Application No. 2 of 2023

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

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

BETWEEN

RAFFAELLO CAPITAL LIMITED	Applicant
and	
SECURITIES AND FUTURES COMMISSION	Respondent

Tribunal: Mr. Michael Hartmann, GBS, Chairman

Date of Ruling: 11 June 2024

RULING

Introduction

1. This interlocutory ruling determines two applications, both made on behalf of the Applicant. The first is for the late filing of two witness statements, both statements being related essentially to matters of fact ("**the two factual statements**").The second is for leave to file the statements of three expert witnesses ("**the three expert witness statements**"). Leave to file the statements, of course, means that the statement makers will be permitted in due course to give evidence based on those statements.

2. The Respondent, the Securities and Futures Commission ("**the SFC**"), opposes both applications.

3. That said, as matters have transpired, it appears that the opposition to the filing of the two factual statements is essentially one of principle. That is not the case, however, with the application to file the three expert witness statements. That application is firmly opposed on the merits.

Background

4. The Applicant, a limited liability company registered in Hong Kong, has been licensed by the Respondent, the SFC, to carry on Type 6 regulated activities pursuant to the provisions of the Securities and Futures Ordinance, Cap 571.

5. Type 6 regulated activities encompass the giving of advice on matters of corporate finance, more particularly, as in the present case, acting as corporate finance advisers - that is, as sponsors - to applicants seeking to be listed on the Hong Kong Stock Market.

6. The importance of the role of sponsors has been emphasised by the SFC in a 2005 consultation paper [1]:

> "... sponsors, who act as corporate advisers to listing applicants, play a pivotal role in bringing listing applicants to the Hong Kong market and providing investors with information about these companies."

[1] Consultation Paper on the Regulation of Sponsors and Compliance Advisers.

7. In early 2017, Paprika Holdings Limited ("**Paprika**"), incorporated in the Cayman Islands, sought a listing on the GEM [2] Board of the Stock Exchange of Hong Kong. The Applicant was appointed as the sole sponsor.

8. Paprika's business primarily involved the marketing and selling of "Paprika" and "Paprika Edition" handbags and accessories through retail outlets, including department stores. Some of Paprika's products were sold to wholesalers who then sold the product to end-users.

9. Paprika's listing application was first submitted in June 2017, covering the "track record period" for the financial years ending 31 March 2016 and 2017. The application was subjected to considerable scrutiny on the basis that the information contained in it may not be accurate. This resulted in the Applicant, in its role as sponsor, filing several amended prospectuses, all being subject to question.

10. The central focus of the concern investigated by the SFC and the Stock Exchange was the very significant increase - the inflation - in Paprika's sales (and revenue) over the two-year "track record period" preceding the application for listing.

11. In the end result, in April 2018, the application for Paprika's listing on the GEM was withdrawn.

12. Following that withdrawal, the SFC carried out an investigation to ascertain whether the Applicant, in its role of sole sponsor, had been guilty of a failure to exercise its duties of due diligence. The SFC's investigations revealed that over the track record period, that is, over the two year period preceding the application for listing, Paprika's revenue had "increased by 57.8% from HK$57 million in the year ended 31 March 2016 to HK$89.9 million in the year 31 March 2017". In this regard, the SFC found that -

a. The revenue from retail stores had increased by 60.5% from HK$43 million to HK$69 million.

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[2] The "Growth Enterprise Market".

b. The revenue from concessionaires counters had increased by 18.4% from HK$8.7 million to HK$10.3 million, and

c. The revenue from wholesalers had increased by 96% from HK$5.1 million to HK$10 million - of which over 90% was attributable to the increase in sales of a company called Novi eBusiness Limited ("**Novi**"), Paprika's largest wholesaler.

13. The SFC also found that three of Paprika's top five suppliers, which accounted for 53.4% of Paprika's total purchase costs in the year ended 31 March 2017, including a company called API Trading Company Limited ("**API**"), were new suppliers which only commenced their business relationships with Paprika in 2016.

14. In the result, by letter dated 11 June 2021, the SFC informed the Applicant that it proposed to take disciplinary action against it under s.194 of the Securities and Futures Ordinance ("**the Ordinance**"), this action being founded on its preliminary view that the Applicant had failed -

a. to conduct adequate due diligence on the retail sales transactions effected at the retail stores operated by Paprika;

b. to ascertain the background and independence of Novi (Paprika's largest wholesaler) and API (Paprika's fifth largest supplier for the year ended 31 March 2017);

c. to examine with professional scepticism the accuracy and completeness of statements and representations made to it by Paprika and to be alert to information that contradicts or brings into question the reliability of those statements and representations.

15. Having given the Applicant the opportunity to make representations, the SFC issued a Decision Notice dated 8 May 2023 finding that, on the evidence, it was satisfied that the Applicant had been culpable of a failure to conduct adequate due diligence in the discharge of its duties as sponsor.

16. By way of penalty, the SFC determined that the Applicant should be publicly reprimanded and fined an amount of HK$4 million dollars. In imposing the fine, the SFC took into account that the fine may place the Applicant "in financial jeopardy".

17. On 25 May 2023, the Applicant applied for an extension of time to file its application for review of the SFC determination. An extension was granted until 21 July 2023 when the Applicant filed its application. From that time, regrettably, the Applicant's review proceedings have been bedevilled by delay. Hence the need for the Applicant to seek the Tribunal's permission to file its two witness statements dealing with factual issues [3].

The admission into evidence of the two factual statements

18. As indicated at the beginning of this ruling, as matters have transpired, Counsel for the SFC has accepted that the opposition to the filing of two factual statements is essentially one of principle. Counsel has therefore - sensibly - adopted a neutral position in respect of the matter.

19. The two "factual" witnesses are Tsang Kin Hung, Ricky ("**Ricky Tsang**") and Leung Shi Tai, Samuel ("**Samuel Leung**"). The Applicant seeks the admission into evidence of both their witness statements.

20. At all material times, Ricky Tsang was a director of the Applicant while Samuel Leung was the Chairman of Paprika. Both men were, it seems, intimately involved in the application for a GEM listing. Having considered their witness statements, the Tribunal is satisfied that, in conducting a full merits review of the Applicant's application, the evidence of both men is essential. To deny permission for the witness statements to be filed and relied upon during the review hearing would, in the view of the Tribunal, undermine the ability of the Applicant to fully and fairly present its case.

21. Nor can it be said that there has been any gross abuse of process. Counsel for the Applicant pointed to the fact that time had been required to "unearth all the relevant

[3] Directions given by this Tribunal on 6 February 2024 required the filing by the Applicant of any factual witness statements within 28 days but that was not done.

documents" and to cross-check Samuel Leung's statement with contemporaneous documents. It appears also that time was also required for Samuel Leung to take his own legal advice. While therefore preparatory work by and on behalf of the Applicant may not have been as expeditious and focused as desired, nothing has been put before the Tribunal to suggest that there has been any purposeful or grossly negligent undermining of the Tribunal's process.

22. As such, although there has been delay, the Tribunal is satisfied that the process of the Tribunal, while delayed, has not been undermined and that any prejudice to the SFC may, if necessary, be adequately compensated in an order for costs.

23. Permission is therefore given for filing and serving of the two factual statements: those of Ricky Tsang and Samuel Leung.

The admission of expert evidence.

24. The determination of whether and, if so, to what degree, expert evidence should be admitted into evidence, is an important part of case management. It is no formality.This importance was described in direct practical terms in *Chok Yick Interior Design and Engineering Co Ltd v Lau Chi Lin* [4], cited with approval by the Court of Appeal in *Shenzhen Futaihong Precision Industry Co Ltd v BYD Co Ltd & Others* [5] -

> "I wish to stress that application for expert directions is not a mere formality. It is an integral part of the case management process. As a trial judge, I have seen far too many cases where the lack of proper preparation of expert evidence resulted in unnecessary costs and time spent on evidence which is of no help to the resolution of the dispute. And such wasteful exercise cost the parties a great deal of money, not only in terms of the fees paid to experts, but also legal costs spent on paying for the lawyers' reading, understanding of the reports, discussing the matter with experts and then the time (and costs) of the lawyers explaining and exploring the expert evidence with the judge by way of submissions and the examination and cross-examination of the experts during trial."

25. Mr. Chris Fong, for the Applicant, has sought permission for the expert evidence of three witnesses to be given at the review hearing. Mr. Norman Nip SC, for the

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[4] [2010] HKCU 978, HCA 1480/2008, 5 May 2010.
[5] [2019] 2 HKC.

SFC, has submitted that, on a proper understanding of the guiding principles, none of the three witnesses will be of any real assistance and each application for them to give evidence as experts should be dismissed.

26. Who then are the three expert witnesses that the Applicant seeks to call? Mr. Fong has submitted that each has extensive experience in varying aspects of advising on corporate finance matters, including matters relevant to the discharge of sponsorship duties. In written submissions, Mr. Fong has set out the background of the three intended witnesses and described their relevant expertise in terms that are essentially as follows:

A. *Chung Wai Chuen, Alfred ("**Alfred Chung**").*

Mr. Chung is a partner in a Hong Kong accounting firm who has, for over 15 years, specialised in "IPO audit assurance, investigation audit, consultancy and compliance" Mr. Chung has extensive IPO auditing experience and, apparently, has successfully completed a large number of IPOs. Counsel has said that Mr. Chung's evidence will focus on how reporting accountants work with sponsors and other professional parties in the due diligence process. Particularly, as the Tribunal understands it, he will give expert opinion "as to the detective and/or forensic approach adopted and/or required by the Respondent [the SFC] during the listing application".

B. *Tam Kin Fong, Ringo ("**Ringo Tam**").*

Ringo Tam, who has over 23 years of experience in the corporate finance field, is the management director of a licensed sponsor. He has extensive experience in IPO sponsorship work, having successfully completed a large number of successful IPO applications. Counsel has said that Mr. Tam's testimony would focus on how sponsors work with other professional parties in the process of IPO due diligence; in particular, seeking assistance from third parties. He would further testify as to the "checking and auditing procedures" integral to the sponsorship process.

C. *Cheung Leung Simon ("**Simon Cheung**")*

Simon Cheung's testimony, similar to the testimony of Ringo Tam, would focus on how sponsors work with other professional parties in the process of IPO due diligence, speaking to matters of shared responsibility. In particular, and of special relevance in this matter, Mr Cheung would speak of the practice of verifying credit card payments.

27. Mr Fong has submitted that the intended evidence to be given by Ringo Tam and Simon Cheung is not duplicitous. As Mr Fong put it, although they are both involved extensively in IPO listing applications, their different backgrounds would enable the Tribunal to better appreciate "the different approaches necessary and specific concerns relevant" to IPO applications in diverse industries.

28. The Tribunal has difficulty with this proposition. Mr. Fong, in his own written submissions, accepted the appearance of duplicity. To be frank, the differences that Mr Fong has attempted to delineate in order to set aside this appearance are not convincing. Even if the professional experiences of Ringo Tam and Simon Cheung are different, they certainly appear to be allied experiences and in any event, surely, the ability to draw contrasts between allied areas of expertise is inherent in the skills of an expert.

29. Bearing in mind the importance of case managing the admission of expert evidence, that is, of avoiding extra delay and extra costs when that evidence is to be given to what itself is an "expert panel", the Tribunal is satisfied that the Applicant's case will not be advanced by the admission of two sets of testimony related to almost identical areas of asserted expertise.

30. In this regard, it is to be remembered that the SFAT is itself an expert body, certainly not in need of near repetitive evidence.

31. That the SFAT is an expert body was confirmed by the Court of Appeal in *Tsien Pak Cheong David v Securities and Futures Commission* [6] . Tang ACJHC, in giving the judgment of the court, at para 44, said:

> "I agree… that the SFAT has independent and relevant expertise. As the Government stated in its Consultation Document on the Securities and Futures Bill, in each SFAT case, the presiding judge will be "assisted by two lay members selected on account of their expertise in the relevant field." … In [its] Legislative Council Brief… the Government explained that "members will primarily be business people, professionals or academics appointed by the Chief Executive on account of their impartiality, standing in the community and, most important of all, ability to bring relevant experience or expertise to bear in considering an appeal against specified decisions of the SFC."

[6] [2011] 3 HKLRD 533.

32. Referring to membership of the SFAT, Tang ACJHC said, at para 45:

> "... they [members] are eminently suitable to determine fairly and impartially what is needed to safeguard the integrity and reputation of the financial markets of Hong Kong."

33. Simon Cheung, it appears, will give evidence related to the verification of credit card payments, an area, it seems, of particular importance in retail matters. Permission is therefore granted for him to give expert evidence. Permission is not granted, however, to call Ringo Tam as an expert witness.

34. What then of Alfred Chung and Simon Cheung, remembering that it is the position of the SFC that, leaving aside the issue of duplicity, no expert witnesses at all are needed?

35. Mr Fong has emphasised that, if the Applicant is denied the ability to call these two witnesses, it would materially undermine its case in respect of what is essentially the central and determining issue in this application for review, namely, the manner - in the prevailing circumstances - in which the Applicant should properly have discharged its duties of due diligence.

36. Among other matters, Mr. Fong has asserted that Jocelyn Chi, a qualified accountant and director of a forensic accounting firm, was instructed to prepare a report that would underpin the SFC decision to find the Applicant culpable. Ms. Chi's report included a detailed analysis of -

a. fund flow diagrams and/or tables setting out the movement of all suspicious funds flow with relevant details; and

b. a detailed analysis in respect of any over/understatement of any figures/balances in Park's financial statements/revenue during the Track Record Period.

37. As the Tribunal understands it, it was Mr. Fong's case that it would be unfair - in the circumstances of this matter - to permit the SFC to structure its findings of culpability - or even test their inherent strength - by relying on expert assistance when denying the Applicant any such assistance.

38. In response, Mr Nip, for the SFC, has said that this assertion is simply wrong. In respect of the issues in dispute, the SFC has not relied on the reports of Jocelyn Chi. Her report was set down for completeness only, that is, for purposes of full disclosure.

39. In determining whether the Applicant should be permitted to call Alfred Chung and Simon Cheung as expert witnesses, the Tribunal has had regard to *Shenzhen Futaihong Precision Industry* (cited in para. 24 above) in which the following broad conditions for the admission of expert evidence were stated, namely, that the subject matter of the expert opinion must fall within an area in which expert evidence may properly be given; the witness must be qualified to give evidence of the type in question and his or her evidence must be relevant.

40. In respect of the first condition, the Tribunal is satisfied that the complexities of sponsorship in putting together IPO applications is clearly, in principle, an area in which expert evidence may properly be given. This is the case even though matters related to sponsorship may have come before it on a number of occasions before.

41. The issue of whether Alfred Chung and Simon Cheung are themselves qualified to give expert evidence in respect of the issues in question is more difficult. Considerably more information as to the experience and expertise of the two potential witnesses would normally have been expected; for example, whether they have been accepted as experts in any earlier proceedings (in Hong Kong or elsewhere). It is regrettable that greater detail was not given of the professional experience of the two. It is further regrettable that the particular areas of expertise to which it is intended that they would testify were not more precisely defined so that the issues to be addressed by them were not better understood. Put shortly, there was an uneasy air of truncated generality concerning their areas of specialist knowledge and the depth of their expertise in respect of those areas.

42. That said, however, the Tribunal is satisfied that there was - at the end of the day - just sufficient to speak to the fact that the two were qualified to give expert evidence to their matters in issue. Whether they will be successful in meeting any challenges concerning their expertise at the hearing itself is another matter.

43. As to relevance, while this issue too was coloured with generality, there was just sufficient.

44. Mr. Nip submitted that, even if the expert evidence sought to be called went to the heart of matters to be determined, the exercise of sponsorship in the present case was not related to any unusually technical or arcane areas of professional endeavour. Mr. Nip emphasised that the SFAT, being an expert tribunal, it should only seek expert evidence if that evidence would assist with matters falling outside its own experience and knowledge. The SFAT, however, has dealt regularly with issues of IPO due diligence; it has pronounced on the nature and levels of professionalism required and is therefore - without hearing expert evidence - well qualified to determine appropriate standards of due diligence to be adopted by sponsors.

45. As an expert body, of course, the SFAT's strength lies not in the in-depth knowledge of its members as to what must actually be done to ensure an acceptable level of due diligence in respect of each and every IPO application. In the majority of cases no doubt none of the members of the Tribunal will themselves have been a party to any such procedures. The expert character of the SFAT lies instead in the ability of its members to fully understand the true nature and character of the evidence given to it; what evidence to accept, what evidence to give less weight, and being able to come to a determination based upon that exercise. In short, the strength of the SFAT lies in the ability of its members to hear, understand and to weigh with professional competence the often technical evidence related to the securities and futures industry in Hong Kong that is placed before it - including, when it will assist in reaching an accurate and fair judgment, expert evidence.

46. In determining this application, the Tribunal has also had regard to the sequential questions set out in *Phipson on Evidence* [7]. The questions may be summarised as follows:

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[7] 20th Edition,2022 at 33-43.

a. Looking at each issue, is it necessary for there to be expert evidence before it can be resolved? If it is necessary (as opposed to merely helpful) then it must be admitted.

b. If the evidence, while helpful, is not necessary, the Tribunal is then able to proceed without the admission of that evidence - subject to a consideration of the third question.

c. In the context of the proceedings as a whole, is expert evidence, even though not necessary, nevertheless reasonably required to resolve the proceedings in question? In answering this third question, the Tribunal may take a range of questions into account, essentially exercising a broad judicial discretion, for example, the importance of the issue to which the expert evidence relates.

47. The Tribunal is satisfied, on a consideration of the material before it, that, while the receipt of expert evidence from the two potential witnesses may not be necessary, nevertheless it is reasonably required to resolve the application for review. Indeed, in the opinion of the Tribunal, its denial may well perform an unfairness on the Applicant in presenting what for it is an existential set of issues.

48. In determining this issue, the Tribunal has taken into account that while it has had to consider the role of sponsors in IPO applications in a number of past decisions, the facts and circumstances - and therefore the inherent dynamics - of every IPO application are, to a greater or lesser degree, different from each other. By way of sponsorship, each application therefore may present its own particular challenges even if, on its face, the sponsorship appears to be unexceptional. That being the case, in reaching an informed and balanced determination of the level of professionalism, employed by the sponsors, the Tribunal is satisfied that, depending on the fact of each case, it may be assisted by the receipt of expert evidence and this is one such case.

49. In the circumstances, permission is granted for the Applicant to submit expert statements made by Alfred Chung and Simon Cheung and for them to be called to give expert testimony. The Tribunal will hear submissions as to when the expert evidence

should be placed into evidence.

50. There will be an order nisi that costs of the application will be in the cause.

Michael Hartmann, GBS
(Chairman)

THE SECURITIES AND FUTURES APPEALS TRIBUNAL
證券及期貨事務上訴審裁處

Mr. Chris Fong, Counsel, instructed by Siu and Co., Solicitors,
for the Applicant

Mr. Norman Nip, SC, leading Mr. Julian Lam, instructed by the SFC,
for the Respondent