Application No. 11 of 2007

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

ROBIN JONATHAN GIBBS FOX — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Mr Kwok Lam Kwong, Larry, J.P., Member

Mr Tang Kwai Nang, B.B.S., J.P., Member

Date of Hearing: 11 January 2008

Date of Determination: 28 November 2008

DETERMINATION

The application

1. This is an application by Mr Robin Fox for review of a disciplinary decision of the SFC dated 14 September 2007, in which the regulator determined to fine Mr Fox the sum of HK$70,000.00.

2. The decision was made under section 194(2) of the Securities and Futures Ordinance, Cap 571, and is a 'specified decision' within the meaning of section 217(1) of that Ordinance.

Background to the SFC disciplinary action

(a) The Notice of Proposed Disciplinary Action

3. By letter dated 31 October 2006, the SFC issued a Notice of Proposed Disciplinary Action ('NPDA'), which focused upon the role played by Mr Fox, at the material time a licensed person with the South China Capital Limited ('South China') and a manager within its Corporate Finance department, within the context of an application for listing on the GEM Board of a mainland company known as 'Sobao Group Limited', in terms of which such listing application South China was the sponsor.

4. In the NPDA the SFC alleged that Mr Fox: (i) had failed to ensure that in the context of this listing application the representations made

and the information provided to regulators was true, accurate, complete and not misleading in a material aspect in breach of General Principle 2 of the Code of Conduct for Persons Licensed and Registered with the SFC ('the Code of Conduct') and Clause 5.8 of the Corporate Finance Adviser Code of Conduct ('the CFA Code of Conduct'); (ii) that he had failed to conduct and/or ensure that due and careful enquiries on Sobao's business were conducted, thereby breaching General Principle 2 of the Code of Conduct, and Clauses 5.1, 5.8 and 6.1 of the CFA Code of Conduct; (iii) that he had failed properly and diligently to supervise persons working on the Sobao listing in breach of General Principle 3 and Clause 4.2 of the Code of Conduct and Clause 2.4 of the CFA Code of Conduct; and (iv) that he failed to keep and/or ensure that proper books and records and a proper audit trail of work were kept, in breach of General Principle 2 of the Code of Conduct and Clause 2.3 of the CFA Code of Conduct.

5. The NPDA was in very detailed terms, and is some 82 paragraphs in length, together with a schedule of the List of Documents relied upon, which constituted records of interviews, correspondence between the Hong Kong Stock Exchange and South China Capital Ltd, and miscellaneous other documents, in all some 55 documents; it dealt, *inter alia*, with the regulator's Grounds for Concern, Mr Fox's role as a manager of Corporate Finance within South China, and a detailed history of the events which had led the SFC to take the view adumbrated in that letter.

6. At paragraph 74 of the NPDA, the SFC indicated that it then proposed to suspend Mr Fox's licence under the SFO for a period of 9 months, and in the paragraph following set out its reasons for considering why this proposed penalty was appropriate in light of the factors therein listed, which in substance were four: (i) the extensive degree of deficient due diligence; (ii) the seriousness of the untrue statements made to the regulators; (iii) the potential impact that an inappropriately prepared IPO may have on investors and on the credibility of Hong Kong's stock markets; and (iv) the fact that Mr Fox had no disciplinary record.

(b) The representations made

7. Mr Fox was invited to make representations to the SFC should he object to such proposed disciplinary action, and duly he did so object.

8. By a letter dated 16 February 2007 from his solicitors, Messrs Boase Cohen & Collins, the SFC concerns as set out in the NPDA were addressed in some detail.

9. As a precursor to dealing *seriatim*, upon a paragraph by paragraph basis, with each of the allegations levelled against him, on his instructions Mr Fox's solicitors took the opportunity also set out in summary form his overall position in respect of these allegations.

10. This took the form of a categorical denial that Mr Fox was at any stage assigned the role of 'supervisor' in the proposed listing of the

Sobao Group Limited, nor that he was ‘manager in charge’, roles which, it was said, at all material times were held and discharged by one Mr Eric Chan, Assistant Supervisor for the proposed listing, and at the time Corporate Finance Director of South China.

11. Further, the allegations that Mr Fox had failed to conduct due and careful inquiries were strenuously refuted, and were, it was said, “premised upon a misunderstanding of his role” within this listing preparation and “upon a misplaced confidence in the veracity of information furnished to the Commission” by Mr Eric Chan and by one Mr Aron Leung; similarly the allegation of inadequate supervision was denied, and was the allegation that Mr Fox had failed to keep proper records: the position was that “his true role in the proposed listing did not require him to discharge such a duty…”

12. In addition, within this letter of representation Messrs Boase Cohen & Collins also made reference to certain “material irregularities” within the investigation, maintaining that full translations of all the materials relied upon had not been furnished either to the firm or to the client, and that in November 2003, at the time of Mr Fox’s only interview by the SFC, that Mr Fox had been given to understand that he would be required for further interview, but that “he was never given this opportunity”; further, that his impression throughout was that he was assisting the SFC “solely as a witness of fact”, and that the allegations now facing Mr Fox largely arise “further to the four interviews of Mr Chan which were subsequent to that of

our client" and that in light of Mr Chan's position and role in the proposed listing "we are surprised that the Commission chose not to afford Mr Fox an opportunity of giving the investigators his full version of events."

13. In this context it was said that at no stage had the Commission chosen properly to put Mr Chan's allegations directly to Mr Fox, and that thus Mr Fox had been "denied due process"; the letter of representation goes on to say that it is Mr Fox's case that "the information supplied particularly by Mr Chan is largely untrue, riddled with factual errors and seriously tainted by self interest".

14. Accordingly, it was suggested to the SFC that in order to redress the imbalance and to enable the regulator to obtain a full understanding of Mr Fox's position, that Mr Fox was prepared to offer himself for further interview at any time convenient to the Commission: "in all fairness such an opportunity should be afforded to him".

15. Mr Fox's professional background is as a non-practising accountant and chartered financial analyst with experience in investment banking and management; his integrity never before had been called into question. He was engaged by South China Capital, in August 2002, by one Mr Patrick Cheng, the scope of his duties comprising the managing of transactions within Mr Cheng's Department at South China, the managing of such transactions not requiring any knowledge of Chinese.

16. Mr Patrick Cheng and Mr Eric Chan were subsequently to resign from South China in the wake of the debacle over the purported listing of the Sobao Group, and the letter of representation concludes by referring to the irony inherent in the fact that after these resignations, Mr Fox, now so heartily impugned, personally had remained at South China Capital, with one of his duties being to prepare an internal house manual setting out the 'due diligence' procedures for sponsors of listing applications.

17. If we may say so, the letter of representation, of which Mr Cohen appears to have been the author, is a solid and well-argued document, eschewing strident averment in favour of calm, reasoned assertion, and in our view was a document deserving of careful consideration by the regulator. Attached to this letter were copies of documentary materials which the applicant wished to place before the SFC, and which have been included in the relevant bundle before us.

18. One of these documents was a letter dated 29 January 2007 written by Mr Patrick Cheng, and copied to Mr Goyne of the SFC, in which Mr Patrick Cheng of South China Capital, who resigned in the wake of this failed listing application, stated *inter alia* that it was Mr Eric Chan, Mr Fox's immediate boss, who had been "primarily responsible" for the Sobao transaction "including taking charge of the process with respect to due diligence and the listing application" and that Mr Chan "was in charge of the entire implementation process, including due diligence work and documentation work."

(c) The Notice of Final Decision

19. That the SFC indeed did consider carefully the representations made on behalf of Mr Fox is evident from the regulator's Notice of Final Decision dated 14 September 2007 which was sent to Mr Fox, wherein, at paragraphs 5(i)-(xi) his main submissions are fully summarised.

20. Paragraph 6 of this Notice contains the final decision of the regulator in this disciplinary proceeding.

21. The SFC say that having considered all the material before it, including the representations thus made, it had been concluded that Mr Fox had committed the failures outlined in the NPDA, and thus had been in breach of the Code of Practice, *save for* item (d), namely, the allegation as to a failure to keep proper books and records and a proper audit trail of work, and thus that Mr Fox's fitness and properness to remain licensed has been called into question for the purpose of section 194 of the SFO.

22. Paragraph 7 contains the revised decision upon penalty.

23. Instead of the 9 month suspension originally imposed, the SFC notified Mr Fox that it had decided to fine him ***HK$70,000.00***, and that in coming to his decision upon penalty the regulator had considered not only the matters set out in paragraph 64 of the NPDA (which concerned the fact that South China was not taking instructions for this listing directly from Sobao's directors when preparing the draft prospectus, or in answering the

Stock Exchange queries, and that Mr Fox had been instructed by Mr Chan to regard a Mr Law, a non-director nor a Sobao employee, as his direct contact person to obtain information for this listing application, albeit there had been no written records of any authorization so to do from Sobao's directors), but in addition that allegation (d) as to lack of records/proper paper trail had been dropped.

24. The Notice of Final Decision thereafter proceeds to recite at some length the regulator's reasons for the decision as ultimately made to fine Mr Fox in the foregoing sum.

25. This document speaks for itself, and for the sake of brevity we do no more than to summarize its basic thrust.

26. The allegation of procedural unfairness and deprivation of due process was firmly refuted, as was the applicant's protestation as to his lack of personal responsibility for that which had occurred, and that there had been no responsibility upon him to supervise the Sobao listing or the people working thereon.

27. The SFC found that Mr Fox had failed to ensure that representations as made to the HKSE were true, accurate and not misleading, and in addition, the SFC concluded that the documents they had inspected and which were attached to Mr Fox's representations "show that your involvement [in the Sobao sponsorship application] was not as restricted as

you claim", citing in this regard certain specific emails and letters signed by Mr Fox, and the fact that he had assisted with the preparation of a draft of the prospectus and with responses to Stock Exchange queries thereon, albeit that it is acknowledged that "you were not the main person in charge of the listing", and also that there were other supervisors involved in the matter.

28. The SFC also relied on the fact that in the context of the due diligence work, Mr Fox had described himself as assisting Mr Chan from 21 May 2003 and in helping to answer the Stock Exchange questions: "even if the circumstances forced you to assist…that does not absolve your duty to do the necessary due diligence once you had taken the work upon yourself", and that he was in error in relying upon assurances as to due diligence and in not reviewing the due diligence files.

29. Other details were sketched in, including that of Mr Fox putting himself forward "as declaring the accuracy of the content" of certain letters: "with your experience in the industry, you ought to have known that signing letters to the regulators should not be taken lightly", and that, as signatory, he ought to have satisfied himself as to the accuracy of the correspondence with the Stock Exchange.

30. The letter concluded with the view that, Mr Fox's representations having been considered, they did not adequately explain the allegations put to him: "we are not convinced that your involvement was limited merely to correcting the English in documents. You were involved

in tasks that are effectively due diligence and in drafting and settling replies to queries from the SEHK arising from the draft prospectus. These roles are fundamental to the listing process…" The SFC further was not convinced that Mr Fox had not taken on a supervisory role in relation to staff members Tsoi and Leung, and that it was "no excuse" for Mr Fox simply to have relied on colleagues' assurances as to important matters.

31. Nevertheless, the letter states that in light of the time period in which Mr Fox's application for transfer of his licence had been under review, the fact that one allegation was being dropped, and his co-operation with the regulator, the penalty as proposed was to be reduced, given that the SFC did not consider that his failures had been "as serious as we first considered", although it remained their view that Mr Fox's fitness and properness had been called into question, and that he had been guilty of misconduct for the purpose of section 194 of the SFO.

32. Mr Fox remains aggrieved at this conclusion, notwithstanding the very considerable dimunition in the penalty ultimately decided upon by the SFC, and accordingly filed for a review of this decision.

The proposed application for listing of the Sobao Group

33. At this stage we should briefly allude to the aborted 'Sobao Group' listing application, the failure of which caused substantial fall-out within South China Capital, which as a body itself was disciplined in this regard, together with its Chief Executive, Mr Howard Gorges, and which

further attracted the forced resignations of other senior staff, including the aforesaid Mr Patrick Cheng and also that of Mr Eric Chan, whom himself has launched an application for review before this Tribunal in SFAT No 1 of 2008.

34. In this latter context, we observe that we consider it unsatisfactory in principle for the applications of Mr Fox and Mr Chan not to have been scheduled to be heard together or, at the least, dealt with on a back to back basis, given that they involve the like factual matrix of this failed listing, although we take this opportunity to record that, as matters transpired, prior to the issuance of this Determination we now have had the opportunity also not only to hear the review application of Mr Eric Chan, but also to issue our Determination with regard to that application for review.

35. However, to return to the Sobao listing application, which finally was refused by the Hong Kong Stock Exchange after no less than, we are told, *five* submissions on the part of South China of draft versions of the proposed prospectus.

36. In terms of the proposed listing of the Sobao Group, the relevant Form 5A specifically had named Mr Gorges as South China's Principal Supervisor of the listing application, and Mr Eric Chan as Assistant Supervisor.

37. In the event this application has generated considerable quantities of paper.

38. Suffice it to say that it is wholly clear to this Tribunal, on the face of the available evidence, that little cogent or serious effort was made by South China, *qua* sponsor, properly and accurately to reflect the nature of the background and business of the Sobao Group in preparation for the proposed listing. We have been taken through a number of documents which tend to suggest that this application obviously was 'client driven', without great regard to the accuracy of the facts as then asserted, within the various drafts of the prospectus were proposed to as underpin the proposed listing, and that those involved at South China Capital regrettably permitted themselves to advance information within these drafts submitted to the HKSE notwithstanding that the content was insufficiently verified, and in some instances wholly unverified, in particular in response to the detailed, and if we may say so, entirely appropriate, HKSE queries as to the true situation with regard to the background and operation of the Sobao Group.

39. We do not wish to be unfair, but to describe the entire process as being conducted in an entirely 'slapdash' manner is, we think, somewhat to understate the position.

40. At this juncture we should indicate our gratitude to Mr Beresford, counsel for the SFC, for his considerable work in detailing, within his skeleton argument, the precise sequence of events, commencing

with the appointment of South China as sponsor to assist the Sobao Group – which was stated to have been engaged in the development, marketing and sales of healthcare food products and dietary supplements since 1999 – with its application for listing on the Growth Enterprise Market ('GEM'), and the divers actions taken by South China pursuant to that application, including the various drafts of the prospectus submitted to the HKSE, the frequent requests for clarification made by the HKSE, and the consequent representations made pursuant to such requests by South China as sponsor.

41. From this information a significant pattern which emerges is that, when each particular draft of the prospectus was analysed by the Stock Exchange, and a series of insightful and relevant questions passed back to the sponsor, South China, it appears that these questions duly were passed back to the Sobao Group, and that the responses therefrom in turn simply were passed back to the Exchange absent any real or proper attempt on the part of the sponsor at any more than token verification of the answers thus received.

42. Hence the scenario wherein, it is said, the sponsor became little more than an 'intermediary post-box' for the client, which clearly wished to obtain the listing on an urgent basis.

43. So that, for example, the nature of the Sobao business for the past 24 months, the names of the company's subcontractors, the nature of the R&D work undertaken and the equipment thus used, the description of

pre-trial testing of products, and the background of certain Sobao personnel all became the subject of queries which, the regulator now asserts, simply were *not* the subject of the relevant and appropriate degree of due diligence.

44. In this context Mr Beresford has taken us in detail through the sequence of events, as each submitted draft of the prospectus was rejected on the basis of queries which never properly were answered, until there came a time when the entire undertaking formally was aborted, and the proposed listing rejected by the Exchange on 9 October 2003.

45. It was within this factual framework that the involvement of Mr Fox came under regulatory scrutiny.

46. To take but one example of several quoted and relied upon by Mr Beresford: on 18 August 2003 South China represented in a letter to the Stock Exchange that (i) it had been aware of the research and development arrangement of the Sobao Group with an entity known as Southern Pharmaceutical since the beginning of its due diligence work in October 2002; and (ii) the written R&D Agreement had been entered into on 1 March 2003; and (iii) it knew of the written R&D Agreement in or around April 2003, this letter giving the names of Eric Chan, Robin Fox and Aron Leung as the persons authorized to conduct the day-to-day communication with the Stock Exchange.

47. On 27 August 2003 South China repeated its representations to the Stock Exchange as to the R&D Agreement, once more giving the foregoing names as the persons authorized to conduct communication with the Exchange, on 4 September 2003 South China had replied to the Stock Exchange's comments of 26 August 2003, and on 30 September 2003 South China represented to the Stock Exchange that it had been informed about the verbal arrangement between Sobao Group and Southern Pharmaceutical when it had carried out due diligence, and that it had requested the Sobao Group to document the arrangement; in this context Mr Fox had participated in the drafting of the relevant letter, which once more gave the names of Eric Chan, Mr Fox and Aron Leung as the persons authorized to speak on the matter with the Exchange.

The SFC investigation and records of interviews

48. We also have been taken by Mr Beresford through a summary of the various interviews conducted by the SFC of relevant South China personnel, including Mr Fox, which interviews have resulted in the instant case in the disciplining of Mr Fox in the terms of the correspondence outlined at the beginning of this Determination.

49. There is no necessity to go into detail about these interviews, which ranged over a significant number of persons and subjects relevant to this proposed listing. Suffice to say that, in broad terms at least, everyone appears to have blamed everyone else for the imbroglio that took place in terms of this proposed listing of the Sobao Group.

50. For example, in his SFC interview on 21 October 2003, Aron Leung said that Eric Chan and Robin Fox had supervised the listing application and that they had not given him any instructions in relation to due diligence; on 4 November 2003, HK Law, another South China employee, said that he had talked with Mr Fox two or three times about replies to major Stock Exchange queries; in his own interview on 9 December 2003 Mr Fox had said that Mr Eric Chan had told him that it was not necessary to visit the alleged Sobao Group subcontractors, and said that when he took over the listing application he was told the manufacturing was outsourced and the locations of the relevant factories, and that he, Fox, had agreed that the contracts were material and that it would have been best practice to have had them translated from the Chinese for him to review; in his interview on 11 December 2003, Eric Chan had said that Robin Fox, "the manager in charge", was responsible for reviewing the prospectus, and that he had "delegated the project jointly" to Robin Fox and Aron Leung, but that since Fox could not read Chinese, Aron Leung had acted as the contact person; in his interview of 31 July 2004, Aron Leung said that, apart from asking Sobao Group for the agreements with the subcontractors, South China did not do any due diligence: he did not know what to do himself, and his supervisor, whether Fox or Chan, did not give him any instruction as to what due diligence had to be done in relation to the subcontractors, so that he did not do any work. He further said that "it was probably Eric Chan who was in charge of this job" albeit, on Chan's instructions, most of the things that he had done had been given to Fox to peruse before they were given to

Chan, although he accepted that Fox "may not have known everything that had happened before he was involved with this job with the Sobao Group…"

The applicant's argument

51. Mr Robin Fox, who was legally unrepresented at this application, gave sworn evidence from the witness box, which evidence encompassed not only that which was in his witness statement prepared for this application, but also, and for the sake of completeness, further included the various matters of which he also had spoken in some detail in submission from the bar.

52. Mr Fox affirmed that the matters which he had pressed on this tribunal were the truth, and thereafter he was cross-examined by Mr Beresford, for the SFC, the main thrust of which was to deal with the extent and ambit of Mr Fox's involvement with the proposed listing on the GEM of the Sobao Group, and also with relevant regulatory publications dealing with the expected standard of conduct on the part of sponsors making application for listing of companies: in this latter context Mr Beresford referred to a paper on the regulation of sponsors, dated May 2003, produced jointly by the SFC and the Hong Kong Exchanges and Clearing Limited, wherein is stressed the public reliance on the integrity, independence and expertise of sponsors and underwriters in terms of the public issue of securities which has the function of enhancing the marketability of the security as issued.

53. In substance, Mr Fox's submission to this panel, as reflected in his evidence, was that in terms of the Sobao listing he was but a minor personage in the listing process with no "subsidiary supervisory responsibility", as was alleged by the regulator, and that it was "impossible" for him adequately to supervise staff to ensure compliance with the relevant Codes.

54. As such, he said, he essentially was on the periphery of affairs, acting on the instructions of Eric Chan, the Assistant Supervisor for the sponsor and Corporate Executive Director, and that he, Mr Fox, frequently was at a disadvantage linguistically, given that he had no competence in written or spoken Chinese, and thus effectively he was dependent upon things that were told to him by other staff members; he frankly accepted in his evidence that he had been "too trusting in terms of what he had been told", and in terms of the drafts of the prospectus submitted, he said that he had been acting on the instructions of others.

55. In fact, the whole basis of his application was that he had acted reasonably in the particular adverse circumstances as had confronted him in this case, and that in material part he had been misled in certain aspects of the application by Mr Eric Chan, the stipulated Assistant Supervisor. He had had no control, he said, over the substantive content of the drafts of the proposed prospectus nor the substantive content of submissions to regulators by the sponsor in the course of the listing application, not least because he had had to rely on others as to the content of Chinese documents; he

emphasized also that the sponsor's legal advisor had also been engaged to perform prospectus information verification.

56. In no sense did Mr Fox try and cover up the fact that indeed he had been involved in the Sobao listing: he described such involvement as having been a "horrible episode" in his life, and Mr Fox emphasised and re-emphasised that he personally had been responsible for no conscious misrepresentations to the regulator.

57. Nor, he submitted, had he personally been instructed to perform due diligence, nor had he been capable of so doing in fact, given his lack of written and spoken Chinese, the inability of the listing applicant's directors to speak in English and the amount of source documentation in Chinese, which was left to the Assistant Supervisor, Mr Eric Chan, and his Chinese staff, as had been necessary in the circumstances. Mr Fox commented that if he had refused to work on the listing application *unless* everything had been translated for him there existed a good probability of his being asked to resign.

58. For his part, Mr Fox submitted, he regarded his work in this whole affair as essentially peripheral, and not far short of merely secretarial: to repeat, he had been told by Mr Eric Chan, the Assistant Supervisor for this listing, that it was not his job to perform due diligence, he was not capable of so doing, given his linguistic problems, and supervision of South China staff, to the extent of ensuring their compliance with the relevant

Codes, was not delegated to him, and in any event was not possible in the circumstances, nor did he have direct control over the substantive content of draft documents.

59. Of course, Mr Fox said, indeed he had discussed certain work with staff members, had read draft documents, and had made suggestions, but in his view that was not to be regarded as 'supervision' in this context; moreover the SFC appeared to have accepted that Mr Aron Leung had reported directly to Mr Chan, so that in practice he could not have 'supervised' Mr Leung, whilst given that he reported to Mr Chan, he could not have supervised him either.

60. Mr Fox further maintained that he was unfamiliar with, and did not understand the SFC concept, as now introduced into this case, of "subsidiary supervisory responsibility", and he was able to find no reference to this concept in the Codes or in the SFO. In the circumstances he contended that it was unreasonable to have concluded, as the SFC appeared to have done, that he had failed properly and diligently to supervise persons working on the Sobao listing.

61. In terms of the representations he was said to have made, Mr Fox said that in this connection he had relied on Mr Chan's own work and on the other Chinese speaking staff, especially Mr Leung, and had assumed that the information submitted was true, accurate and complete, although, with the benefit of hindsight, such trust in the Assistant Supervisor,

Mr Chan, had turned out to have been fundamentally misplaced. He also suggested that he had been entitled to rely upon the supervision of Mr Chan, the Assistant Supervisor, by Mr Gorges, the Principal Supervisor, which supervision the SFC had found to be inadequate according to their press release announcing the formal disciplining by the SFC of Mr Gorges, who appears to have entered into a global disciplinary settlement with the SFC.

62. In fact, in light of the surrounding circumstances his primary role, said Mr Fox, was to act in effect as an "English editor" and in co-ordinating responses to queries by the Stock Exchange: he pointed out that within the Notice of Final Decision the SFC had recognized that one of his roles had been the co-ordination of replies, since the command of English of his colleagues was relatively poor, and apart from Mr Gorges, the Principal Supervisor for this sponsorship and Group Executive Director at South China, Mr Fox was the only native English speaker. This was why, when Mr Chan was away, as was often the case, he had signed letters to the Exchange on a 'pp' basis.

63. Mr Fox also took issue with the apparent reliance (at least initially, albeit whether this continued to be the case was not clear on the face of the Notice of Final Decision) by the SFC upon the witness statements from Mr Eric Chan, the Assistant Supervisor and corporate finance director at South China, whom, said Mr Fox, "has been thoroughly discredited and whose representations changed over the course of the investigation" to the effect that he, Mr Fox, was the 'manager in charge' and that he had been

responsible for all due diligence; in addition, he said, there had been an important mistranslation in the witness statement of Mr Leung, to the effect that Mr Leung sometimes had reported to Mr Fox directly, when the proper reference should have been that he had reported to Mr Chan directly.

64. Finally, Mr Fox made a number of observations on the burden of proof, to which here we need not make detailed reference, and he went on to say that if, on the basis of the evidence before it, the Tribunal was to conclude that he did not act reasonably, then he considered that his level of punishment was considerably 'out of sync' with that levied upon his immediate boss, Mr Chan; moreover, he suggested that the standards being applied by the SFC in 2007 were, and are more, onerous than those at play in 2003.

65. The regrettable result of this sad affair, Mr Fox submitted, was that the SFC's approval of his licence application to move to another employer, dated 13 September 2006, had been delayed for some 11 months, when normally such approval would have taken around 7 days, and he submitted that in the circumstances the 'approval period' effectively was a period of suspension which was not merited, not least since the actual approval by the SFC, as per its letter of 10 September 2007, was made notwithstanding the apparent existence of "concerns" on the regulator's part, although such concerns clearly had been insufficient to arrive at the conclusion that Mr Fox was not 'fit and proper' within the meaning of the SFO.

66. Accordingly Mr Fox suggested, if he now was accepted to be a ‘fit and proper person’, this was and should be a matter for the Tribunal to take into specific account.

The SFC response

67. Mr Beresford approached this application in a typically fair and balanced manner.

68. He noted that the details of this particular case raised the broad issues of failure to ensure that representations made to the Exchange were accurate, failure to conduct/ensure due and careful inquiries on the listing applicant’s business, failure properly to supervise persons working on the listing, and finally, whether the penalty as imposed was excessive.

69. However, he submitted, such factual findings apart, this case also raised the general issue of whether a Manager such as Mr Fox, who neither was the named Principal Supervisor (Mr Gorges) nor the named Assistant Supervisor (Mr Eric Chan), but who nevertheless was licensed to carry on and in fact did carry on licensed activities, could avoid *any* degree of responsibility for his part in carrying out this regulated activity, and for the actions undoubtedly assumed by him in relation to this listing application.

70. In the course of his address Mr Beresford rehearsed the law in this area, which focused on the meaning attributable to ‘misconduct’ within section 193(1)(d) of the SFO, and on the fact that within the relevant

provisions of the Corporate Financial Adviser Code, a sponsor is responsible for its own representations, and further noted that that responsibility fell to be assessed in the context of the sponsor's responsibility to use all reasonable endeavours to ensure that the listing document was prepared to the required standard and that no relevant information had been omitted or withheld (CFA Code, para 5.8), to understand the business of the client (para 6.1), and the requirement of the GEM Listing Rules to the effect that the sponsor be closely involved in the preparation of the listing document (Rule 6.45), whilst the sponsor must declare to the Stock Exchange, prior to the issue of the listing document, that it had satisfied itself, after having made due and careful inquiries, of specified matters of importance (Rule 6.47(2)), which was a separate obligation to that in Rule 6.45 to ensure that the document had been verified to an appropriate standard and was not misleading.

71. The importance of these basic requirements was obvious, counsel said, given the trust reposed by the investing public in the listing document, namely the prospectus – which in the instant case never was issued, given the rejection/failure of the proposed Sobao Group listing.

72. Thus, this issue of the sponsor's responsibility under the GEM Listing Rules to make due and careful inquiries was an activity within General Principle 2 of the Code of Conduct for Persons Licensed or Registered with the SFC, which requires a sponsor to act with due skill, care and diligence in the best interests of the market.

73. In the event, Mr Beresford noted that the SFC had found as a fact that Mr Fox had failed to conduct and/or ensure that due and careful inquiries on Sobao's business were made, particularly in relation to Sobao Group's subcontractors, that he had failed diligently and properly to supervise persons, namely Aron Leung, who were working on the listing application.

74. The fine levied of HK$70,000 was fully justified on the evidence, counsel maintained.

75. The correct question to be asked, he said, in terms of the SFC's specific findings of negligence, was whether Mr Fox ought, by reason of surrounding circumstances, to have been put on inquiry that the representations as made to the Exchange were false, that inadequate due diligence had taken place, and that Mr Leung had been inadequately supervised.

76. If, on the other hand, upon this rehearing the Tribunal was to come to the view that Mr Fox indeed was well aware of these matters, but had chosen to turn a 'blind eye' thereto, then the correlative question would arise as to whether the penalty imposed by the SFC had been too lenient.

Decision

77. We confess that we have not found this an easy decision to make – indeed there has not always been complete agreement on all matters

between the members of the tribunal hearing this particular application – although at the outset we are minded to emphasise that in our view there is no question of finding, and we do *not* so find, that Mr Fox deliberately turned a 'blind eye' to the manifest deficiencies perpetrated by the sponsor, South China, in relation to this proposed listing application. In this connection we wish to state that we do not consider Mr Fox to be other than an honourable person.

78. Accordingly we judge this case solely in terms of the formulation suggested by Mr Beresford as to whether, in the circumstances, Mr Fox should have known or realised how deficient were many aspects of this sponsorship, including the vexed issues of supervision and due diligence.

79. Let us state at the outset that we consider, and indeed accept, that Mr Fox found himself in a difficult position.

80. With the exception of the Principal, Mr Gorges, who clearly was hardly involved in this whole sad affair, and who obviously had left the matter to his subordinates, Mr Fox was the sole European on a team assembled for this job which otherwise was conducted predominantly in Chinese.

81. Thus, there was an immediate linguistic disadvantage facing Mr Fox, and we think there is some merit in his contention that a good deal of his attention in fact was 'quasi-secretarial' in terms of polishing the

English within the drafts and often responses to be submitted to the regulator, and generally co-ordinating work done by others.

82. Accordingly, we are willing to, and do, accept the primary position that Mr Fox was *not* at the forefront of the basic work required to be done in connection with this sponsorship, and that there was a considerable measure of reliance by him personally on the work done by others, whom in practice reported directly to that which appears to have been be largely absentee Assistant Principal, Mr Eric Chan.

83. Viewed thus, Mr Fox clearly was at an inherent and considerable practical disadvantage: indeed, with the benefit of hindsight he may well now take the view that he should have adopted the firm position within South China to the effect that the dynamic of this sponsorship, the preparation for which was conducted with the client in the Chinese language, was outwith his competence, and that he should have attempted to avoid any part whatever in that which clearly was a disastrously prepared piece of work: the issuance and submission to the Exchange of no less than the four or five drafts of the proposed prospectus for the Sobao Group issue seems to us to speak volumes as to the standard of work and due diligence that this sponsor then was producing.

84. However, it is a matter of record that Mr Fox did *not* take such a stand. Whether he feared for his continued employment prospects we know not, although we are inclined to the view that the probability was, as

indeed he suggested in evidence, that to insist or gainsaying his own participation in this project in fact may have placed his continued employment with South China at risk.

85. So the hard fact is that Mr Fox soldiered on, albeit in difficult circumstances.

86. This much, therefore, is clear.

87. The analytical question which arises, therefore, is that having taken this decision to remain involved, to what extent, if at all, should he now be subject to disciplinary sanction by the SFC, which in our view had ample reason to take a very dim view of the overall manner in which this proposed listing was handled by South China: indeed, the sad and lengthy litany of facts/mistakes/errors/misrepresentations speak for themselves.

88. At the end of the day, we have come to the view that, manifold personal difficulties notwithstanding, Mr Fox cannot simply be wholly absolved from *any* responsibility, much as he would wish us to conclude that this should be the situation.

89. At this juncture we wish to observe that, as a witness, and indeed as a person with corporate finance experience and background, he struck as both as sound and fundamentally truthful, in distinct contradistinction to our reaction to Mr Eric Chan, whose performance in the

witness box in his application for review – as to which, see our observations in our Determination dated 28 November 2008 – struck as most unfortunate, to put it at its lowest.

90. But this is to digress.

91. If there was a flaw within Mr Fox's case, and the presentation thereof, it was that in our view he tended, perhaps understandably given the opinions he espoused before us, to *underplay* the extent of his involvement in this application.

92. In so saying, we wish to make it clear that we do ***not*** imply any intention on his part to deceive the Tribunal – to the contrary, we regarded Mr Fox as an honest man caught in a difficult professional dilemma – but we think it fair comment that the unduly extended history of this disciplinary action (there is no dispute by the SFC but that he was kept waiting for some 11 months for the new accreditation he sought, pending resolution by the SFC of his disciplinary sanction in this case), and thereafter in waiting for this review application to be heard, no doubt has tended to diminish in his own mind the degree of his involvement and the actual work that he did perform.

93. As Mr Beresford pointed out in this final submission, matters of fact which are documented cannot be gainsaid, and in coming to the view that we have taken the opportunity fully to review all the contemporary

documentation, in which context reference to Mr Fox appears not infrequently.

94. Thus, whist we unequivocally *reject* the 'blind eye' thesis that counsel for the regulator trailed before us, equally there is no doubt in our minds but that Mr Fox *did* personally participate in this sponsorship application to a degree which cannot in our view simply be relegated to the 'quasi-secretarial', however much, with the benefit of hindsight, that Mr Fox may wish thus to characterize his position.

95. For example, it is a matter of record that in terms of this application his title was 'manager', and that, pursuant thereto, he was asked by Eric Chan to participate in this application a few weeks before it was made.

96. Mr Fox was asked to look through the draft prospectus that was submitted on 29 April, which contained the representations as to the history, background and operation of the Sobao Group, the primary accuracy of which duly caused the Stock Exchange to launch its extensive inquiries – paradoxically it is a matter of history that the covering letter and the initial prospectus is admitted to have been submitted prematurely to the Exchange by Mr Aron Leung, without, it must be said, Mr Fox's knowledge (or indeed that of Mr Chan) by reason of the apparent fact that the Sobao Group was under "time pressure", and that "Mr Leung took it upon himself to put everything in".

97. However, after this initial (and obviously highly embarrassing) false start, as it were, Mr Fox undoubtedly assumed the role of the English language arbiter in all the materials thereafter submitted to the Exchange, although in evidence he accepted that this 'primary role' as he put it, indeed developed and that he grew to act as co-ordinator ("a role of co-ordination"), and it is evident that thereafter he *personally* took steps to obtain "a better understanding of the company": as Mr Fox said in cross-examination, these steps "may not have been complete, I may not have had a perfect understanding, obviously I didn't in light of subsequent events, but I did try…"

98. Mr Fox did fairly accept that he *never* had met the authorized representatives of the Sobao Group, who were known to him as one Lam Chak Hing and Ms Cheang Pek Seong, instead confirming himself to meeting a 'Mr Law' instead ("because he was the only one who spoke English") who was *not* listed as such a representative, and he also accepted that he never had taken instructions as to the client from those specifically authorized to give such instructions.

99. Mr Fox further argued that the concept of 'due diligence' normally involved site visits and interviews with the stipulated responsible persons, plus consultation with the company's lawyers, and when he finally was able to visit the Sobao Group, as ultimately he did, in May 2003, he did *not* meet the responsible persons; he also accepted the suggestion from counsel that when undoubtedly he had become thus involved, he also had

realised that South China was not in a position properly to answer questions emanating from the Stock Exchange as to, for example, the identity of subcontractors of the Sobao Group, and yet it is clear on the available documents that he had permitted his name to be given to the Exchange as one of the three South China personnel authorized to communicate with the Exchange on precisely this issue, and to sign letters, albeit often on a 'pp' basis in the frequent absence of Mr Eric Chan, containing responses to the specific queries raised by the regulator.

100. In this connection Mr Fox denied the suggestion that he was well aware at the time that all that South China was doing was acting in effect as a 'forwarding service' to pass the information obtained from client to the Exchange, but that subsequently he had become aware, at least by the time of the Stock Exchange fax of 21 May 2003, that there was a problem not just with the names of the subcontractors, but also with the list of names of Sobao's top five customers and suppliers, and that (as per para 1.8 of that fax) the observation of the Exchange was that "substantial additional disclosure on the history of the group is necessary to show that it has actively pursued its business for 24 months, has a business of substance and a viable plan for future development…" As Mr Fox put it, by 21 May 2003 he *did* realize that "substantial further disclosure was necessary" in terms of this application and the content of a further draft prospectus.

101. Against this backdrop his evidence that he had taken steps personally to make a site visit on 26 May 2003, speaking solely to the

intermediary Mr HK Law, and that he accepted that he asked questions of Mr Law based on the letter from the Stock Exchange dated 21 May, albeit ultimately he came to realize that "this listing application was a bit of a dog", we are constrained to take the view – and we so find – that by this stage Mr Fox at the very least intuitively must have realised there was a real degree of deficiency in the due diligence process that had (or, rather, had not) been taking place, although he stoutly maintained that the various substantive (and partial) answers ultimately provided by South China to the Stock Exchange queries were not provided by him, but primarily by Eric Chan, then working in direct conjunction with Aron Leung.

102. For the purpose of this Determination we do not consider it necessary exhaustively to review the entirety of Mr Fox's evidence.

103. Suffice it to say that whilst we understand, and are minded to accept, his desire not to be characterized as "an alternative assistant supervisor", nevertheless in our view, and in the circumstances in which he found himself, he is unable factually to place himself so outwith the relevant management supervisory circle, and so much at the periphery of this application, as to remove any possibility of legitimate criticism arising from the deficiencies within the various drafts of the prospectus as were submitted by South China as to, for example, representations regarding the applicant's history of business, R & D, existing customers and products of the Sobao Group – all of which were, to put it at the lowest, obviously less than fully researched by South China.

104. We repeat that in our judgment Mr Fox was *not* positively aware that what was being put forward in the various proofs was, in some respects, either exaggerated or without foundation, or both, but we consider that in the area of due diligence in particular he is unable to take himself wholly 'out of the loop', and thus to achieve a complete setting aside of the disciplinary measure imposed currently against him.

105. As Mr Fox himself put it, in commenting upon a yet further and subsequent representation to the Stock Exchange made by the sponsor about a 'product development and research cooperation agreement' entered into with a company known as 'Southern Pharmaceutical' on 1 March 2003, he accepted that the representations as to the sponsor being aware of this agreement by as early as October 2002, (the commencement of the due diligence) "with hindsight…were probably false"…"but they didn't seem so to me at the time", and further, as to this admittedly "horrible episode", "at the time when I was in the middle of this I felt uncomfortable but, as I have said, I couldn't put my finger on it…"

106. In a nutshell, therefore, Mr Fox unfortunately found himself, as an English management executive within South China, in the middle of that which had become a disastrous listing application, particularly in terms of the due diligence and representation aspects – we are less certain about the allegation as to Mr Fox's failure of supervision, given the linguistic problems – albeit he was in a considerably more passive and, in our view, certainly in a non-dishonest/disingenuous role than otherwise was the case

with certain other South China personnel, but in the circumstances we regret that the instinctive sympathy that we entertain for his position does *not* permit us to reach the conclusion to which he invited us in his presentation, namely, that in the circumstances no disciplinary sanction whatsoever should be imposed upon him.

107. In coming to this view we bear firmly in mind the detailed provisions of the GEM Listing Rules, as were in force at the time, regarding the fundamental and central importance of sponsors within the listing application process.

108. It is also right to say that, whilst he disagreed with the SFC view regarding the nature and quality of his own involvement in this listing application, Mr Fox very properly and correctly did not cavil at Mr Beresford's submission as to the fundamental importance of the sponsor's role as reflected, for example, in *paragraph 21* of the GEM Listing Rules, in force in 2003, which reads:

> *"In satisfying itself that all relevant requirements of the Listing Rules have been complied with, the Listing Division attaches great importance to the role and responsibilities of a sponsor and, where relevant, to the opinions and reports of the issuer's other professional advisers…*
>
> *The involvement of the sponsor and also underwriters in the issue of securities at the IPO enhances the marketability of the securities, because the public relies on the integrity, independence and expertise of these professionals. The close proximity of sponsors to their client, the issuer, enables them to enjoy superior access to information and an ability to influence disclosure…"*

whilst *paragraph 22* is in the following terms:

> *"In Hong Kong the sponsor to an issuer has an overall responsibility to satisfy itself, on all available information, that the issuer is suitable to be listed, and that its directors appreciate the nature of their responsibilities and can be expected to honour their obligations under the Listing Rules. The sponsor also makes a declaration to the Exchange, based on its due diligence, that the listing document contains all information required by virtue of the Listing Rules and relevant legislation. In effect this is a declaration that the document contains all information that an investor may reasonably require to make an informed assessment of the issuer and the rights attaching to the securities to be listed"*

and *paragraph 27* reads thus:

> *"The sponsor's role is of special importance in Hong Kong, due to the unusually large proportion of listed companies and listing applicants whose domicile and main operations are located outside the jurisdiction. In the case of private mainland enterprises, verifying information (including the credentials of promoters) presents particular challenges."*

109. If our conclusion as to the' liability aspect' of this application be correct – and we emphasise that this is not a conclusion we have come to without considerable reflection upon the invidious practical circumstances in which Mr Fox found himself – we turn now briefly to the issue of quantum.

110. Our first observation under this head is that it is clear, consequent upon the representations made to it on Mr Fox's behalf, that the SFC radically rethought its initial conclusion as contained in the NPDA of 31 October 2006, wherein it was then proposed to suspend Mr Fox's licence for a period of 9 months, and amended this, as per the Notice of Final Decision, to a fine of $70,000. The regulatory reasons for so doing are set

out in detail in this Notice, and in our view constitute a realistic and not unfair *reassessment* of the position of Mr Fox.

111. In short, it is clear to us that the SFC realized that in terms of this disastrous listing application – wherein there is substance in the regulator's allegation that as sponsor South China permitted itself to act as little more than a glorified intermediary between the proposed listed company and the Exchange, and simply passed on information obtained absent necessary critical investigation and inquiry (in substantial part, it seems to us, because of the client's obvious desire to get this listing through as quickly as possible) that Mr Fox by no means occupied any central role/responsibilities, but was a relatively minor player in this whole regrettable affair.

112. During the course of his submissions as to quantum of sentence, Mr Beresford properly has reminded the Tribunal of the correct approach of a review body such as this to disciplinary sanctions for professional persons, which principle was restated by the Privy Council in *Gupta v. GMC* [2002] 1 WLR 1691, at para 21 of the speech of Lord Rodger, who delivered the judgment of the Board, which in turn cited the celebrated Court of Appeal decision in *Bolton v. Law Society* [1994] 1 WLR 512, noting that these cases, and the principles adumbrated therein, have been cited with approval in earlier determinations of this Tribunal.

113. Mr Beresford also correctly stressed the previous observations of this Tribunal that it is *not* an alternative regulator, and that it will interfere with a regulator's decision only when something has gone plainly or badly wrong; in addition, counsel noted that a principal purpose of the powers conferred under section 194 of the SFO us the preservation and maintenance of public confidence in the securities and futures industry rather than the administration of retributive justice, and that this is a matter of judgment vested in the SFC: *cf Raschid v. GMC* [2007] 1 WLR 1460.

114. In this context counsel for the SFC further made specific reference to the Disciplinary Fining Guidelines published by the SFC in accordance with section 199(1)(a) and under section 399 of the SFO.

115. Mr Beresford also attached to his skeleton argument a summary of previous SFC decisions on sponsorship, together with the relevant press releases accompanying such decisions, although we would observe that whilst material of this type often is useful in terms of a general comparative framework, inevitably individual cases are 'fact-sensitive', and thus require specific evaluation within the prevailing sentencing framework thus established.

116. We wish to say, also, that the issue of sentence in this case is a matter which keenly has occupied our minds. One of our members in particular regarded it as essential to reduce Mr Fox's fine to a lesser figure, not because the fine as levied necessarily must be regarded as 'plainly

wrong' in absolute terms, but because of that which we consider to be the regrettable and wholly disproportionate discrepancy between the fine originally levied upon Mr Fox, and that levied upon his superior, the Assistant Supervisor, Mr Eric Chan, who received a fine of HK$200,000, and whose responsibility for that which occurred struck us as being very substantially greater than that of Mr Fox: in which context see the judgment of this Tribunal, similarly constituted, in SFAT No 1 of 2008 dated 28 November 2008.

117. In summary, this aspect has caused us some degree of difficulty. At the end of the day, however, and after considerable reflection, we are of the view that the fine as currently levied upon Mr Fox indeed should be subject to reduction, from HK$70,000 to HK$40,000, which in this case we regard as not unreasonable in order to produce a more just and equitable disparity between the fine involved upon the Assistant Supervisor, Mr Chan, whom it seems to us was in considerable dereliction of his duties, and that imposed upon Mr Fox.

118. Accordingly, in this particular instance, it seems to us, with respect, that the justice of the particular case must be the paramount consideration, and in this regard, and in the circumstances of this case, we consider such a reduction in fine to represent a just (or, at the least a not unjust) result.

119. Moreover, in the very particular circumstances of this case we further consider that we have a degree of flexibility in that some allowance also can be made in this case in terms of costs. Normally, of course, costs follow the event, but in this context, and in the exercise of our unfettered discretion, we are *not* minded to order that Mr Fox, who in terms of liability has been the unsuccessful party in this review, should pay the costs of the SFC on this application.

Order

120. It follows from the foregoing, therefore, that the Order of the Tribunal upon this application for review is as follows:

(i) Save that there be a variation of the fine imposed upon the applicant from HK$70,000 to HK$40,000, this application for review in SFAT No 11 of 2007 be dismissed;

(ii) There be no order as to costs.

Hon Mr Justice Stone
Chairman

Mr Kwok Lam Kwong, JP
Member

Mr Tang Kwai Nang, JP
Member

Mr Robin Fox, Applicant, appearing in person

Mr Roger Beresford, instructed by the SFC, for the Respondent