 214(1)(a) to (d).

32. In this case, the SFC relies upon section 214(1)(b), (c) and (d). With focus on those paragraphs, the sub-section materially provides as follows:

> "Where, in relation to a corporation which is or was listed, it appears to the Commission that at any relevant time the business or affairs of the corporation have been conducted in a manner –
>
> (a) ...
>
> (b) involving defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;
>
> (c) resulting in its members or any part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect; or
>
> (d) unfairly prejudicial to its members or any part of its members,
>
> the Commission may, subject to subsection (3), by petition apply to the Court of First Instance for an order under this section."

33. The terms used in section 214(1)(b) have been recently considered by DHCJ Hunsworth in *Securities and Futures Commission v Yeung Chung Lung* (unreported, HCMP 205/2013, 17 February 2017). In particular, at §82, he considered the phrase "or other misconduct", as something of a belt and braces exercise, presumably to cover the widest range of possible misconduct. By way of example, and in reference to an earlier decision, he accepted that the failure of a director to exercise the requisite degree of skill and care in the management of the company as may reasonably be expected of a person of his knowledge and experience and holding his office and functions within that company was enough to establish misconduct under the paragraph. I acknowledge and agree that point, and note that "other misconduct" has also been held to embrace things such as "culpable neglect of duties".

34. In the same case, DHCJ Hunsworth also considered section 214(1)(c) and (d). As to sub-section (c), he recognised that it can be complimentary to the other sub-sections, but that it is not easy to think of examples where the affairs of the company have been conducted with no suggestion of impropriety on the part of its directors and with no suggestion of unfair prejudice to the shareholders, yet where it can confidently be said shareholders have been deprived of information which they might reasonably be expected to be given. He therefore felt it unhelpful to hypothesise other than to say such circumstances may arise and will be evident when they do.

35. As to sub-section (d), DHCJ Hunsworth accepted, as I also accept, that conduct which is unfairly prejudicial is conduct which results in harm to the members of the company or part of the membership in their capacity as members of the company. The harm is harm which could either have been avoided or ameliorated without harming the legitimate interests of others who were parties to the particular transaction. It covers a range of conduct. At one end of the scale is fraud. At the other end of the scale the conduct can take the form of neglect or inaction on the part of those to whom the affairs of a company are entrusted. The question to be asked in such circumstances is whether the conduct

concerned is that which can be expected from the managers of the company to whom those affairs have been entrusted. The directors of course cannot leave their duties to be performed by others.

36. Once section 214 of the SFO is engaged, the principles relating to disqualification orders under section 214(2)(d) are well-established, and do not need reference to authority. Those principles are:

(1) The power to determine the appropriate period of disqualification is a discretionary power. It is necessary for the Court to be satisfied that the director's involvement in the relevant matter involves a sufficiently serious failure to satisfy his duties that some period of disqualification is justified and fair.

(2) The purpose of imposing a qualification order is twofold. The first, and primary, purpose is that of the protection of the public. The second is the purpose of general deterrence.

(3) In determining the period of disqualification, the Court will adopt a broad-brush approach, where earlier decided cases will be of limited assistance to the exercise of the Court's discretion.

(4) The period of disqualification must reflect the gravity of the offence. A starting point of assessment may be fixed by reference to the gravity of the conduct, with a discount given for any mitigating factors.

(5) Previous authorities have identified starting points within brackets, which provide guidelines not tramlines. Those brackets are:

(a) disqualification of over 10 years for particularly serious cases;

(b) disqualification of below 5 years for relatively less serious cases, and

(c) disqualification of between 6 and 10 years for cases in between.

(6) The Court will have regard to a wide range of considerations including the age, state of health and character of the offender, the nature of the breaches, the honesty and competence of the offender, the length of time he has been in jeopardy, whether he appreciates and/or admits the breaches, his general conduct before and after the offence, the periods of disqualification of his co-directors that may have been ordered by other courts, and the interests of shareholders, creditors and employees.

Breaches of Duties

37. I accept that the evidence as a whole identifies that: (1) R1 was able to, and did, dominate and control the affairs of Long Success and the Board for his personal advantage or other ulterior purposes; (2) there was no or no effective system of internal controls in the company; and (3) the Relevant Respondents, along with others, had allowed R1 to exercise his domination and control, and neglected or omitted to exercise their duties. Those matters are admitted by each of the Relevant Respondents.

38. In that context, each of the Relevant Respondents accepts that he breached his duties owed as a director to Long Success. They do so as follows.

39. R6 and R7 were in breach of their duties to act in the interests of Long Success and/or to exercise due and reasonable care, skill and diligence in approving the Acquisition Agreement without making any or any sufficient enquiries or requesting for further information about the Acquisition when they knew or ought to have known of the particular circumstances (which I have set out above).

40. R6, R7, R8 and R13 were in breach of their duties to act in the interest of Long Success and/or to exercise due and reasonable care, skill and diligence in approving the March 2011 Confirmation Letter without making any or any sufficient enquiries or requesting for further information about the same, when it was prejudicial and of no discernible benefit to Long Success or Glory Smile.

41. R6, R7 and R8 were further in breach of their duties in failing to monitor, make enquiries or to follow up on Chook's compliance with the Profit Guarantee. In particular:

(1) Each of R6, R7 and R8 knew or ought to have known about the March 2011 Confirmation Letter under which the payment of the Profit Guarantee shortfall in 2010 was postponed.

(2) Matters regarding compliance with the Profit Guarantee ought to have caused concern to a director exercising due and reasonable care, skill and diligence, given in particular the substantial amount of the Profit Guarantee shortfall and the financial position of Long Success at the time.

(3) Those matters ought to have prompted a director to exercise independent judgment in his consideration and investigation of the relevant issues, instead of just following orders deferring to a member of the Board or professional advisers.

(4) But each of R6, R7 and R8 failed or failed sufficiently to monitor, make enquiries or follow up on compliance with the Profit Guarantee, which failure

contributed to R1's agreeing to the Forfeiture and subsequently causing Long Success to enter into the June 2012 Confirmation Letter.

(5) Each of R6, R7 and R8 also allowed Long Success to publish announcements dated 31 March 2011, 3 October 2011 and 28 June 2012 stating that the relevant Confirmation Letter and the Forfeiture were fair and reasonable and in the interests of Long Success and its subsidiaries as a whole, when they ought to have known that the for Confirmation Letters (viewed as a whole) and the Forfeiture were prejudicial to the interests of Long Success and Glory Smile.

42. The points in the above paragraph apply in like fashion to R3. Whilst R3 only assumed his position as executive director and Vice Chairman of Long Success in December 2011, he knew or ought to have known from Long Success' announcements dated 31 March 2011 and 3 October 2011 about the March 2011 Confirmation Letter, under which payment of the Profit Guarantee shortfall in 2010 had been postponed.

43. As regards the Guarantee Agreement and the Confirmation by the Director documents provided to the SEHK, and though he was not a director at the time, R3 was witness to the Guarantee Agreement and knew or ought to have known about it and the lack of objective, rational or commercial reasons for the provision of the guarantee. R3 therefore breached his duty to exercise due and reasonable care, skill and diligence in failing to inform the Board of those matters. He then further negligently or recklessly made false or misleading statements to the SEHK.

44. I specifically note that R3 expresses some doubt about the logic of the retrospective constructive knowledge and the extended liability of a witness of signature, but R3 does not wish to challenge the approach put forward by the SFC and the proposed way of resolving the matter.

45. Further as regards the Guarantee Agreement and the 'Confirmation by the Director' documents provided to the SEHK, each of R6, R7 and R8 also negligently made false or misleading statements to the SEHK, in circumstances where there is nothing to suggest that the confirmations were made to the best of their knowledge and belief having made all reasonable, due and careful enquiries.

46. It can also be said that the Relevant Respondents were all in breach of their duty to ensure compliance with the GLR.

47. I have, of course, also taken into account the specific matters which Counsel for each of the Relevant Respondents has drawn to my attention, including of course that each of the Relevant Respondents has frankly accepted their failures, and has promptly agreed to the

Carecraft procedure and the orders proposed by the SFC. I also take into account the period of time over which this matter can be said to have been hanging over the head of the Relevant Respondents.

Section 214 Engaged

48. Looking at the three basic conditions to be satisfied, in this case: (1) Long Success was a listed corporation until its listing status was cancelled; (2) I accept that the affairs of Glory Smile, Jining Gangning and Zhongshan Jiu He were the affairs of Long Success; and (3) the conduct falls within one or more of the heads specified in section 214(1)(a) to (d).

49. I accept that the evidence demonstrates, and I note that the Relevant Respondents admit, that by reason of their acts or omissions the business or affairs of Long Success have been conducted in a manner:

(1) involving defalcation, fraud, misfeasance or other misconduct towards members or any part thereof: section 214(1)(b);

(2) resulting in its members or part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect: section 214(1)(c); and/or

(3) unfairly prejudicial to its members or part of its members: section 214(1)(d).

The Proposed Orders

50. The Appendices to this Judgment set out the agreed proposed order to be made in respect of each of the Relevant Respondents. The agreements are as to, and the SFC seeks, disqualification orders against the Relevant Respondents of the following durations:

(1) R3: 5 years

(2) R6: 30 months

(3) R7: 30 months

(4) R8: 2 years

(5) R13: 2 years

51. The SFC submits that the order sought against each of the Relevant Respondents is commensurate with the gravity of their respective conduct, and is in accordance with the principles I have outlined above. In accordance with the applicable principles, I acknowledge the weight to be given to the views of the SFC, though I am not in any way

bound by them.

52. Overall, whilst there have been some serious breaches of directors' duties in the conduct of affairs of a listed company and its subsidiaries, the parties submit – and I accept – that the evidence mainly points to negligence or neglect of duties (as opposed to active commission of misdeeds) on the part of the Relevant Respondents. Also taking into account their agreement to dispose of these proceedings by the *Carecraft* procedure, with the consequent saving of time and costs, I accept that the disqualification bracket for each of the Relevant Respondents is 5 years or below.

53. I agree that R3 is more culpable than the other Relevant Respondents, and that his breaches of duties relating to matters regarding the Confirmation Letters, the Forfeiture and the Guarantee Agreement justify a period of disqualification of 5 years. R3 himself acknowledges that the period agreed, as first put forward by the SFC, must have taken into consideration the principle of fairness outlined in the authorities.

54. I agree that the involvement of R8 was limited to the Confirmation Letters and the Forfeiture, and that the involvement of R13 was limited to the March 2011 Confirmation Letter, identifying relatively less culpability, and which justifies a shorter period of disqualification of 2 years.

55. I also agree that the involvement of R6 and R7 may be described as somewhere between the levels of culpability of R3 (on the one hand) and R8 and R13 (on the other), justifying a period of disqualification of 30 months.

56. Agreement has also been reached between the SFC and each of R6 and R8 to "carve out" certain non-listed Hong Kong companies from the disqualification orders being sought.

57. As to R6, he is an employee of Sino Prosper Management Ltd, which conducts investment business for itself and its subsidiaries, and where his main role and responsibility is to provide investment opinions and analyses to the board of the company. Given that the nature of that company's business is unrelated to the general investing public, and taking account of R6's role as an employee, the SFC considers that carving out this company from the disqualification order against R6 would not be against the public interest. I agree.

58. As to R8, he is the Chief Financial Officer of Goji (HK) Ltd, and a director of both Youni (HK) Ltd and Younibody (HK) Ltd. Those companies are part of the "Goji Group" and operate a chain of fitness gyms, supply health food and beverages, and operate a nutrition and wellness business, respectively. R8's role and responsibility in the group

includes overseeing finance, human resources and administration and credit control departments, approving daily operating expenses and signing cheques, and managing daily operations and reporting matters to the board. Given that the nature of those businesses is unrelated to the general investing public, the SFC considers carving out those companies from the disqualification order sought against R8 would not be against the public interest. I agree.

Result

59. In the circumstances, I make an order in the following terms.

60. Pursuant to section 214(2)(d) of the Securities and Futures Ordinance (CAP 571) ("SFO"), R3 shall not, without leave of the Court, for a period of 5 years with effect from the date of this order:

(a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any corporation in Hong Kong; and

(b) in any way, directly or indirectly, be concerned, or take part, in the management of any corporation in Hong Kong.

61. Pursuant to section 214(2)(d) of the SFO, save and except for Sino Prosper Management Limited, R6 shall not, without leave of the Court, for a period of 30 months with effect from the date of this order:

(a) be, or continue to be a director, liquidator, or receiver or manager of the property or business, of any corporation in Hong Kong; and

(b) in any way, directly or indirectly, be concerned, or take part, in the management of any corporation in Hong Kong.

62. Pursuant to section 214(2)(d) of the SFO, R7 shall not, without leave of the Court, for a period of 30 months with effect from the date of this order:

(a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any corporation in Hong Kong; and

(b) in any way, directly or indirectly, be concerned, or take part, in the management of any corporation in Hong Kong.

63. Pursuant to section 214(2)(d) of the SFO, save and except for Goji (HK) Limited, Youni (HK) Limited and Younibody (HK) Limited, R8 shall not, without leave of the

Court, for a period of 2 years with effect from the date of this order:

(a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any corporation in Hong Kong; and

(b) in any way, directly or indirectly, be concerned, or take part, in the management of any corporation in Hong Kong.

64. Pursuant to section 214(2)(d) of the SFO, R13 shall not, without leave of the Court, for a period of 2 years with effect from the date of this order:

(a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any corporation in Hong Kong; and

(b) in any way, or directly or indirectly, be concerned, or take part, in the management of any corporation in Hong Kong.

Costs

65. Each of the Relevant Respondents has agreed to pay the costs of the SFC in these proceedings, or such portion thereof as the Court thinks appropriate, to be taxed if not agreed with certificate for two Counsel.

66. Only Counsel for R13 has made any specific submissions relating to the appointment of costs. He accepts that each case turns on its own merits and the Court retains the discretion to order and apportion costs. But he also submits that the relative culpabilities of the Relevant Respondents are reflected in the periods of disqualification, such that the costs to be borne by the Relevant Respondents should also be apportioned in a way to reflect the circumstances as a whole. His suggestion is that, when looking at the involvement of the respective Relevant Respondents, an appropriate apportionment for R13 should be no more than 10% of the costs of the proceedings.

67. I accept that some apportionment amongst the Relevant Respondents is appropriate, and that the apportionment might broadly reflect the overall circumstances and respective culpabilities. In the exercise of my discretion, I consider the correct apportionment to be as follows: R3 (30%), R6 (20%), R7 (20%), R8 (15%), and R13 (15%). I so order.

(Russell Coleman)

Judge of the Court of First Instance

High Court

Mr Victor Dawes SC and Ms Bonnie YK Cheng, instructed by Securities and Futures Commission, for the petitioner

Mr Foster Yim, instructed by Cheung & Liu, for the 3rd respondent

Mr Derek Chan SC and Ms Kristy KY Wong, instructed by K&L Gates, for the 6th, 7th and 8th respondents

Mr Kevin Hon, instructed by Sidney Lee & Co, for the 13th respondent