Application No. 8 & 9 of 2009

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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IN THE MATTER of a Decision made by the Securities and Futures Commission pursuant to s 194 & 198 of the Securities and Futures Ordinance, Cap 571,

And

IN THE MATTER of s 217 of the Securities and Futures Ordinance

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BETWEEN

WAN TEN LOK	Applicant in 8/2009
YAN KWOK TING SUNNY	Applicant in 9/2009
and	
SECURITIES AND FUTURES COMMISSION	Respondent

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Before: Chairman, Hon Saunders J,

Dates of Hearing: 8-12, 17-18 November 2010, 19-20, 23-27 May, 8 June, 7 July 2011

Dates of 1st Supplementary Written Submissions: 5 & 12 August 2011

Dates of 2nd Supplementary Written Submissions: 9 & 14 September 2011

Date of Decision: 7 October 2011

D E C I S I O N

Background:

1. By two Notices of Final Decision, (NFD), issued by the Securities and Futures Commission, (SFC), findings were made against both Mr Wan and Mr Yan pursuant to ss 194 & 198 of the Securities and Futures Ordinance, Cap 571, (SFO), that they were guilty of misconduct for the purposes of s 194 SFO. Both were prohibited from being licensed with the SFC, Mr Wan for a period of six years, and Mr Yan for a period of four years.

2. Both have applied to this Tribunal, pursuant to s 217 SFO, to review the decisions of the SFC.

3. Mr Wan was licensed under the SFO:

(i) between 1 April 2003 and 30 August 2004, as a "Responsible Officer" of Core Pacific-Yamaichi Capital Ltd (CPYC), permitted to carry out regulated activities Types 1, (Dealing in Securities), 4, (Advising on Securities), 6, (Advising on Corporate Finance) & 9 (Asset Management);

(ii) between 4 September 2004 and 29 November 2004, as a "Representative" permitted to carry out regulated activities Types 1 and 6;

(iii) between 29 November 2004 and 1 July 2005 as a "Responsible Officer" permitted to carry out regulated activities Types 1 and 6; and

(iv) between 1 July 2005 and 31 December 2005 as a "Representative" permitted to carry out regulated activities Types 1 and 6.

4. Mr Yan was licensed under the SFO:

(i) between 1 April 2003 and 28 October 2004, 24 November 2004 and 27 June 2005, and 5 October 2005 and 23 December 2006, as a "Representative" permitted to carry out regulated activity Type 6; and

(ii) between 13 January 2005 and 27 June 2005, as a "Representative" permitted to carry out regulated activity Type 1.

Mr Wan has not been licensed with the SFC since 1 January 2006. Mr Yan has not been licensed with the SFC since 24 December 2006.

The circumstances in which the decisions were made:

5. The factual background giving rise to the investigations by the SFC and leading ultimately to the decisions are largely not in dispute[1].

[1] Footnotes refer to the Core Bundle (CB) or hearing bundles (A1-A25, B, C1-C12, D1-D4, E1-E2, F, G1-2), followed by the relevant tab, and page number in each bundle; e.g. A1/7/192, or to the transcript of evidence, (Transcript), by reference to the date and page number, or to Tribunal Exhibits,(Ex.).

The factual dispute revolves around the integrity of certain documents and soft copies of those documents, and it was to those that the great bulk of the evidence was addressed.

6. The original enquiry by the Stock Exchange of Hong Kong Ltd, (the Exchange) that stimulated the events that led to this case concerned circumstances subsequent to the listing, on 26 July 2002, of Tungda Innovative Lighting Holdings Ltd (Tungda) on the Growth Enterprise Market board (GEM) of the Exchange. CPYC was the sponsor for the listing, and, pursuant to the listing rules, was obliged to act as continuing sponsor to the company after listing.

7. Mr Wan had joined CPYC in September 1998, as an assistant director. He was promoted to the post of director in 2000, and became CPYC's Head of Corporate Finance, and an executive director in July 2002. Mr Wan left CPYC in August 2004 to join Macquarie Bank.

8. Mr Yan had joined CPYC in October 2000, as a manager in the corporate finance department. In March 2003, he became the personal assistant to Mr Wan. Mr Yan left CPYC in October 2004, when he too joined Macquarie bank.

9. On 26 July 2002, Tungda was listed on the GEM board of the Exchange. CPYC was the sponsor for Tungda's listing. The GEM listing rules then in force provided that the Sponsors declaration must:

> "…be signed on behalf of the Sponsor by the principal supervisor and assistant supervisor who have been most actively involved in the work undertaken by the Sponsor and will be treated by the

> Exchange as an acknowledgement of their personal involvement in the matter."

On 18 July 2002, Mr Wan, Lee Deng Charng, and Kelvin Wu (then an assistant supervisor of CPYC), had signed on the "Sponsor's Declaration in support of a New Applicant", (Form G)[2], in which they declared, inter alia, that Tungda was suitable for listing.

10. CPYC was appointed to act as the continuing sponsor for Tungda after the listing. On 7 August 2003, Mr Wan signed a form[3] entitled "Review Form for Continuing Eligibility" which listed Mr Wan as a principal supervisor actively involved in the continuing sponsorship of Tungda, with Griffin Tse as his assistant. CPYC's continuing sponsorship was terminated in October 2003, after the events which gave rise to this case.

11. On 23 May 2003, during the required period of continuing sponsorship, the Exchange wrote to CPYC in respect of a complaint that had been made alleging that overseas sales of induction lamps, which had formed a significant part of the income disclosed in Tungda's prospectus, had been overstated, (the complaint). In response to the enquiry, CPYC sent three letters, on 13 June 2003[4], 27 June 2003[5] and 22 July 2003[6], seeking to answer the queries raised by the SFC. In both the SFC's enquiry, and in the proceedings before me, these three letters have been called "the three submissions".

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[2] C1//50/7250.
[3] A4/20/816.
[4] CB2/15/7240.
[5] CB2/15/7245.
[6] CB2/15/7248.

12. The terms of the Exchange's first letter are important, because it sets out the parameters that needed to be considered by CPYC in formulating its replies, and because it illustrates the importance of the matters about which complaint had been made. The letter[7] was in the following terms:

> "We refer to a complaint received by the (Listing) Division in relation to the overstatement of sales reported in the Company's prospectus and related fraudulent act by the Company's management. The allegations are summarised as follows:-
>
> 1. The prospectus discloses that the overseas sales of induction lamps amounted to approximately HK$25 million for the year ended 31 March 2002. However, the complainant alleged that no overseas customers have ever expressed interest in induction lamps and queried the authenticity of the overseas sales;
>
> 2. The management forged invoices and shipping documents in relation to induction lamps, and falsify the sales thereof; and
>
> 3. The sales of other lighting products were overstated by 7 times.
>
> We would like to have a submission to address the above allegations by no later than the close of business on 30 May 2003. In addition, the sponsor and other relevant professional parties, such as the reporting accountants, are required to provide details of the due diligence work conducting the initial public offering exercise of the Company with respect to the above." (sic)

13. The essence of the enquiry made by the Exchange required an examination of the due diligence work that had been undertaken by CPYC in preparing Tungda for its IPO. It was plain from the first enquiry made by the Exchange that it would be necessary to examine the basis upon which Tungda had stated its overseas sales in its prospectus. That would

[7] B/44/7238.

necessarily require an examination of both the due diligence that had been undertaken at the time of the IPO, and an examination of the documentation that was relied upon by Tungda to substantiate the sales alleged in the IPO.

14. The fact of the complaint and the subsequent three submissions by CPYC in response were drawn to the attention of the SFC who reviewed the matter. The SFC took the view that the three submissions gave the Exchange an unjustified impression that CPYC had conducted sufficient due diligence work in relation to the alleged overstating of the sales. The SFC concluded that the verification processes that CPYC had carried out in response to the complaint were severely limited. The SFC was of the view that the limitations on the verification process ought to have been followed up by CPYC in its role as a continuing sponsor, and the consequent limitations of their response to the Exchange, drawn to the attention of the Exchange.

15. For reasons apparently unrelated to the issues in this review, Mr Wan resigned from CPYC in August 2004. He then joined Macquarie Bank as Managing Director, and on application to the SFC his accreditation and approval as a responsible officer was transferred to Macquarie. Mr Yan's departure from CPYC in October 2004, was equally, apparently unrelated to the issues in the review.

16. Having been dissatisfied with the response by CPYC to the complaint, in January 2005, acting under s 182 SFO, the SFC commenced an investigation into persons connected with the Tungda listing at CPYC for the purpose of considering whether to exercise any disciplinary action.

The investigation was largely directed at the substantive contents of the three submissions, and CPYC's handling of the Exchange's enquiry into the allegations of Tungda's overstated sales.

17. As part of the investigation, documents retained by CPYC were examined by the SFC and a number of current and ex-CPYC staff were interviewed. Mr Wan was interviewed by the SFC on three occasions, 4 July 2005[8], 11 July 2005[9] and 12 September 2005[10]. In the usual way, written records were kept of those interviews.

18. In about April 2006, Mr Wan resigned from Macquarie and joined BOCI Asia Ltd, (BOCI). He duly made application to the SFC for the transfer of his accreditation and approval as a responsible officer with BOCI. On 20 April 2006, the SFC wrote to Mr Wan informing him that his application for transfer of accreditation would be deferred because he was the subject of an SFC investigation and/or disciplinary proceeding[11]. The investigation had at that time been proceeding since January 2005, 17 months earlier, and it was then 11 months since Mr Wan had been last interviewed.

19. Between May and July 2006, Mr Wan, through his solicitors, submitted a total of four "supplemental statements" to the SFC enclosing a number of documents and e-mails. In these supplemental statements Mr Wan made a number of assertions which, if correct, purported to relieve him of any active responsibility, other than his fixing of a formal signature

[8] A17/27/4609.
[9] A17/28/4651.
[10] A17/29/4704.
[11] Ex. 10.

to the three submissions, in the response of CPYC to the Exchange's enquiries. I am satisfied that the following summary, from the opening of counsel the SFC, accurately reflects the assertions made by Mr Wan in the four supplemental statements.

20. First, Mr Wan asserted that it was the assigned responsibility of Ms Carol Tsang Sze Man, (Ms Tsang), a director of the Corporate Finance Department in CPYC, to prepare, verify and confirm the content of the three submissions. In support of this Mr Wan produced three internal memoranda [12] addressed to him, printed on CPYC letterhead, each purportedly signed by Ms Tsang as the purported responsible officer of the Tungda matter, (the three internal memoranda). The three internal memoranda stated, inter alia, that all due diligence work in relation to each of the three submissions had been done by Ms Tsang and her staff, who then verified to Mr Wan that nothing needed to be brought to his attention and recommended Mr Wan to sign each of the three submissions.

21. Next, he asserted that he signed the three submissions[13]:

> "not because I assumed personal responsibility for the content of the letters, or the issuance of the same. Rather, I signed for and on behalf of CPYC indicating that CPYC had accepted responsibility for the content of the three letters".

22. Mr Wan then asserted that prior to signing the three submissions, in what he described as an "administrative capacity", he had meetings with Ms Tsang and Mr Yan, during which he made due enquiries with Ms Tsang. According to Mr Wan, Ms Tsang confirmed that she had

[12] A19/31/5167.
[13] A19/31/5133.

conducted the required enquiries, interviews and due diligence investigations which were summarised in three documents entitled "Summary checklist of verifications"[14] and purportedly signed by Ms Tsang, (the three checklists). The three checklists were purportedly handed to Mr Wan during these meetings, and were produced as an annexure to Mr Wan's second supplemental statement dated 13 June 2006.

23. Next Mr Wan asserted that CPYC's post-listing team had provided drafts of the three submissions directly to Mr Lin Ko Ming, (Mr Lin), at that time the CEO of CPYC, for his review, confirmation and approval. He said that Mr Lin had instructed Mr Wan to sign the three submissions, which Mr Wan did, in an "administrative capacity". Mr Wan produced drafts of the three submissions[15] with the purported hand written endorsement of Mr Lin confirming his agreement of the contents of each of the three submissions, and requesting Mr Wan to sign the same, (the three draft submissions).

24. In the SFC's decisions and in the course of the review before me the three internal memoranda, the three checklists and the three draft submissions have been referred to collectively as "the new evidence".

25. In October 2006, Mr Wan, through his solicitors, submitted to the SFC a statutory declaration[16] from Mr Yan, dated 19 October 2006. In that declaration Mr Yan outlined his contemporaneous involvement in the preparation and receipt of the new evidence, and stated that he gave the

[14] A19/32/5254.
[15] A19/34/5466.
[16] A25/40/7037.

documents comprising the new evidence to Mr Wan in around April to May 2006, and that he:

> "passed all physical and electronic copies of those documents relating to CPYC in my then possession to Mr Wan in or around June 2006".

26. The declaration went further. Mr Yan deposed to being present when Ms Tsang gave the assurances to Mr Wan in respect of the due diligence work. He said:

> "I was also present in the discussions in which Ms Tsang illustrated to Mr Wan and myself the due diligence work done by the post-listing team in relation to Tungda Lighting through relevant documents which included checklists and selected samples of documents contained in some specific box files. Discussions took place between Mr Wan and Ms Tsang in the sessions. Ms Tsang confirmed and recommended the signing of the relevant submissions by Mr Wan for and on the behalf of CPYC. I was also responsible for preparing the discussion notes."

27. The new evidence was significant. If genuine it might well be described as comprising a "get out of jail free card" for Mr Wan, as it purported to relieve him of any involvement whatsoever in the response contained in the three submissions by CPYC to the SFC enquiry, other than as a mere figurehead endorsing a signature on documents that have been researched and prepared by others, and approved by the CEO of CPYC.

28. On 30 November 2006, for the first time, the SFC interviewed Mr Yan. On 12 December 2006 the SFC re-interviewed Mr Wan. Also, on 12 December 2006, pursuant to s183 SFO, the SFC, by formal notice, required Mr Wan to produce to the SFC copies of all of the CPYC

documents that Mr Yan had, according to his statutory declaration, passed to Mr Wan in 2006, specifically including both hardcopy and soft copy.

29. Mr Wan responded to the s 183 notice by letter dated 18 December 2006. In that letter he informed the SFC that he only had hard copies of the requested documents, which he had already provided to the SFC. He said that the soft copy of the documents that Mr Yan had passed to him had been left at the offices of his previous employer, BOCI.

30. Ms Tsang was also re-interviewed[17]. She denied both signing or having seen any of the new evidence. She asserted that she had not undertaken the tasks allegedly performed by her in the three memoranda or the three checklists, and that the signatures which purported to be her signatures were not in fact affixed by her to those documents.

31. Mr Lin was also re-interviewed[18]. He said that he had no recollection of having seen either hard copies or soft copies of the draft of the three submissions, and that he did not believe that the endorsements on three draft submissions were in fact written by him on those documents.

32. Between March 2007 and May 2008, Mr Wan sent to the SFC a further four supplemental statements to the SFC comprising over 1,500 pages of statements and supporting exhibits[19]. These formed part of the material before me.

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[17] A1/3/48.
[18] A3/16/553.
[19] A20/35/5474, A21, 22, 23 & 24; A25-38.

The issue of the Notice of Proposed Disciplinary Action (NPDA):

33. On 16 May 2008, the SFC issued an NPDA[20] against Mr Wan. That notice informed Mr Wan of a preliminary finding that he was guilty of misconduct and/or was not fit and proper to be licensed because:

(i) he had failed to act with due skill, care and diligence when preparing the three submissions, and to ensure that they were complete, accurate and not misleading, (the submission charge);

(ii) he had misled the SFC by providing false or misleading information and documents in his interviews and supplemental statements. The SFC stated that its preliminary view was that the new evidence was "fabricated or forged": (the false documents charge).

The NPDA proposed to prohibit Mr Wan from entering the industry for a period of 10 years.

34. On 22 May 2008, the SFC issued to Mr Yan an NPDA[21] in similar terms. The notice informed Mr Yan of a preliminary finding that he was guilty of misconduct and/or was not fit and proper to be licensed because he had misled the SFC by providing false or misleading information in his declaration dated 19 October 2006, and his interview

[20] CB1/1.
[21] CB1/2.

with the SFC, (the false information charge). The NPDA proposed to prohibit Mr Yan from entering the industry for a period of eight years.

35. Between 21 November 2008 and 15 June 2009, Mr Wan submitted to the SFC a further three submissions entitled "Defence Submissions". On 7 December 2008, Mr Yan made further representations in writing to the SFC enclosing a report dated 27 November 2008[22], from Dr Stephen Strach, a forensics handwriting and questioned document examiner.

The issue of the Notices of Final Decision:

36. On 9 September 2009, the SFC notified its final decisions [23] to Mr Wan and Mr Yan respectively, maintaining their preliminary conclusions that both were guilty of misconduct, and were not fit and proper persons to remain licensed. The period of prohibitions were reduced, to six years for Mr Wan, and four years for Mr Yan.

37. On 29 September 2009, Mr Yan applied to this Tribunal to review the NFD issued against him. On 30 October 2009 Mr Wan applied to this Tribunal to review the NFD issued against him.

38. A preliminary conference in respect of both reviews was held on 21 January 2010, when the reviews were consolidated and directions were given as to the filing of evidence. On 23 March 2010, the parties

[22] A25/42/7138.
[23] CB1/3 & 4.

agreed, pursuant to Rule 31, Schedule 8, SFO, that the review should be determined by the Chairman alone, as the sole member of the Tribunal.

The production of the DVD:

39. As I have recorded in §29 above, on 18 December 2006, in a letter written by Mr Wan, he had asserted that he had left the soft copy of the documents that had been given to him by Mr Yan at the offices of his previous employer. On 30 April 2010, Mr Wan signed, and subsequently filed with this Tribunal, a witness statement[24] in which the following assertion was made:

> "I am ***now*** in possession of a copy of one of the backup data disks which I obtained from Danny Tso, Dickson Chan and other relevant officers ***in late July 2003.*** The backup disk also contained an instance of the Post_Listing\Company\Tungda folder and parts of the electronic converted documents before late July 2003. Such electronic documents included some of the working files relating to the Tungda complaint. Among other documents, the set of digitalized documents categorised under '0306 conversion' ***included a checklist dated 27 June 2003 and a memo dated 13 June 2003, both signed by (Ms Tsang) Tsang and a draft submission dated 13 June 2003 with Lin's written markup***." (emphasis added)

40. It is not in dispute that this was the first time that the SFC had been made aware of the existence of such a DVD, (the first DVD). The first DVD had not been disclosed to the SFC by Mr Wan in his response to the s 183 notice issued in December 2006. Instead, Mr Wan had then asserted that he had left the soft copy of the documents at the offices of the employer.

[24] A25/39/7021 at 7034, §111.

41. As a result of this new material, the SFC wrote to Mr Wan's solicitors asking for provision of further particulars as to the provenance of the DVD. That enquiry elicited the following response[25] from Mr Wan's solicitors on 27 May 2010:

> "... our client is unable to recall exactly from whom he obtained this disk because the disk was given to him in the ordinary course of business in about mid-2003 during his employment with CPYC and not in relation to and/or in response to our client's involvement in the Tungda complaint first made in May, 2003, and well before he was first interviewed by your office in July 2005."

42. On 27 May 2010 Mr Wan's solicitors provided to the SFC a copy of the DVD, (the second DVD). Attempts were made both by SFC in-house technical staff, and an external forensic computing expert, Mr Benedict Pasco, instructed by the SFC, to obtain a forensic copy of the first DVD for analysis. Both were unsuccessful in doing so.

43. Mr Pasco was accordingly instructed to conduct a forensic analysis of the second DVD which, according to Mr Wan's solicitors, was an "exact replica" of the first DVD. Mr Pasco provided a report[26] which formed part of the evidence, as did Mr Cheah Wee Teong of RSM Nelson Wheeler Consulting Ltd[27], for Mr Wan.

The procedure adopted for the review:

44. The false documents charge made against Mr Wan and the false information charge made against Mr Yan were, in my view, properly

[25] D3/138/12192.
[26] A25/43A/7237a.
[27] E/E3/e238.

characterised as being tantamount to allegations of criminal behaviour. The false documents charge against Mr Wan was in essence an allegation of fabrication of documents, forgery of Ms Tsang's signature and acts tending to pervert the course of justice. The false information charge against Mr Yan was in essence an allegation of acts tending to pervert the course of justice. In those circumstances, at a preliminary conference 21 January 2010, I ruled that the review ought to proceed by way of a hearing de novo, with the SFC carrying the burden of proof in establishing the allegations it sought to make against Mr Wan and Mr Yan.

45. The procedure that should be adopted such a case is that the SFC should commence the hearing of the review by calling the witnesses it is intended to call, with those witnesses then being cross-examined by counsel for Mr Wan and Mr Yan. Following the presentation of the case for the SFC, it would be open to Mr Wan and Mr Yan to give or call such evidence as they may be advised. That was the procedure that had been adopted by the Tribunal, (Stone J presiding), in *Ip Chun Chun v SFC* Application No. 10 of 2009, a case concerning allegations of forgery.

46. While not disputing that, in so far as the facts upon which the allegations were based was concerned, the burden lay with the SFC, Mr Bell for the SFC submitted that when an application for review related to the characterisation of a particular market activity, a burden lay with the applicant to show that the SFC has "obviously gone wrong", since it was the SFC who was the specialist regulator, with specialist knowledge in the area of securities. For that proposition he relied upon decision of Tribunal in *Ip Chun Chun*.

47. The matters with which this Tribunal is concerned, in this application, are not specialist regulatory matters, nor do they relate to the characterisation of a particular market activity. The allegations contained in the false documents charge and the false information charge are simply allegations of fact made by the SFC, and they must be established to the appropriate standard of proof by the SFC. In this particular case, no burden lies on the applicants. (See also the decision of the Court of Appeal in *Tsien Pak Cheong David v SFC*, (unreported, 14 June 2011, CACV 226/2010.)

48. Although the allegations may properly be characterised as allegations of criminal behaviour, it does not follow that the criminal standard of proof applies in these proceedings. The standard of proof in proceedings before the Tribunal is set by s 218(7) SFO in these terms:

> "Subject to section 221(3), the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law."

Section 221(3) relates to the Tribunal's powers to punish for contempt, and is accordingly not relevant in these proceedings.

49. It was agreed by counsel that in applying that standard of proof, I should adopt the approach set out in *Re a Solicitor v The Law Society of Hong Kong* (2008) 11 HKCFAR 117, where, at 119, the matter is put this way in the headnote, which I accept accurately reflects the tenor of the judgments:

> "The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it was to be regarded, the more compelling would have be the evidence needed to prove it on a preponderance of probability."

Throughout the hearing, when considering whether or not the SFC has discharged the burden of establishing the relevant facts to the legislatively prescribed standard, I have borne these principles firmly in mind.

The case for the SFC:

50. The new evidence was necessarily either genuine, or a fabrication. There was no suggestion of any halfway house, nor any suggestion that if fabricated, it may have been fabricated by someone other than Mr Wan, assisted by, or at least with the knowledge of, Mr Yan. It was not suggested that the new evidence might have been fabricated by someone other than Mr Wan, without his knowledge of the fabrication. Mr Bell relied first on the evidence of Ms Tsang and Mr Lin as direct evidence of fabrication of the new evidence, as both asserted that they had not made or put their signatures to any of the documents in the new evidence. Next, Mr Bell relied upon circumstances he said the evidence established, as leading inevitably to the conclusion that the new evidence was fabricated.

51. Mr Bell sought first to demonstrate that the circumstances in which the new evidence was said to have come into existence did not in fact exist. Second, he sought to examine the provenance of the new evidence, and what he described as positive evidence pointing to the new evidence constituting a fabrication. Finally, he sought to demonstrate from

the actions of Mr Wan particularly, that the new evidence could not have existed at the time the three submissions were made to the SFC.

The case for Mr Wan:

52. The case advanced for Mr Wan was that if the Tribunal could not be satisfied to the appropriate standard that the false documents charge was proved, then, given the new evidence, the Tribunal should not find the submission charge proved. It was submitted for both that, having regard to the whole of the evidence, there must be a reasonable doubt in respect of the false documents charge. It was submitted that if the false documents charge could not be established, then the false information charge must necessarily go as well.

53. In addition to that submission, counsel for Mr Wan relied upon eight propositions to contend that the submission charge should not be upheld. They were:

(i) that Mr Wan had acted properly and reasonably in delegating the tasks resulting in three submissions; and that there was a plain distinction between his responsibility in 2002, at the time of the IPO of Tungda, and in 2003 at the time of three submissions; further that the complaint/enquiry by the Exchange was directed at the adequacy of CPYC's due diligence at the time of the IPO, and that to respond, CPYC need not go beyond its own record;

(ii) that there was no duty on the part of CPYC or Mr Wan, in 2003, to conduct any further enquiry;

(iii) that given that the allegation comprised in the complaint/enquiry from the Exchange was one of forgery by Tungda, and that those involved in Tungda were only indicted that forgery in September 2010, if Deloittes, Tungda's auditor could not detect that forgery nothing more could be expected of CPYC; in other words, CPYC was entitled to rely on the response from Deloittes;

(iv) that an e-mail from Brian Kwok of CPYC dated 5 August 2003, a [28] was "admittedly for record purpose";

(v) that by the time the third submission had been sent, with no follow-up from the Exchange, there was no duty for CPYC to do anything further; even if there was such a duty, (which was denied) failing to do anything further was in the circumstances a mere error of judgement;

(vi) that the apparent failure to refer to payment records in the third submission did not and could not have conveyed the message that CPYC had not referred to payment records; on Mr Wan's case, CPYC had referred to payment records but merely failed to mention that; and that if the Exchange were to take further action an issue might arise, but the consequence of the absence of further action by the Exchange was that the failure to refer to

[28] CB2/43/2773.

payment records in the third submission is not evidence to support the submission charge;

(vii) it accordingly follows that the fact that CPYC was responding to the Exchange's enquiry in 2003, regarding past events in 2002, CPYC was entitled to defend itself, or at the very least not under a duty to "confess" if its answers were inadequate, it was for the Exchange to take further action;

(viii) in making the three submissions to the Exchange neither Mr Wan nor CPYC were conducting a "business activity" within the meaning of general principle 2 of the Code of Conduct;

The case for Mr Yan:

54. Mr Yan was not involved in the submission charge, which was confined to Mr Wan. The case advanced for Mr Yan in respect of the false information charge comprised three points. First, it was argued that neither Ms Tsang nor Mr Lin should be believed on their assertion that they had not made or put their signatures on the documents comprising the new evidence.

55. Second, it was argued that on the basis of the expert evidence that there was no direct evidence to suggest that the signatures of Ms Tsang and Mr Lin on the new evidence were applied by a cut-and-paste method, and that accordingly the appropriate standard of proof to establish fabrication of the documents could not be met.

56. Third, it was argued that Mr Yan's evidence as to scanning documents to soft copy for Mr Wan and keeping of those soft copies, could not be discounted, and accordingly, the false documents charge could not be established to the appropriate standard of proof.

The direct evidence of fabrication of the documents:

57. Ms Tsang stated, both in her interviews with the SFC and her evidence before the Tribunal, that she did not prepare or sign the three memoranda or the three checklists, and that she was not the person in charge of handling the enquiries from the Exchange into Tungda. She acknowledged that the signatures on the various documents appeared to be hers, but said that she did not make those signatures on those documents. The inference that arose from her evidence was that the signatures had been affixed to those documents using cut-and-paste from other documents. To cut-and-paste the signature would constitute forgery.

58. Ms Tsang was adamant, to the extent of being angry, that it should be suggested that she was responsible for the documents comprised in the new evidence. In particular, she drew the attention of the Tribunal to the fact that there was simply no reason why she would lie about her signature being on the documents. She put it this way at the end of her cross-examination[29]:

> "Also, I want to say the listing of the IPO was not responsible by myself. In the month of July 2002, this was the first day I joined this company, CPYC, exactly on that day which was when Tungda was listed. Anything that has gone wrong regarding the prospectus of Tungda listing has nothing to do with me and is not

[29] Transcript, 11 November 2010, p.34.

> connected with me. *I have no reason to cover up for them.* You understand? Why I need to stay fully satisfied with the (due diligence) work? It is none of my business, you understand? Why I need to cover up? I learned from the e-mail that there are some problems in getting the information, right? If you are the one, and you know that, will you still sign on that kind of memorandum and confirm that Ms Tsang has fully satisfied the information? *There is no reason and there is no need for me to do a cover-up because even if anything had gone wrong I did not have to be responsible for that."* (My emphasis)

59. It was not suggested to Ms Tsang in cross examination, nor was it suggested in submission, that there was any reason at all why Ms Tsang would assist in a cover-up of insufficient due diligence work that had been undertaken prior to the IPO. If Ms Tsang's evidence was accepted, the overwhelming inference from that evidence was that the new evidence was a fabrication.

60. Like Ms Tsang, Mr Lin accepted that the handwritten manuscript on the three draft submissions appeared to be his handwriting, but his evidence was that he had never written those words on those documents. In particular, as to the second draft submission, he stated categorically that the words had been cut and pasted from somewhere else, because he would not have used the expression; "financial position met with the standard", in approving a draft submission to the Exchange.

61. The evidence of Mr Lin must be examined in the light of his personal background. Mr Lin had been found guilty of failing to make timely disclosures to both the Exchange and Shaanxi Northwest New Technology Company Ltd, (SNNT), of his 5.22% interest in SNNT when he used a nominee to subscribe for shares during a placement, in contravention of Part XV of the SFO, on 30 June 2005. He was also found

guilty of causing CPYC to make a misrepresentation in the level of demand for new shares in SNNT, failing to disclose his own subscription of 12 million SNNT shares, in breach of the GEM Listing Rules, and signing a marketing statement which contained inaccurate information as to the placement of SNNT shares on behalf of CPYC on 5 October 2009.

62. Mr Lok, although not pressing the matter heavily, relied upon these convictions as impacting adversely on Mr Lin's credibility.

63. On 21 July 2011, while I was in the course of preparing this decision, the secretary to the Tribunal received a fax, addressed to me, purporting to come from a Mr Vincent Tse. The fax header, although disclosing the date and time of dispatch, did not disclose the number from which the fax was sent. Although apparently signed by Mr Vincent Tse alone, the fax was expressed in the plural voice and referred to the fact that the SFC had successfully prosecuted and taken disciplinary action against Mr Lin in 2005 and 2009, and that he had been banned for seven years from re-entering the industry, and had a criminal record. Attached to the fax were 11 pages constituting a complaint by Mr Vincent Tse and supporting documents that had apparently been sent to the SFC and the Police in 2008.

64. Although the facts in respect of the SFC's action against Mr Lin formed part of the evidence before me, I referred the 12 pages that I had received to the parties for any further submissions they may wish to make, (the 1st supplementary written submissions).

65. Those advising Mr Wan elected not to make any further submission. Mr Yan himself prepared a statement in which he recorded his concern that the investigation of the SFC had not been thorough and complete. The basis upon which that submission was made was first that Mr Lin's assertion that he had not read or reviewed the three submissions, and presumably had not endorsed his approval on the submissions, was unbelievable.

66. Next, it was asserted that Mr Lin's credibility was doubtful in view of the allegations disclosed by Mr Vincent Tse. Finally it was asserted, without particulars, that crucial documents had been tampered with thereby prejudicing the investigation of the SFC, and, again without particulars, that former and existing staff members of CPYC had been subjected to pressure and/or manipulation by CPYC during the investigation. The documents that were said to be tampered with were not identified.

67. The SFC responded. I was informed that they had in fact received the 2008 complaint, purportedly from Mr Vincent Tse. They had investigated the matter at that time, and had interviewed Mr Vincent Tse, who had previously worked in the Legal Compliance Dept of CPYC. In that interview, Mr Tse denied that he had sent any complaint letter to the SFC or to other regulatory authorities.

68. Mr Vincent Tse was again interviewed. Again, he denied sending the fax of 21 July 2011 to the Tribunal. He said that he was willing to give evidence in court in that respect. Those advising Mr Yan did not respond to the submissions from the SFC.

69. I disregard entirely the fax purportedly from Mr Vincent Tse.

70. I have had due regard to the fact of the criminal conviction, and the SFC's disciplining of Mr Lin when considering the weight to be placed upon his evidence.

71. Mr Lin had little recollection of the events that had taken place seven years before, other than asserting that although the script on the three draft submissions was in his handwriting, he had not actually written in those terms on the handwriting. He was somewhat evasive when he was concerned that the cross examination might impact upon his past record. In the absence of any corroborating evidence in respect of Mr Lin's assertions, I could place no weight at all on Mr Lin's evidence, other than noting his denial of having written on the three draft submissions. In simple terms, were the only evidence as to the handwriting on the three submissions that of Mr Lin, I would not find it established to the appropriate standard of proof, that he had not made that handwriting. In §§115-119 below, I deal with evidence which Mr Bell said corroborated Mr Lin's evidence that he did not write the script on at least one of the draft submissions.

72. Ms Tsang's evidence on the other hand was straightforward and, on its face believable. If there were no other evidence which might cast doubt on Ms Tsang's evidence, her evidence alone would be sufficient to establish the case of the SFC in respect of the three checklists and the three internal memoranda. But the evidence, as will be seen, went much further. From my review of the whole of the evidence set out below I have come to the conclusion that there is significant evidence to corroborate Ms Tsang's

evidence that she was neither responsible for post-listing at the relevant time, nor did she have any significant role in the preparation of the three submissions, nor did she prepare or sign the three checklists or the three internal memoranda.

The post-listing section in CPYC:

73. The work involved in the continuing sponsorship of a listed company is generally described as "post-listing" work. It covers a number of matters. For example, if an event involving a listed company occurs which is required to be the subject of a public notice, the post-listing section will assist a listed company in preparing the necessary notification. If any subsequent questions arise in relation to the listing of the company an enquiry by the Exchange is usually made, in the first instance, not to the company itself, but to the financial advisers who were responsible for the listing, and the continuing sponsorship. Such a matter, as with the inquiry into the overstatement of overseas sales by those involved in Tungda, is dealt with by the financial advisor's post-listing section.

74. An important issue in the hearing was whether or not Ms Tsang was responsible for post-listing work, including the continuing sponsorship of Tungda, when the Exchange made its enquiries of CPYC in May 2003. It is central to Mr Wan's case that it was Ms Tsang, who was the person who prepared and supplied the documents contained in the new evidence for Mr Wan to sign, and that she was the person who was responsible for handling the Exchange's enquiry into the overstatement of overseas sales by Tungda. His case was that she was responsible for handing the enquiry, because at that time she was in charge of the post-listing section.

75. Ms Tsang herself denied being in charge of post-listing at the relevant time, denied undertaking the necessary enquiries into Tungda, preparing any of the documents comprised in the new evidence, or signing those documents. She accepted that on the copy documents that she was shown the signature appeared to be hers, but denied affixing that signature to the original of any of the documents.

76. Mr Bell relied upon three key areas to found his submission that Ms Tsang was not involved in the post-listing matters of Tungda. They were:

(i) an examination of the relevant forms submitted to the Exchange;

(ii) the circumstances of Ms Tsang's resignation, and subsequent withdrawal of resignation, both of which took place in April 2003;

(iii) the manuscript circulation lists on CPYC documents relating to Tungda;

The forms submitted to the Exchange;

77. It was a requirement of the GEM listing rules then in force that the sponsor for a company applying for listing must make a declaration in support of the new applicant that it is suitable for listing. Rules 6.49 and 6.50 provide:

> "6.49 At least one of the principal supervisors and one of the assistant supervisors must be actively involved in the work

> undertaken by the Sponsor in connection with any proposed application for listing by a new applicant. The Sponsor's declaration referred to in rule 6.47 must, save in exceptional circumstances, be signed on behalf of the Sponsor by the principal supervisor and assistant supervisor who have been most actively involved in the work undertaken by the Sponsor and will be treated by the Exchange as an acknowledgement of their personal active involvement in the matter.
>
> 6.50 The Sponsor shall ensure that a principal supervisor and an assistant supervisor remain actively involved in the provision of on-going advice and guidance sought by a listed issuer of which that Sponsor acts."

78. As noted in §8 above, on 18 July 2002, the sponsor's declaration[30] for Tungda had been completed by CPYC, that declaration indicating that the persons most actively involved in the work undertaken were Mr Wan, Lee Deng Charng and Kelvin Wu. However, at the time the Exchange made its first enquiry of CPYC about Tungda, on 23 May 2003, Mr Wan was the only responsible officer remaining in CPYC who had had any involvement in Tungda's listing.

79. On 7 August 2003[31], shortly after the three submissions had been sent to the Exchange, a general form, known as a "Form D", not specific to a particular listing, required by the Exchange relating to the continuing eligibility of CPYC to act as a sponsor was completed and signed by Mr Wan, and submitted to the Exchange. The form recorded that the principal supervisors of CPYC were Mr Wan, Daniel Ng and Ms Tsang. Paragraph 8 of the form requires a table setting out the listed issuers for whom the firm was acting as sponsor, and identifying the names of the principal supervisors actively involved. Mr Wan is listed as the

[30] C1//50/7250.
[31] A4/20/816.

principal supervisor actively involved in the continuing sponsorship of Tungda with Griffin Tse as his assistant[32].

80. Ms Tsang was not listed as a principal supervisor or an assistant supervisor actively involved in any of CPYC's continuing sponsorship. By contrast, Daniel Ng, like Mr Wan and Ms Tsang, identified as a principal supervisor, was listed as an assistant supervisor in seven of the listed sponsorships.

81. On the same day, both Mr Wan and Ms Tsang were required to submit to the Exchange a document known as a "Form E". In that form the signatory informs the Exchange of the matters in which they continue to act as a principal supervisor. Mr Wan's Form E listed 23 companies in which he had been involved between April 1999 and August 2003. Included in the list was Tungda, with Mr Wan's involvement being described as Principal Supervisor. Ms Tsang's Form E listed only two companies in which she was involved, neither of which is Tungda.

82. Ms Tsang's evidence was that she had not listed Tungda because she had not been involved in any work concerning Tungda at that time. Mr Wan said that she ought to have included Tungda, and other work that she did in that form.

83. The contemporaneous documents submitted to the Exchange are inconsistent with Mr Wan's assertions, both that Ms Tsang was in charge of post-listing work in June and July 2003, and that she was actively engaged in work relating to Tungda. The documents are entirely

[32] A4/20/823.

consistent with Ms Tsang's assertion that she was not placed in charge of post-listing work until August 2003 and that in June and July 2003 she had no involvement in the Exchange's enquiries in respect of Tungda.

Ms Tsang's resignation and withdrawal of resignation:

84. On 22 July 2002, Mr Wan sent an e-mail[33] to Daniel Ng, in the following terms:

> "As discussed, you will be overall responsible for supervision of Kenneth Chan's, Eddie Wong's and post-listing GEM sponsorship cases."

The e-mail went on to set out the identities of the ongoing projects. Tungda was not included as its listing did not take place until a year later.

85. On 4 September 2002, Brian Kwok joined CPYC. On 22 September 2002, Mr Wan sent an e-mail[34] to all staff members in the Corporate Finance (CF) group of CPYC, headlined:

> "Subject: New manager of the CF's post-listing team - Brian Kwok"

The e-mail announced Brian joining as manager of the corporate finance team and said:

> "Brian will focus his efforts on the post-listing/advisory services.
> ……
> Brian will report to Daniel and is expected to enhance our efforts in the post-listing/advisory areas."

[33] CB2/16/1293.
[34] CB2/17/1301.

86. An organisational chart [35] supplied by CPYC to the SFC pursuant to a notice under s 183(1) SFO, shows the post-listing section being managed by Brian Kwok, who reported to a director, Daniel Ng, who in turn reported to Mr Wan. Ms Tsang is shown as a director at the same level as Daniel Ng, but with no post-listing responsibility. That organisational chart was, according to CPYC's computer records, last updated on 15 October 2002.

87. The contemporaneous documentary evidence establishes, and Mr Wan does not dispute, that prior to April 2003, Daniel Ng was the principal supervisor in charge of post-listing.

88. On 2 April 2003, Mr Wan sent an e-mail[36] to both Daniel Ng and Ms Tsang, to which was attached a document reassigning duties. The general coordination of post-listing was allocated to Ms Tsang. Brian Kwok remained engaged solely in post-listing. An organisational chart[37] reallocating the tasks amongst members of the corporate finance group was produced. That chart shows only one director, Daniel Ng, with Ms Tsang now having a reporting line to Mr Wan through Daniel Ng. Ms Tsang's responsibilities are listed as "Post-Listing, IPO Execution & FA/IFA Team Head". Brian Kwok is now described as being in a "Sub-team, Post-listing". His reporting lines are to both Ms Tsang and Daniel Ng. The computer records of CPYC show that that document was last updated on 1 April 2003.

[35] CB2/10/1344.
[36] CB2/18/1302.
[37] CB2/9/1340.

89. Ms Tsang's evidence was that without prior discussion with her, Mr Wan had proposed both that she take on post-listing work, and that she report to Daniel Ng. She objected to this proposal and handed in her resignation. She said that subsequently Mr Wan persuaded her to stay by withdrawing the proposed change in responsibilities, and that she withdrew her resignation on the condition that her responsibilities remained the same. She said that she did not take up post-listing work until mid-August, after the three submissions had gone to the Exchange.

90. Mr Wan said that he had had a meeting with Daniel Ng and Ms Tsang on 1 April 2003. He referred to a diary entry made on 1 April 2003, recording the fact of intended meeting at 6 p.m. on that day, the entry stating: "Internal CPYC CF[38] discussion (Meeting Room)". He said that at the meeting both Daniel Ng and Ms Tsang agreed that the post-listing work would be transferred to Ms Tsang and that she agreed to take up the work. He said that the objection raised by Ms Tsang was to the proposed reporting line to Daniel Ng, but not to taking up post-listing work. He said that she subsequently withdrew her resignation after he agreed to scrap her proposed reporting line to Daniel Ng.

91. Ms Tsang's evidence that she did not agree to take up post listing work is entirely consistent with three e-mails that followed the meeting and her resignation. First, at 4:58 p.m. on 7 April 2003, Mr Wan sent an e-mail[39] to the corporate finance department in general in which he said:

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[38] "Corporate Finance".
[39] CB2/19/1307.

> "It is decided that the existing structure will be preserved unless business development requires otherwise."

92. One of Ms Tsang's concerns as to post-listing was the workload involved. At 6:15 p.m. on the same day Mr Wan sent an e-mail[40] to Ms Tsang in the following terms:

> "I sincerely hope that you could reconsider your stay with us. I understand the workload and the pressure would be high. *The structure proposed was only for discussion.* I hope that you could support me on revamping the team in view of the difficulties. I hope that you could reconsider your resignation." (My emphasis)

At 6:36 p.m. on the same day Mr Wan sent a further e-mail[41] to Ms Tsang in which he said:

> "I sincerely hope that u could reconsider your stay. Chairman needs CPY to move into M&A. Daniel will spend the majority of his time in the PRC. We want him to assume a black face in pushing executives in execution. Thats why we draw up the draft structure. Anyhow, I have shelved the structure. Hope u could still be part of us." (sic)

The next day, 8 April 2003, at 9:53 a.m. Mr Wan e-mailed[42] Ms Tsang saying:

> "I genuinely hope that you could reconsider your stay….. If it is also related to the post-listing work, I could shift it out to others…."

93. The resignation letter[43] completed by Ms Tsang on 7 April 2003, was produced from CPYC's personnel file for Ms Tsang. Mr Wan

[40] CB2/19/1308.
[41] CB2/19/1309.
[42] CB2/19/1310.
[43] D4/170/12368.

produced what purported to be a withdrawal of the resignation letter[44], signed by Ms Tsang on 24 April 2003. In the letter Ms Tsang apparently says that she will take up the new arrangement.

94. The original of that letter could not be located by CPYC in their personnel file. Despite the fact that the withdrawal letter was apparently written by Ms Tsang only 2½ weeks after the resignation letter, it is formatted in an entirely different manner, its style is entirely different, in particular, in the identification of the writer below the signature. Ms Tsang's evidence was that she did not write or sign the letter, and that she had never seen it before.

95. E-mails sent in August 2003, the time at which Ms Tsang said she was placed in charge of post-listing, are also entirely consistent with Ms Tsang's evidence.

96. First, on 18 August 2003 at 7:47 p.m., Mr Wan sent an e-mail[45] to Ms Tsang stating:

> "As per our discussion last time, you *will* be assigned to take care of the daily post-listing sponsorships. If you have no further opinion, I will formalise the arrangement." (My emphasis)

The next day, 19 August 2003, at 3:24 p.m., Mr Wan e-mailed Griffin Tse, copying Ms Tsang and Daniel Ng saying[46]:

> "Carol *will* be the director overall in charge of the post-listing work. Let's organise a session with Brian. Daniel will be joining

[44] D4/170/12367.
[45] CB2/20/1311.
[46] CB2/20/1312.

> the handover the session but he will focus more on origination and external FA role after the handover." (sic) (My emphasis)

At 7:48 p.m. on 20 August 2003, Mr Wan e-mailed[47] Ms Tsang in an e-mail subject lined; "On-going transactions of continued sponsorships", saying:

> "We have a number of on-going transactions of GEM clients and I intend to put you in charge."

Finally, on 28 August 2003, Ms Tsang e-mailed[48] Mr Wan:

> "Would you please instruct IT to give me and Griffin the access right to the "Posting_Listing folder" in the F drive. Thanks"

97. I accept Mr Bell's submission that the series of e-mails both in April 2003, and in August 2003 are entirely consistent with Ms Tsang's evidence that she was not allocated post-listing work until August 2003. They are entirely inconsistent with Mr Wan's assertion that Ms Tsang was placed in charge of post-listing in April 2003, and was responsible for post-listing work in June and July 2003.

98. Much was made of the reference in Ms Tsang's e-mail to 28 August 2003, to a "Posting_Listing" folder in the F drive. Such a folder did exist, but there was also a "Post_Listing" folder. There was no content in the "Posting_Listing" folder.

99. I accept Ms Tsang's evidence that she would have sought access to the folder in order to undertake the post-listing work. In my view

[47] CB2/20/1313.
[48] CB2/20/1314.

it is more likely than not that when the decision was made to allocate Ms Tsang to post-listing in August 2003, the IT department would have been immediately requested to give her access to the Post_Listing folder, and no particular request would be required by Ms Tsang. It is more likely than not that she later found the "Posting_Listing" folder in the F drive, and sought access to it believing that it would be necessary for her work. Had she been placed in charge of post-listing in April 2003 that request would have been made much earlier.

100. Mr Wan produced a memorandum[49], dated 6 May 2003, purportedly signed by Mr Lin, together with an organisation chart, in which Mr Lin apparently gave approval to a new structure with Ms Tsang being responsible for the supervision of post-listing work. It is entirely inconsistent that if such a structure was in place and approved by Mr Lin in May 2003, it would be necessary for Mr Wan to e-mail Ms Tsang on 18 August 2003, (see §96 above), using the future tense, to inform her that she would be assigned to take care of post-listing and that he would take steps to formalise the arrangement. In three e-mails, two on 19 August 2003, and one on 20 August 2003, Mr Wan used the future tense in relation to Ms Tsang's assignment to post listing[50]. The use of the future tense in those e-mails is entirely inconsistent with Mr Wan's assertion that Ms Tsang was placed in charge of post-listing in April 2003.

101. The evidence of Abigail Mak was that the preparation of organisational charts for Mr Wan were her responsibility. She acknowledged preparing the organisational charts which have been

[49] E2/28/867.
[50] See §96 above.

referred to above. When shown the chart referred to in the previous paragraph, in her interview[51] by the SFC she said that she could not remember preparing it. She pointed out that she would use a different font type, a different format and different headings. She was also able to demonstrate that no computer audit trail could be found in respect of this document.

102. Mr Wan placed reliance on three sets of minutes apparently recording corporate finance department weekly meetings on 28 April 2003, 10 June 2003, and 6 August 2003,[52] apparently showing Ms Tsang having been placed in charge of post-listing since April 2003. These minutes were allegedly prepared by Mr Yan.

103. The evidence of Abigail Mak was that there were regular meetings in the Corporate Finance department, but that minutes were rarely taken, perhaps only one or two times a year. If minutes were taken they were taken by Miss Mak, who kept them in a designated file under her supervision. None of the three sets of minutes relied upon by Mr Wan could be located at CPYC. However one set of minutes dated 16 June 2003[53], quite different from those produced by Mr Wan was located. It is entirely consistent with the evidence of Miss Mak.

104. Mr Bell drew to my attention what he described as significant inconsistencies between the three sets of minutes and the evidence of Mr Wan. First, the minutes record Mr Wan as stating that Ms Tsang was in charge of the overall post-listing work, and Daniel Ng as telling the

[51] A16/21/4368-16; Q16.
[52] A20/35/5698-5706.
[53] D4/177/12390.

meeting that the post-listing work would be passed to Ms Tsang and that he would assist in reviewing the documents. This is inconsistent with Mr Wan's evidence, and the memoranda dated 6 May 2003[54], that Ms Tsang was placed in charge of only half of the post-listing work during a "transition period" between April and August 2003.

105. The minutes refer to an arrangement that all submissions relating to post-listing would be reviewed by Daniel Ng. This is entirely inconsistent with Mr Wan's evidence that Ms Tsang withdrew her resignation because the reporting line to Daniel Ng was scrapped. Ms Tsang had objected both to the workload, and reporting through Daniel Ng, the latter because both were at the same level at CPYC, that of director. It is entirely inconsistent that Ms Tsang would have accepted responsibility that required her to report through Daniel Ng, or that she would have accepted that her work would be "reviewed" by him.

106. Priscilla Cheng was a CPYC employee who was in the post-listing section. Her evidence was that the Tungda enquiry by the Exchange was handled by Mr Wan and that she would have had no contact with Ms Tsang during the period of the enquiries because Ms Tsang was engaged in IPOs at that time.

107. Griffin Tse, another CPYC employee, variously reported to Daniel Ng and Ms Tsang, depending on who he was assisting at a particular time. His evidence was that after the departure of Brian Kwok in August 2003, he was assigned, together with Ms Tsang, to post-listing

[54] E2/28/867.

work. That evidence is entirely consistent with Mr Wan's e-mail to him on 19 August 2003, (see §96 above).

108. I have had careful regard to the evidence of Daniel Ng. In both his interview with the SFC, and in his evidence he said that Ms Tsang took up the post-listing work in April 2003. In both circumstances he said that he relied upon his memory of the events for that assertion.

109. Mr Bell submitted, and I accept, that Daniel Ng's recollection of the events in the period April to August 2003 is inconsistent with the contemporaneous documents, and inconsistent with the evidence of both Priscilla Cheng and Griffin Tse.

110. In the course of his interview with the SFC Daniel Ng was shown three contemporaneous e-mails which were inconsistent with his recollection of events. His response was that as he had not seen the e-mails before he could not comment on them[55]. However in the course of his evidence before the Tribunal he proffered explanations as to those e-mails[56].

111. When referred to Mr Wan's first e-mail to Ms Tsang of 7 April 2003, (see §91), he now said that the expression "existing structure" referred to the structure that Mr Wan had sought to put in place in April 2003. When asked about Mr Wan's second e-mail to Ms Tsang of the same day, to which he had been copied, (see §92), he now said that pressure of work was not Ms Tsang's explanation for not wishing to do

[55] E1/1/17, Q61.
[56] Transcript, 12 November 2010, 32-36.

post-listing work. When referred to Mr Wan's e-mail to Ms Tsang on 18 August 2003, (see §96 above), he said the context involved his handing over of the "rest of the cases" to her.

112. When asked why he was able to provide those explanations he said that they "suddenly came to him"[57] in the witness box. He could not explain why they did not occur to him when he was interviewed by the SFC in March 2007. He was obliged to accept that the e-mail from Mr Wan to Ms Tsang on 18 August 2003 was inconsistent with his understanding of the situation at that time.

113. I did not find Daniel Ng to be a witness upon whose evidence any weight at all could be placed. I preferred the evidence of the contemporaneous documents, and that of Ms Tsang, Miss Mak, Priscilla Cheng and Griffin Tse.

114. I am satisfied to the appropriate standard of proof that Ms Tsang did not become responsible for post-listing work at CPYC until sometime in August 2003. It follows that Ms Tsang would not have been responsible for the preparation of the three checklists, or the three internal memoranda.

Mr Lin's script on the three draft submissions:

115. There was separate evidence addressed to the handwritten script purportedly endorsed by Mr Lin on the three draft submissions. Mr Lin's evidence was, in terms, that that script was cut and pasted onto those three

[57] Transcript, 12 November 2010, p 39-40.

draft submissions. Having regard to Mr Lin's personal background I could not accept his evidence, simply by itself, that he did not write that script.

116. The first of the three draft submissions produced by Mr Wan as an annexure to his fourth supplemental statement was dated 13 June 2003[58]. Mr Wan's evidence was that on 13 June 2003, he had received the draft with Mr Lin's handwritten endorsement from Mr Yan, "in the early afternoon", and that he had met with Ms Tsang between 4:30 p.m. and 5 p.m. later that day.

117. Mr Lin's unchallenged evidence was that he left Hong Kong for Shenzhen at 2:30 p.m. that afternoon, and came back to Hong Kong at 5 p.m. that day. The document upon which Mr Lin purportedly wrote his approval was last modified in the computer, at 2:37 p.m. on that day. The evidence established that the square brackets surrounding the date appearing both the top left-hand corner of the first page and the paragraph numbered "2" of the second page of the document (i.e. "[13] June 2003"), had been deleted at 2:37 p.m. that day, prior to printing, at 2:44 p.m.[59]. That being the case, at the time of printing, Mr Lin was out of Hong Kong, I find it to be unlikely that he would have written the script that appears on that draft as produced by Mr Wan.

118. Counsel for Mr Wan reminded me that Mr Lin's assertion that he left 2:30 p.m. could only be a rough estimate. Even if it was only a rough estimate, I am satisfied that in the circumstances Mr Lin could not have endorsed the script.

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[58] A19/34/5466.
[59] E1/3/250/§50, E1/3/504; see also Ex 6.

119. Mr Lin's evidence, although coming as it does from a tainted witness, is corroborated by that other evidence. In other broad aspects, as is demonstrated by the discussion below, the contemporaneous documentary evidence supported Mr Lin's assertion that he would not have written on the three draft submissions as Mr Wan alleged. Although I would not have accepted Mr Lin's evidence by itself, having regard to the whole of the evidence, I accept him as a truthful witness in respect of his assertion that he did not make the three handwritten statements on the three draft submissions.

The production of the new evidence:

120. The new evidence, comprising the three internal memoranda, the three checklists, and the three draft submissions purportedly endorsed by Mr Lin were respectively provided on three separate occasions by Mr Wan to the SFC. First, on 11 May 2006, the three internal memoranda were annexed as annexure 9 to Mr Wan's supplemental statement of that date. Second, over a month later, on 13 June 2006, the three checklists were annexed to Mr Wan's second supplemental statement as annexures 17, 19 and 20. Finally, a further month later, on 12 July 2006, the three draft submissions were produced as annexures 42-44 to Mr Wan's fourth supplemental statement.

121. Mr Wan impressed as a man in complete command of the finest matter of detail concerning these events. His memory for dates and events appeared to be prodigious. In those circumstances it is truly remarkable that when interviewed by the SFC on three occasions, 4 July 2005, 11 July 2005 and 12 September 2005, he made no mention whatsoever of these

vital documents. Equally, in numerous e-mails sent by Mr Wan to the SFC between 5 July 2005, and 13 October 2005[60], he made no reference at all to the new evidence.

122. In his 1st interview with the SFC on 4 July 2005[61], Mr Wan said this:

> "But I reiterate, before signing on the submissions to the Stock Exchange, I ask all colleagues involved whether they had completed everything up to such a standard with which they themselves were satisfied. I only signed on (the submissions) after they said everything that had been completed. Further, most of the members comprising the post-listing team of Tungda possessed professional qualifications as accountants and/or CFA."

It is quite remarkable that he refers only to oral confirmations, and does not refer to the memoranda or checklists allegedly containing the confirmation he sought from his colleagues.

123. He repeated his position in his second interview on 11 July 2005[62]. He was asked if he had read the submission before he signed it. He said:

> "A. Of course I had read this letter before signing on. I also asked the relevant colleagues of the post-listing team and another RO, Daniel Ng, whether they had completed everything. I would only sign after being confirmed by them that there was no problem. This was what happened as far as I can remember.
>
> Q. Who drafted (the first submission)?

[60] D1/65-76.
[61] A17/27/4627-16.
[62] A17/28/4680-7.

> A. (The first submission) was not drafted by me, but I believed that this letter should have been drafted by Brian and/or Griffin."

This assertion is entirely inconsistent with the proposition now advanced that the memoranda or checklists and draft submissions were prepared by Ms Tsang. If, as Mr Wan now says, they were prepared by her, it is remarkable that he did not say so in this interview, but instead suggested that the letter of submission was prepared by Brian Kwok or Griffin Tse.

124. At Q-A14 of the same interview he goes further:

> "However, before I signed on this letter, I had asked colleagues in charge whether the contents of this letter were true, accurate and complete. However, I cannot recall whom exactly I asked. It should include Daniel Ng, and I must have asked the opinion of Daniel Ng at the end."

125. Again it is remarkable that no reference is made to the involvement of Ms Tsang.

126. Even when asked if there was any written proof of his verification he failed to refer to the memoranda or the checklists. He said[63]:

> "Q. …did you conduct any other verification and (if so,) is there any written proof of your verification?"
>
> A. I did. For example, it should be the case that I have done so in the weekly meetings and/or by e-mails. But (as) I have left CPYC for a long time, I cannot recall if I have any written proof in this respect."

[63] A17/28/4680-17.

127. That he made no reference to these documents is even more surprising, when the interviews are placed alongside his evidence[64] before me, that in April 2004, less than a year before the interviews, he had surreptitiously removed 21 boxes of CPYC files to his Yau Tong warehouse, which boxes purportedly included the first DVD containing scanned copies of the new evidence. He said that he had kept files on the DVD for the purpose of:

> "protecting myself against Mr Lin and CPYC."[65]

128. When Mr Wan was interviewed by the SFC on 5 July 2005, he had asserted[66]:

> "I, as one who had already left the company, no longer have access to the relevant files and information. Therefore, it is most unfair to me that I have to remember every detail of some of the documents or e-mails…"

If, as he said, in April 2004, he had surreptitiously removed 21 boxes of CPYC files to storage in a warehouse in order to "protect" himself, I have no doubt at all that he would not have given that answer. His response would have been to say that there were documents in existence in the nature of checklists and the like which would demonstrate where the responsibility for the three submissions actually lay.

129. Mr Bell submitted that it was simply incredible that standard procedure documents, allegedly used when handling serious enquiries from the Exchange, which on Mr Wan's evidence were for his own

[64] Transcript, 24 May 2011, p27-28.
[65] Transcript, 24 May 2011, p 28.

protection, would not be mentioned by Mr Wan when first asked about the circumstances of the enquiry by the Exchange. I agree. It is equally incredible that after having been interviewed on the first occasion, in July 2005, Mr Wan did not immediately go to his Yau Tong warehouse and retrieve the necessary documents. That is especially so when the documents had been carefully preserved by him "to protect" himself.

130. It is also incredible that Mr Wan did not go and retrieve the documents in April 2006, when the transfer of his licence from Macquarie to BOCI was refused pending the resolution of the investigation. He said he was "shocked" by that letter. It is incredible that he failed to produce documentation which potentially would have resolved the investigation and enabled him to take employment with BOCI as a licensed person.

131. In the course of his evidence Mr Wan gave a completely different explanation for the existence of the new evidence. He now said that when he received the letter from the SFC on 20 April 2006, (see §18 above), he called Mr Yan and asked whether Mr Yan had kept any documents relating to post-listing work at CPYC. He said that Mr Yan subsequently passed to him documents in both hardcopy and soft copy form, including the new evidence which Mr Wan then included in his supplemental statements to the SFC in 2006.

132. Mr Yan in his statutory declaration[67] put the matter this way:

> "In or around late April 2006, Mr Wan enquired with me if I had kept any document relating to Tungda Lighting. I passed several

[66] D1/65/11572-2.
[67] A25/40/7042.

> copies of the documents of Tungda Lighting (including but not limited to the three internal memos I received from the post-listing team during the period from June 2003 to August 2003, certain internal notes and checklists, other memos from Mr Lin etc) then in my possession to Mr Wan in or around late April or early May 2006. I have also passed all the physical and electronic copies of those documents relating to CPYC in my then possession to Mr Wan in or around mid-June 2006."

133. In that statement Mr Yan asserts that all of the new evidence was given to Mr Wan in their first meeting. He refers to each of the three groups of items comprising the new evidence, and does not suggest other than that they were all given to Mr Wan on the same occasion. His reference to "also" passing further documents to Mr Wan in mid-June 2006, is difficult to understand. Mr Bell submitted that the last sentence, in which the expression "also" is used, constitutes a reference to CPYC documents in general rather than the specifically selected Tungda documents. Whatever is right, it is clear that Mr Yan asserts that, at least in documentary form, all of the new evidence was given to Mr Wan at their first meeting.

134. If that is right, then it is quite inexplicable that Mr Wan would supply the three different groups of items to the SFC on three different occasions. Logically, they go together. One justifies the other. It is simply unbelievable that Mr Yan gave all three groups of items to Mr Wan on the same occasion in April 2006. If he had done so, Mr Wan would have undoubtedly passed all documents immediately to the SFC at the same time.

135. It is also inexplicable that if Mr Wan had kept, in storage, scanned and hard copies of documents to protect himself, he did not go

straight to that storage to locate the documents, but instead contacted Mr Yan enquiring whether or not Mr Yan had kept documents relating to post-listing work at CPYC. If, as he said he had stored the documents himself, for his protection, there was no need for him to contact Mr Yan.

136. When Mr Yan gave evidence on 27 May 2011, he said that it was quite easy to find the relevant documents. He said he had a CD with documents on them and by using a search based upon the word "Tungda", or "Greenlight", (CPYC's code word for the Tungda IPO), the documents would be simply found. He agreed that the nine documents comprising the new evidence turned up in his first search, and that he then printed them from the CD-ROM and gave them to Mr Wan. After the luncheon adjournment Mr Yan resiled from that evidence. He now said that he could not remember whether he gave the nine documents comprising the new evidence to Mr Wan in one batch or whether they were handed to Mr Wan in a second or third meeting.

137. If, as Mr Yan says, the documents were on a CD-ROM and easily located, it is unbelievable that he would not have printed them all at the same time and given them all to Mr Wan at the same time.

138. Neither Mr Wan nor Mr Yan were able to produce the CD-ROM on which it was said the documents had been contained. According to Mr Wan, he made arrangements for a printing house to print the necessary documents, but he left the CD-ROM containing the scanned copies at BOCI when he left in mid-June 2006. The assertion that he would have left behind the CD-ROM is unbelievable. His application to the SFC for a licence had been delayed because of the continuing Tungda

enquiry. Contained on the CD-ROM were the very documents upon which Mr Wan would be able to rely in order to exonerate himself from that enquiry, and consequently enable the issue of his licence. That he would have left that CD-ROM behind is simply an unbelievable assertion.

139. The fact that some copies of the new evidence were on a DVD[68], and had been kept by Mr Wan since 2003, was first revealed in a witness statement prepared for the hearing of the application for review by Mr Wan, dated 30 April 2010[69]. Mr Wan said this:

> "I am now in possession of a copy of one of the backup data discs which I obtained from Danny Tso, Dickson Chan and other relevant officers in late July 2003. The backup disc also contains an instance of Post_Listing\Company\Tungda folder and parts of the electronic converted documents before late July 2003. Such electronic documents included some of the working files relating to the Tungda complaint. Among other documents, the setter digitalised documents categorised under "0306 conversion" included a checklist dated 27 June 2003 and a memo dated 13 June 2003 both signed by (Ms Tsang) Tsang and a draft submission dated 13 June 2003 with Lin's written markup."

140. A number of matters arise from this assertion. First, although the use of the expression "I am now in possession" implies an event that has occurred close to the time of making the witness statement, it is clear that Mr Wan asserts that he has been in possession of this DVD since late July 2003. If that is the case, it is unbelievable that when pressed about the matter by the SFC in his first interview, leading to his response complaining about the absence of documentation, (see §128 above), Mr Wan did not immediately go to retrieve the documents from the DVD which, on his own evidence, had been in his possession since late July

[68] Ex 7.
[69] A25/39/7034.

2003. At the very least, the existence of the DVD would have come to his mind when Mr Yan gave him the CD-ROM containing the new evidence.

141. Mr Wan attempts to explain the delay in producing the DVD in paragraphs 104 to 111 of his witness statement. The explanation is labourious in the extreme. Again, it needs to be borne in mind that in April 2006, he had learned from the SFC that his application for the transfer of his licence would not be approved because of the ongoing enquiry. Mr Wan had every reason to locate any relevant document quickly to clear his name with the SFC, and facilitate the transfer of his licence. Instead, in his witness statement, §§104-6, he says he :

> "104…(began to be) seriously engaged in responding to the NPDA in around mid-September 2008. I visited my rented warehouse space at Yau Tong and an apartment in Shenzhen. Then, I had managed to retrieve further copies of documents concerning the Tungda matter.
>
> 105. The whole schedule to respond to the NPDA was tight and I could only look through the documents on a best effort basis.
>
> 106. The first representation in response to the NPDA to SFC was submitted on my behalf on 21 November 2008. Among other things, to the vacated boxes containing the documents which I relied upon were provided to SFC to support my case "

142. In an effort to explain why the DVD was not produced in 2008, he says further, §§108-110:

> "108. I received the Notice of Final Decision in early September 2009.
>
> 109. In between my application to SFAT for review of SFC's final decision and the scheduled direction hearings, I had time to

> search through the documents in full after I vacated my rented warehouse space in Yau Tong earlier on in 2009.
>
> 110. I have taken significant efforts to inspect the relevant documents and have recovered relevant documents to support my defense." (sic)

143. In his evidence in chief however Mr Wan said that the DVD was part of the records which his solicitors had invited the SFC to inspect in November 2008, when his solicitors sent a letter to the SFC enclosing his representations in relation to the NPDA. In his evidence Mr Wan was critical of the SFC for failing to respond to the invitation to inspect the documents including the DVD. If the DVD did, as Mr Wan now asserted, form part of the available documents in November 2008, it is unbelievable that it would not have been specifically drawn to the attention of the SFC as being a contemporaneous document. The DVD was not referred to in the annexure list that was sent to the SFC[70]. The annexure list did refer to copies of three CD-ROMs apparently "prepared by Benjamin Lau at CPYC in 2002". However those could not possibly have contained the new evidence which could not have come into existence before June 2003. There could be no confusion between the DVD and three CD-ROMs.

144. It is equally improbable that, if the DVD existed, there would have been no reference to it by Mr Wan in the 800 pages of submissions that comprised his first defence dated 21 November 2008, the 300 pages of submissions making up the supplemental defence dated 20 March 2009, or the 161 pages of submission making up the second supplemental defence dated 15 June 2009.

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[70] Ex 14.

145. In simple terms, Mr Wan's evidence collapsed in confusion over the entirely inconsistent and numerous different explanations for the existence of software containing the new evidence or the new evidence itself.

146. It is significant too, that the DVD that was produced to the Tribunal was not the original. Indeed, none of the soft copies produced by Mr Wan were original soft copies. This effectively prevented the forensic computer experts from undertaking a proper analysis of the true dates and times at which the CD-ROMs or the DVDs were made. It is sufficient now to say that in the whole of the circumstances I am unable to place any weight at all on the evidence contained in the CD-ROMs or DVDs produced by Mr Wan.

The search for documents at the offices of CPYC:

147. In November and December 2006, searches were undertaken at the offices of CPYC by SFC officers pursuant to s 183 SFO notices, to look for copies of the new evidence. In none of the Tungda files, whether held at the office of CPYC, or retrieved from storage, could copies of the new evidence be located. In February 2007, SFC officers inspected files for two other projects handled by Mr Wan at CPYC, both involving post listing enquiries by the Exchange. The purpose of the inspection was to ascertain whether similar memoranda or checklists had been used in the course of responding to those enquiries. No such memoranda or checklists were located.

148. Mr Wan had produced a copy of the DVD on 27 May 2010. On 7 June 2010, the SFC wrote to CPYC requesting a thorough search in all electronic storage maintained by CPYC, for three documents, the checklist dated 27 June 2003, the memo dated 13 June 2003, and the draft submission endorsed by Mr Lin, dated 13 June 2003. That search was undertaken, but copies of the three documents were not found on the CPYC computer servers.

149. On 19 November 2010, the Tribunal issued a notice under s 219(b) SFO[71] to CPYC, requiring CPYC to search again for physical and digital copies of the new evidence, and copies of other memoranda similar to the new evidence. Included in the list of documents required to be sought were the new evidence, and 21 other documents that had been produced by Mr Wan, mainly internal memoranda, which had been purportedly signed by Ms Tsang in relation to 8 other companies handled by CPYC between 2002 and 2003.

150. The search was undertaken by Abigail Mak. Miss Mak searched hard copy files still kept in CPYC's corporate finance department had retrieved files from storage. She spent $5^{1}/_{2}$ days searching for the requested documents. She then searched for digital copies of the requested documents in CPYC's computer servers. The monthly backup tapes had been copied into the servers to enable Miss Mak to undertake the search. She was unable to locate any physical or digital copy of the new evidence or the other documents purportedly signed by Ms Tsang or other documents of a similar nature to those listed in the Tribunal's notice.

[71] D4/166/12243.

151. Having regard to the state of the evidence Mr Bell was entitled to say that the result of the repeated searches strongly supports the conclusion that the numerous memoranda and checklists, purportedly signed by Ms Tsang, and the withdrawal of resignation letter purportedly signed by her and the minutes of meetings which purport to record events never existed at all in CPYC records.

152. It is quite extraordinary that of all of the documents produced by Mr Wan, upon which he relies to relieve himself of responsibility in this matter, none at all can be found, whether hard copy or soft copy, at CPYC's offices. It might be understandable if Mr Wan had produced one document, and a copy of that document could not be found. But when not a single one of the nine key documents upon which he relies, or the 21 documents purportedly signed by Ms Tsang, or any similar document to the nine key documents can be found, then the only inference is that no such documents ever existed.

153. The submission was made for the Applicants that the absence of documents at CPYC's offices meant that their filing systems were unsatisfactory and could not be relied upon. That might be the case if only one or two documents were missing. But when nine key documents cannot be located, and no other documents of a similar nature to those documents can be located, or the 21 documents purportedly signed by Ms Tsang, and numerous other documents, all to the advantage of Mr Wan, cannot be located, then the absence of documents supports the inference of fabrication outside CPYC's offices.

The manuscript circulation lists:

154. When a document was received in CPYC's office a handwritten list was endorsed on the document, which was then copied and circulated to those whose initials were on the list. Mr Wan, Daniel Ng and Ms Tsang all agreed that the handwritten initials constituted a circulation list. Mr Wan described the list in an e-mail to the SFC[72] on 5 July 2005, in the following terms:

> "According to job allocation, the secretary responsible for filing would automatically copy a fax to the relevant executive team in accordance with the contents of the fax and would also mark on the top right-hand corner of the document a list which sets out the names of the members of the executive team for circulation."

155. Mr Bell demonstrated that in relation to the CPYC Tungda files containing documents relating to the Exchange's enquiries on the complaint the initials "CT" were consistently absent. Further, in relation to the CPYC Tungda files containing documents relating to Tungda's general post-listing work prior to 22 August 2003, again the initials "CT" are consistently absent.

156. Significantly, in relation to the CPYC Tungda files containing documents relating to Tungda's general post-listing work from 28 August 2003 onwards, the initials "CT" are consistently present.

157. On the basis of this evidence, Mr Bell was entitled to submit that the absence of Ms Tsang's initials on circulation list prior to August 2003, and the presence of those initials after August 2003, is strong evidence that Ms Tsang was not only, not placed in charge of post-listing

[72] D1/65/11572-3.

until August 2003, but also that she was not placed in charge of responding to the Exchange's enquiries in respect of the complaint.

158. In his e-mail to the SFC[73] on 5 July 2005, Mr Wan referred to the absence of Ms Tsang's initials on the circulation list of the Exchange's enquiries documentation. He then suggested that circulation list had been deliberately deleted from the documents. There was no evidence to support this assertion in the e-mail, and the assertion was not persisted with at the hearing of the appeal. Instead, Mr Wan now suggested that Ms Tsang would have been given the "m" copy, which was a reference to the master file that was maintained by CPYC. However, when pressed by Mr Bell to explain why her initials appeared on the distribution list from September 2003, he was unable to offer a sensible answer other than to say that it was Ms Tsang's responsibility.

159. Neither of the suggestions made by Mr Wan properly addressed the point made by Mr Bell. The inference that arose from the absence of Ms Tsang's initials on both the specific documents relating to the Exchange's enquiries on the complaint, and the Tungda general post-listing matters prior to August 2003, is that Ms Tsang was not involved in dealing with the complaint, nor was she in charge of post-listing prior to August 2003.

160. The handling of the Exchange's enquiries on the complaint took place between May and July 2003. During that period there were numerous e-mails between CPYC staff internally, and between CPYC staff and other parties such as Deloittes, in which the enquiries were addressed.

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[73] Supra, fn 67.

Very few of these emanated from Ms Tsang, and when they did were in response to a specific request. It is right that Ms Tsang was copied a number of the e-mails in the Tungda matter, but there were several occasions[74] in which she was not copied into a set of e-mails, or was not sent a relevant e-mail.

161. I accept Mr Bell's submission that if Ms Tsang was head of the post-listing team responsible for responding to the Exchange's enquiry into the complaint concerning Tungda it is highly unlikely that she would not have extensively e-mailed those and her team in pursuit of the action required to respond to the enquiries, and that her team members would have failed to copy her into the relevant e-mails.

Signature in an administrative capacity:

162. The contention made by Mr Wan in his various statements to the SFC that he signed the three submissions merely in an administrative capacity, and the implication arising from that assertion that thereby he was not liable for the content of the three submissions, was sensibly not pursued by counsel in the argument before me.

163. It is a quite untenable proposition. Those in the securities industry must know that they must take personal responsibility for any statement made to either the Exchange or the SFC to which they have affixed their signatures. When a person signs a letter to the SFC, or a form

[74] Mr Bell identified six: CB2/22/2050-52, CB2/28/2179, CB2/39/2300, CB2/40/2306, CB2/41/2316 & 2321.

or declaration, his signature indicates his involvement and an assumption of responsibility for the content of the document.

164. The argument must fail.

The expert evidence:

165. Two categories of expert evidence were called. They constituted handwriting experts and computer experts.

166. Both handwriting experts agreed that the questioned signatures that they examined were poor quality reproductions, and both agreed with the possibility that the question signatures or script could have been cut from elsewhere and pasted onto the question documents. Although Mr Leung pointed to the placement of the question signatures above a baseline suggesting the possibility of a “cut and paste”, neither he nor Mr Strach were able to say with any degree of certainty that the signatures were or were not the result of cut and paste.

167. The major limitation faced by both handwriting experts was that the documents they had to examine were not original documents. Both agreed that because all of the documents with which they were presented, and indeed which were given to the SFC, were reproductions and not originals, no proper conclusion could be reached as to whether or not the signatures were forged on the documents. Neither expert discounted the possibility that the signatures on the documents were as a result of cut and paste.

168. As to the computer experts, again neither was able to examine original computer data. The CD-ROMs or DVDs that were supplied were in all cases copies, and in one case was sufficiently physically damaged that although it could be copied and read, a forensic copy could not be made.

169. Both agreed that the timestamp on the computer data represented no more than the consequence of the date at which the computer clock was set when the DVD was created, or when the computer file was created or modified. That timestamp was not evidence of the actual creation or modification date of a DVD or computer file.

170. Mr Bell was correct to adopt the observation made by the Tribunal, (Stone J presiding) in *Lau Hing Hung Joie v SFC*, (unreported, SFAT 6 of 2004), at §64:

> "…at the end of the day the issue of expert evidence in this field is but one piece of a far larger 'jigsaw' in terms of the available evidence, and that the determination we ultimately have reached in this case in itself does not turn upon the acceptance or rejection of any particular aspect of such expert evidence."

171. It is the same as in this case. Other than that the expert evidence cannot discount the proposition that the signatures on the nine questioned documents were made as a result of a cut-and-paste exercise, the expert evidence is of no further assistance. This is a case where it is necessary to look at the evidence as a whole. One piece of the evidence alone, for example Ms Tsang's assertion that she did not prepare the three checklists or the three memoranda, would not be sufficient to establish the submission charged to the appropriate level of proof.

Finding as to fabrication:

172. When the evidence is taken as a whole, and the assertions of Ms Tsang and Mr Lin are placed with the peculiar circumstances in which the three checklists, the three memoranda, and the three draft submissions were produced by Mr Wan to the SFC, the contemporaneous forms that were submitted to the Exchange, the complete absence of any apparent involvement of Ms Tsang in post-listing prior to August 2003, the absence of documents in CPYC's files, the evidence of Priscilla Cheng and Griffin Tse, the manuscript circulation lists, and all of the matters that I have dealt with above, the inference becomes overwhelming.

173. I find both Ms Tsang and Mr Lin to be witnesses of truth. I am satisfied, to the appropriate standard, that Ms Tsang was not responsible for responding to the enquiries from the Exchange in relation to Tungda, and that she did not prepare and submit to Mr Wan the three checklists and three memoranda. I am satisfied, to the appropriate standard, that Mr Lin did not endorse his approval on the three draft submissions.

174. The only tenable explanation for the existence of those documents is that they were fabricated by Mr Wan.

175. In reaching that conclusion I have had careful regard to the submission that the fabrication exercise that was undertaken must have been an extensive exercise and that may be argued that it is unlikely that Mr Wan would have undertaken that exercise. While I accept that it is unlikely that a person might go to the extent of fabricating documents in

order to avoid disciplinary proceedings, it is not an impossible proposition. I have had due regard to the submission in reaching my conclusion.

176. The investigation by the SFC against Mr Wan was serious. It would have been seen to be serious by him and it was directly instrumental in preventing a transfer of Mr Wan's license to another company, a matter by which he had been "shocked".

177. The enquiry by the Exchange of 23 May 2003, contained an accusation of fraudulent acts on the part of the Tungda and forgery of invoices and shipping documents by its management. It is not difficult to see that if there had been fraudulent acts or forgery an inference readily arises that the existence of a fraud or forgery might well have come to the notice of those involved in sponsoring the listing, and that in order to achieve the listing they have cooperated in concealing that fraud or forgery. As the CPYC officer apparently most directly involved in the listing, it would be apparent to Mr Wan that suspicion might fall upon him being involved in such events. He had every reason to take steps to distance himself from involvement in the responses to the enquiry.

178. It would have been apparent to Mr Wan that the explanation that he had given for the standard of the submissions had not been accepted by the SFC, otherwise the enquiry would have been concluded and he would have been exonerated or dealt with. Only by distancing himself from direct involvement in the responses to the Exchange's enquiries would he be able to relieve himself of responsibility. He is a university trained computer scientist and although he said his specialty was in chip design, he did not suggest that he would not have had the technical

skills to undertake the exercise that was necessary to cast the blame on Ms Tsang.

179. He had every reason to undertake an extensive fabrication exercise and I am satisfied that he did so.

180. It is right that Mr Yan had less reason to become involved in the fabrication exercise. But it is plain that there was a close relationship between Mr Wan and Mr Yan both professionally at CPYC, and on a personal level. Mr Yan's overt involvement in the exercise was limited to being simply a source of documents, on its face a minor role, and one to which he might easily be persuaded. Although on its face a minor role, it was an important role, because it was designed to lend credibility to the location of challenged documents.

181. It was not suggested by Mr Yan that if Mr Wan had created the plethora of false documents, he was quite unaware of that, and, innocently, delivered boxes of information to Mr Wan. It is plain from his convoluted explanations for his involvement in the location of the documents that he was fully aware of the fact that the documents to which he would refer in his statutory declaration and his evidence had not come from the locations asserted by him. It necessarily follows that he must have been aware of the fabrication exercise.

182. I am accordingly satisfied that the false documents charge against Mr Wan and the false information charge Mr Yan has been established by the SFC to the appropriate standard of proof.

The Submission charge:

183. The original enquiry by the Exchange on 23 May 2003, is set out at §11 above. The first submission was made on 13 June 2003. On 25 June 2003, the Exchange sent by fax[75] to CPYC a copy of page 2 of the first submission with two handwritten queries in respect of a comment as to letters of credit, and a statement as to confirmations from customers.

184. The second submission, by CPYC, in response to that query was sent on 27 June 2003[76]. Now, the Exchange responded by a formal letter raising three particular issues;

(i) the submission failed to address questions 2 and 3 of the letter of 23 May 2003, i.e. the allegations of forgery of invoices and shipping documents, and overstatement of sales and other lighting products by seven times;

(ii) were the overseas customers whose existence was said to be established on the submission of 27 June 2003, the customers in relation to the sales or not; and if so what due diligence work had been performed to verify the overseas sales;

(iii) the submission of 27 June 2003, referred to a confirmation sent out by Deloittes to major customers of the company; specificity as to which allegations were being responded to with reference to the confirmation was required.

[75] CB2/15/7243-4.
[76] CB2/15/7245

185. CPYC responded by its third submission, dated 22 July 2003[77], purporting to answer the three points.

186. In §52-53 I set out the basis upon which Mr Wan argued that the submission charge could not stand. The false documents charge having been found to be established, it is not open to him to rely on the failure of that charge to support the dismissal of the submission charge. I turn accordingly to the specific arguments made.

The delegation arguments:

187. While it is right that some of the steps taken in the course of responding to the Exchange's correspondence were taken by others on the instruction of Mr Wan, that he relied on their work simply cannot absolve him. The GEM Listing Rules and Sponsor's Form D, dated 7 August 2003, are clear; they must state the name of the principal supervisor actively involved in the continuing sponsorship. The requirement for active involvement necessarily means that a defence of delegation and reliance upon the work of others must fail.

188. A person signing a submission to the Exchange takes personal responsibility for that submission and cannot absolve himself from that responsibility upon the basis that he has delegated work to others. That is not to say he may not delegate work, but he must accept responsibility for any delegated work.

[77] CB2/15/7248.

189. It is right that the first enquiry by the Exchange was directed at the adequacy of CPYC's due diligence at the time of the IPO. But it is no answer to the submission charge that an inadequate response was made to either the first enquiry or any subsequent enquiry arising from the first submission. The SFC were perfectly entitled to examine the whole of the conduct of CPYC and its officers in responding to the enquiries made by the Exchange. There is no reason at all that subsequent misconduct in response to an enquiry should not itself be the subject of a charge. The standards that apply at the time of an IPO apply equally during the continuing sponsorship.

190. The argument must fail.

The obligation to conduct enquiry in 2003:

191. It is a remarkable assertion to say that there was no duty on the part of CPYC or Mr Wan, in 2003, to conduct any further enquiry. CPYC was the continuing sponsor of Tungda, and Mr Wan was the principal CPYC officer concerned in that continuing sponsorship. As part of a continuing sponsorship by CPYC and Mr Wan, as the CPYC officer principally responsible for Tungda, (according to his Form E[78]), and principally responsible for the continuing sponsorship[79], were obliged, upon receipt of the enquiry from the Exchange to undertake appropriate enquiries and to respond to the Exchange.

[78] See §81 above.
[79] See §10 above.

192. It would have been misconduct to have failed to have acted in that way.

193. The argument must fail.

CPYC could not be expected to uncover forgery by Tungda:

194. A submission was made as the allegation against Tungda was one of forgery, and that the chairman, Mr Chu and others were only indicted in September 2010, and that if Deloittes as the auditor of Tungda could not detect that there had been forgery, neither CPYC nor Mr Wan should have been expected to detect a forgery.

195. The submission misses the point. The point is the adequacy of the enquiry made by Mr Wan in response to the Exchange's enquiry. It was patently obvious that it was not sufficient, in the face of an allegation of forgery of overseas sales, to examine invoices, delivery notes, shipping documents, and letters of credit only. None of those items are capable of establishing that the sale had taken place. The only way of establishing that a sale, as alleged in the prospectus, had taken place, in the light of the forgery allegation, was to match payments from overseas to the invoices. Staff such as Arthur Au Yeung realised that and warned Mr Wan that they were not getting the required information.

196. Faced with insufficient information, and plainly realising that he could not properly substantiate the sales, Mr Wan sought refuge in the

confirmations received by Deloittes from the overseas customers in response to Deloittes' enquiries at the time of audit. Those confirmations are plainly of no greater value than an invoice and are themselves easily capable of forgery.

197. The real point is that had Mr Wan carried out a proper enquiry, and properly responded to the Exchange, the Exchange would have been informed in July 2003, that Tungda were unable to substantiate the overseas sales they had claimed in their prospectus. From that the Exchange would have been able to take such steps as they considered appropriate in pursuit of the complaint of forgery. Instead, Mr Wan muddied the waters, and concealed the truth.

198. The submission reflects, to an extent, two letters that were received by the Tribunal during the time in which this decision has been under consideration. These two letters purported to come from a television hostess with Hangzhou television, and a friend of Mr Lee Deng Charng, who had been at CPYC at the time of the listing of Tungda. Mr Lee was disciplined by the SFC in respect of his actions in relation to the listing of Tungda. The writer of the letter asserted that she had sat through the criminal trial involving the prosecution of corporate officers of Tungda that had taken place in July and August this year.

199. I invited submissions from the parties in respect of the letter, (the 2nd supplementary submissions). The solicitors for Mr Wan argued that the conviction of the chairman of Tungda and the acquittal of the Chief Financial Officer reinforced the submission that both CPYC and Mr

Wan had not been careless or unprofessional in either 2002 or 2003. Those advising Mr Yan were not instructed to make any submissions.

200. The SFC submitted that the contents of the letter constituted nothing more than an attempt by the writer of the two letters to set out her understanding of what had taken place in the criminal proceedings against the directors of Tungda, and that her understanding could not possibly have any evidential value in the proceedings before the Tribunal.

201. I agree. Both the submissions for Mr Wan and the letter miss the point entirely. The misconduct proceedings against Mr Wan were in relation to the steps that he took in responding to the enquiries by the Exchange. Whether there had been a forgery or not by those at Tungda is not the issue. The issue was whether or not Mr Wan had properly responded to the enquiry by the Exchange. For the reasons set out above I have found that he had not.

202. A proper investigation and response by CPYC and Mr Wan may well not have uncovered the forgery by the Tungda officers, but in that circumstance there would be no misconduct. However, a proper investigation and response would have been likely to have supplied to the Exchange a basis upon which further appropriate investigations might reveal the criminality that had taken place. The responses by CPYC and Mr Wan were designed to ensure that no further investigation should take place.

203. The criminal prosecutions are even less relevant to Mr Yan's conduct because his conduct in relation to the responses to the Exchange

by way of the three submissions was not under investigation. In Mr Yan's case what was under investigation was statements made by him to the SFC in the course of their investigation of the matter. A licensed person has an obligation to act properly and honestly in responding to the SFC in investigation. It is plainly misconduct to mislead the SFC into believing that documents were found, when those documents had never existed.

204. The conviction of the defendants in the Tungda criminal trial is simply irrelevant to the proceedings before me. (See also §§231-234 below.)

Brian Kwok's e-mail of 5 August 2003:

205. This e-mail, addressed to Mr Wan and others recorded his activities and the response of Tungda when he made a site visit to the company on 21 July 2003. It records significant difficulties in obtaining information from Tungda, and limitations on the information that was received.

206. It may well be right that a number of days after a site visit on 21 July 2003, Brian Kwok completed the e-mail in order that there may be a record of what had taken place. Such an e-mail would be "for record purposes".

207. The difficulties and limitations were significant and a subsequent email from Alan Au Yeung on 17 July 2003[80], demonstrated that those difficulties and limitations still existed. These limitations should

[80] A1/6/174.

have been disclosed to the Exchange. It is not for sponsor, in response to enquiries during continuing sponsorship, to hide the truth from the Exchange.

208. The e-mail from Brian Kwok of 5 August 2003, does not assist Mr Wan.

No steps by the Exchange after the third submission:

209. That the Exchange did not further pursue the matter with CPYC after the third submission is simply beside the point. The conduct on the part of Mr Wan is being examined by the submission charge is his conduct during the preparation of the three submissions. It is simply irrelevant that the Exchange did not then pursue the matter further with CPYC.

The failure to refer to payment records in the third submission:

210. The third submission, like the others, was carefully prepared. Mr Wan was fully aware that the investigations that had been undertaken in June and July 2003, had not been able to produce evidence from Tungda in which payments for the overseas sales was shown. He instead referred to Deloittes' audit confirmations form the overseas buyers. It was not an error of judgement not to explain that payment records had not been examined. It was a deliberate decision to conceal that fact.

211. It was plain and clear to those involved in the work involved in responding the Exchange that officers at Tungda were being evasive about

the issue. That evasion resulted in the failure to match payments received to invoices and shipping documents.

212. As early as 10 June 2003, Brian Kwok had informed Mr Wan by e-mail of the problem. He plainly recognised the requirement to match payments to invoices and shipping documents because he asked for the payment records of Tungda's top five customers, as well as invoices, delivery notes/shipping documents. He said clearly in an e-mail[81]:

> ".. certain information regarding Tungda's customers are incomplete.."

213. Mr Wan recognised that in his response, when in reply[82] to Brian Kwok he said that he had indicated to Chairman Chu that:

> ".. the set of information we requested are crucial." (sic)

214. Notwithstanding that recognition, the information was not supplied. The Exchange was not Instead the response to the Exchange referred to confirmations received by Deloittes.

215. A further e-mail from Brian Kwok, with the subject line "*info from Tungda*", on 18 June 2003[83], made the matter clearer still. He said Mr Wan:

> "I have been trying to contact the Company's staff of the required information *on a daily basis* but it has been unsuccessful. Please note that *the info are crucial* and advise how to proceed." (My emphasis)

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[81] CB2/29/2190.
[82] CB2/29/2185.
[83] CB2/32/2218

216. Mr Wan asked Ms Tsang to contact Chairman Chu of Tungda, but there is no evidence that he took any other steps at all. Indeed, in his evidence before the Tribunal he asserted that the series of e-mails referred to above did not even relate to the Exchange's enquiries. He said that the information related to Tungda moving its production facilities, a fact which had not been disclosed in the prospectus. I accept Mr Bell's submission that this is entirely illogical. The first enquiry in respect of the factory was not sent until 19 June 2003, after the e-mails referred to.

217. The second enquiry from the Exchange was a plain reference to the inability of CPYC to access payment records. Both the first and second submissions by CPYC were made to Exchange despite CPYC not having been able to review the crucial payment information. The submissions were demonstrably deficient. In referring to letters of credit, and not payments, as Mr Wan accepted in cross-examination, the submissions failed to establish that payment had been made.

218. The third submission simply evaded the issue and did not respond properly to the enquiries made.

219. More seriously, on 17 July 2003, Alan Au Yeung recorded in an e-mail the following crucial facts:

(i) invoices issued by Tungda could not be reconciled with credit transactions shown in the banking statements;

(ii) the statements provided by Tungda were extracted from their monthly statements, and no complete record was available;

(iii) information regarding Tungda's LC/TR account was not available;

(iv) for sales to overseas customers, only the Letter of Credit and bills of lading were checked, no payment records were available.

220. Subsequently Mr Wan, in a series of e-mail exchanges beginning on 22 July 2003, [84] sought backings for references to confirmations made by Deloittes, and ultimately relied upon those confirmations to assert to the Exchange that there was evidence that the sales had taken place. The plain inference is that he recognised that if Tungda was pressed as to the requirement to meet proper due diligence steps, and produce plain evidence of sales they would not be able to do so. In the absence of that evidence Mr Wan was forced to look to the confirmations, themselves quite unsubstantiated by payment records, but merely assertions from customers, as the evidence was needed. That resulted in a misleading picture being put to the Exchange.

The right of CPYC to "defend" itself:

221. The clear obligation on CPYC as the continuing sponsor of Tungda was to respond to any enquiries made by the Exchange properly and diligently. To an extent licensed persons, whether as original sponsor or a continuing sponsor is in a similar position to a solicitor acting for a client. A solicitor acting for a client has a dual duty. He has a duty to his

[84] CB2/42.

client to represent that client to the best of his ability, but he also has a duty to the court.

222. The dual duty is most sharply illustrated by an examination of the obligation of a solicitor in advising a client required to answer an order for discovery in litigation. It may well be that in the course of preparing the documentation for discovery a document will be found which will be damaging to the client's best interests in litigation. The solicitor has a duty to the court to ensure that that document goes before the court, irrespective of the effect it might have on his client's case. He cannot ignore or hide that document.

223. Equally, a licensed persons dealing with the Exchange have a dual duty. They have a duty to their client to perform their activities to a proper professional standard, but they also have a duty to the Exchange, to act in the best interests of the investing public, and to ensure that neither the Exchange nor the public are misled in any way by a listed entity. If in the course of investigating the enquiries raised by the Exchange, CPYC suspected that the complaint was correct, or that the due diligence that had been undertaken originally was insufficient, or that Tungda were failing to properly respond to their enquiries, CPYC were obliged to inform the Exchange of those facts.

224. The submission that CPYC was not under a duty to "confess" its answers were inadequate is remarkable and demonstrates a fundamental misunderstanding on the part of Mr Wan of his obligations as a licensed person. It is a submission which in effect says that if CPYC had discovered, in responding to the Exchange's enquiries, that in the IPO the

due diligence had been inadequate, and the prospectus was based upon fraudulent sales, CPYC would be entitled to cover that up and concealment from the Exchange. The proposition only needs to be stated to demonstrate its falsity.

Not a "business activity":

225. A submission was made that in responding to the Exchange's enquiries, neither Mr Wan or CPYC were conducting a business activity within the meaning of general principle 2 of the Code of Conduct.

226. Both Mr Wan and CPYC had specific responsibilities in respect of the continuing sponsorship. Those duties arose from their business of sponsoring Tungda for listing and their responsibility for continuing sponsorship. Nothing can be plainer than that their responses to the Exchange were part of the normal licensed business activity of both.

227. The argument is devoid of all merit and must fail.

Conclusion:

228. The steps taken by Mr Wan in discharging his role as a principal supervisor with CPYC, responsible for the continuing sponsorship of Tungda, and responding to the enquiries raised by the Exchange, were demonstrably and deliberately insufficient. Mr Wan was aware of the insufficiencies in the explanations offered by Tungda, and the submissions, signed by him, were deliberately constructed to conceal those insufficiencies.

229. I am in no doubt at all that the submission charge is established to the appropriate standard of proof.

230. Both applications for review are accordingly dismissed.

Chu Chien Tung:

231. On 28 September 2011, the Secretary to the Tribunal received a facsimile addressed, inter-alia, to the Tribunal. The document purported to be a statutory declaration by Chu Chien Tung, who had been the chairman of Tungda. The declaration contains the following statement:

> "The earlier cross-examination of Mr SUNG Wing Sum by prosecution reminded me that some years ago a representative of (CPYC) informally approached me when they were handling the settlement case with the SFC. I refused to be involved. Now, I still felt guilty for Ms Carol Tsang of their firm for having deceived and misled her and her staff in a complaint back in mid-2003." (sic)

232. I requested the Secretary to the Tribunal to enquire of the trial judge whether Mr Chu was a defendant in the criminal trial, and the result of any findings made in respect of him. I notified counsel of my intention to do so and informed them that I did not require further submissions in respect of the facsimile.

233. I was informed by the Clerk to the Honourable Mr Justice Wright, the trial judge, that Mr Chu Chien Tung, the Chairman of Tungda, had been a defendant in the criminal trial. During the course of the trial, whilst on bail, he had absconded. The trial proceeded in his absence, and he was convicted of the following charges in absentia: two charges of

conspiracy to defraud; eight charges of false statement by a company officer; and one charge of conspiracy to use false instruments.

234. I disregard the facsimile entirely. No weight at all can be placed upon an untested assertion by a person who is not only a convicted fraudster, but who has absconded during the course of his trial for fraud.

235. Although I did not invite further submissions on the facsimile, the solicitors for Mr Wan drew my attention to the fact that some of the documents attached to the declaration appeared to be bank records relating to the settlement of transactions. The point does not assist Mr Wan. Again, the key point is missed. It is right that there was some evidence that some payments had been made. The misconduct involved in the disciplinary steps taken by the SFC was the failure of Mr Wan to draw to the attention of the Exchange the deficiencies in Tungda's records that had been revealed following the complaint.

Costs:

236. Mr Wan principally, aided and abetted by Mr Yan, embarked upon a thoroughly discreditable and scurrilous course of conduct designed to evade their responsibilities in this matter. In so doing they have quite deliberately and unscrupulously sought to blame a completely innocent person for Mr Wan's own shortcomings in discharging his duties to the Exchange, under the SFO, and to the public, in his capacity as a licensed person.

237. They have persisted in that course of conduct through a protracted trial which has been undertaken at great expense. In so doing they have instructed their counsel to put to Ms Tsang the quite false proposition that she was the author of the three memoranda and the three checklists. In so saying I do not in any way criticise counsel who were obliged, in the particular circumstances, to act on their instructions. Mr Lok is to be commended for his careful and considered approach in putting his case. That does not excuse in any way the iniquity of the deceit sought to be practised by Mr Wan and Mr Yan.

238. In all of those circumstances I am of the view that they should be ordered to pay the costs of the application for review on them indemnity basis.

239. There will accordingly be an order nisi, to be made absolute at the expiration of 21 days, that the costs of the application for review must be paid by Mr Wan and Mr Yan on an indemnity basis.

240. It remains only for me to thank counsel for their diligence in the preparation of the arguments before me, and in cooperating with me in respect to the demands of my diary in order that the application may be brought to a conclusion.

(John Saunders)
Chairman,
Securities and Futures Appeals Tribunal
Judge of the Court of First Instance
High Court

Mr Adrian Bell SC and Mr Derek Chan, instructed by the Securities and Futures Commission

Mr Lawrence Lok SC, leading Mr Benjamin Chain and Mr Kevin Pun, instructed by Messrs Philip K H Wong and Kennedy Y H Wong, for Mr Wan Ten Lok

Mr Kevin Wong instructed by Messrs Lee & So, for Mr Sunny Yan Kwok Ting