

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under sections 196 and 198 of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

CAI HONGPING

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Mr Michael Hartmann, Chairman

Date of Hearing: 5 & 6 October 2020

Date of Determination: 2 June 2021

DETERMINATION

A *The fraudulent listing of China Metal* A

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C 1. In June 2009, a company called China Metal Recycling (Holdings) Limited
D (“China Metal”) secured a listing on the Main Board of the Stock Exchange of Hong Kong
E (“the Stock Exchange”). In terms of its prospectus, China Metal was in the business of
F dealing in, and recycling, scrap metals. Its main facilities were in Guangdong, Jiangsu and
G Hong Kong. According to its prospectus, China Metal, acting through a wholly-owned
H subsidiary named Central Steel Macau, also dealt in scrap metal on the international market.

I 2. Within months of the listing, concerns arose that, in its listing application,
J China Metal had deceived the market as to the true size of its business. This led to an
K investigation into the affairs of the company by the Securities and Futures Commission
L (“the SFC”). The investigation revealed that there had been a dishonest inflation of the
M company’s business by means principally of the creation of fictitious transactions and
N circular flows of funds.

O 3. In July 2013, the SFC presented a petition to the Court of First Instance to
P wind up China Metal. The petition was brought pursuant to s.212 of the Securities and
Q Futures Ordinance, Cap 571 (“the Ordinance”) on the basis that it was desirable in the
R public interest. In ordering the winding up of the company¹, the Court (per Harris J) made
S the following observations:

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U “In my view, the evidence adduced by the Commission [the SFC]
V establishes that a fraud on a massive scale has been perpetrated by those in
charge of the company on investors, the Stock Exchange and others
involved in the listing of the company. It seems highly likely that Mr Chun
[the CEO of the company and a principal shareholder] caused the round
robin transactions and the creation of bogus bills of lading with a view to
producing significantly better figures than would otherwise be the case. This
must have been done in order to advance the Initial Public Offering and
induce investors to subscribe for shares.”

4. Earlier in his judgment, Harris J had cited figures showing that for the years
2007 to 2009 China Metal had, on one method of calculation, overstated its gross profit by
a sum in excess of US\$140 million, a 72% inflation. The judge found that this was as a

¹ See: Reasons for Decision dated 9 March 2015 (HCCW 210/2013).

A result of premeditated activity. As he said –

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C “Clearly, this was a carefully planned and carefully implemented scheme to
D create accounts which significantly overstated the business and profit of the
E company for the purposes of the listing and thereafter. This was fraud on an
F industrial scale which goes directly to the integrity of the listing. It is
G difficult to think of a clearer case of it being in the public interest that a
H petition be brought by the Commission [the SFC] for a winding up.”

E
F *The role of UBS in the listing of China Metal*

G 5. China Metal, in fact, made two applications for listing on the Main Board
H of the Stock Exchange, the first application being made in June 2008. On this first occasion,
I UBS AG (“UBS”) acted as the sole sponsor, global coordinator, bookrunner and lead
J manager. The application, however, was referred back by the Stock Exchange on the basis
K that UBS at the time held certain debt securities issued by China Metal and that, if 15% of
L the net proceeds of the listing was applied to settle those debt securities, UBS would fall
M into the category of a non-independent sponsor.

N 6. When the second - successful - application for listing was made a year later
O in June 2009, there were joint sponsors: UBS, as before, and China Merchants Securities
P (HK) Co. Ltd. (“CMS”). UBS, however, remained the global coordinator, bookrunner and
Q lead manager.

R *Findings by the SFC into the failings of UBS as a sponsor*

S 7. When concerns arose as to the integrity of the China Metal’s listing, the
T SFC investigated the role of UBS as a sponsor, coming to the following determinations,
U namely, that –

- V (a) UBS had failed to conduct adequate and reasonable due diligence enquiries
in relation to China Metal’s listing and had failed to use all reasonable
efforts to ensure that the information and representations provided in the
prospectus were true and accurate and were not misleading.

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(b) That it had failed to keep a proper audit trail (that is, a written record) of the work done in respect of its due diligence investigations.

(c) That it had breached the sponsor’s undertaking made to the Stock Exchange and/or had filed untrue statements in the sponsor's declaration.

(d) That it had failed to comply with all regulatory requirements applicable to the conduct of a sponsor including the Listing Rules and, in particular, Practice Note 21 of those rules requiring the exercise of due diligence by sponsors in respect of listing applications.

8. In the result, on 14 March 2019 the SFC reprimanded UBS and imposed a financial penalty upon it for its failure to discharge its duties as a sponsor and specifically for its breaches of the following –

(a) General Principle 2 (related to the exercise of due diligence) of the Code of Conduct for persons licensed by and registered with the SFC (“the Code of Conduct”) and paragraph 5.1 (related to the exercise of due skill and care) of the Corporate Finance Adviser Code of Conduct (“the CFA Code of Conduct”).

(b) Paragraph 5.8 (related to the required standard of documentation) of the CFA Code of Conduct.

(c) Paragraph 2.3 of the CFA Code of Conduct, together with certain guidelines, related to the maintenance of proper books and records in order to ensure due compliance with this relevant legal and regulatory matters.

(d) General principle 7 (related to compliance with regulatory requirements in order to promote the best interests and integrity of the market) of the Code of Conduct and paragraph 1.5.1(3) of the Sponsor Guidelines.

A 9. UBS did not dispute the findings made by the SFC, namely, its culpability
B as sponsor, and accepted the sanctions imposed upon it.

C 10. UBS, of course, as a corporation, could only act through its Board, its
D directors and its employees. Or, expressed in the round, through its management. Mr Cai
E Hongping (“the Applicant”) was at all material times a senior member of that management.

F *Disciplinary action instituted against the Applicant personally*

G 11. By letter dated 26 September 2017, the SFC informed the Applicant that it
H had come to a preliminary view that the failings of UBS were to a material degree
I attributable to negligence on his part in his capacity as the leader of the UBS transaction
J team (that is, in his capacity as the “Principal” or “Sponsor Principal”) and as a member of
K senior management of UBS. More particularly, in this regard, the Applicant was informed
L that a preliminary view had been reached that he had failed –

K (a) in breach of General Principle 2 to the Code of Conduct, to exercise due
L skill, care and diligence in the handling of China Metal’s listing application;

M (b) in breach of General Principle 9 of the Code of Conduct, to ensure the
N maintenance of appropriate standards of conduct and adherence to proper
O procedures by UBS;

O (c) in breach of paragraph 4.2 of the Code of Conduct and paragraph 1.3.3 of
P the Sponsors’ Guidelines, to diligently supervise subordinates and generally
Q the sponsor work undertaken by UBS.

R 12. In light of these asserted failings, the SFC informed the Applicant that it had
S come to the preliminary view that he was culpable of misconduct and/or was not a fit and
T proper person to be licensed. Accordingly, pursuant to section 196 of the Ordinance², the

U ² Section 196 of the Ordinance details the disciplinary action that may be exercised by the SFC when a
V regulated person has been found guilty of misconduct or when the SFC has reached a view that a regulated
person is not a fit and proper person to be or to remain regulated.

A SFC proposed to prohibit the Applicant from carrying on any regulated activities for a
B period of five years.

C 13. In January 2018, lengthy submissions in response were filed on behalf of
D the Applicant. In those submissions, while it was accepted that the Applicant at the material
E time had been a member of senior management at UBS, it was denied that he had been the
F leader - that is, the Principal - of the UBS transaction team tasked with navigating the China
Metal listing. It followed that he should not be held personally liable for any lack of due
diligence on the part of UBS.

G 14. On 3 October 2019, however, pursuant to a written ‘Decision Notice’ made
H under sections 196 and 198 of the Ordinance, the SFC informed the Applicant that, having
I considered his response, it had nevertheless determined that he was personally culpable of
J misconduct and/or was not a fit and proper person to be licensed and that accordingly it
had decided to prohibit him for a period of five years pursuant to section 196 of the
Ordinance from doing any of the following in respect of regulated activities –

- K (a) from applying to be licensed or registered;
- L
- M (b) from applying to be approved pursuant to section 126(1) of the Ordinance
as a ‘responsible officer’ of a licensed corporation;
- N
- O (c) from applying to be given consent to act or to continue to act as an
‘executive officer’ of a registered institution under section 71(C) of the
P Banking Ordinance, and
- Q (d) from seeking through a registered institution to have his name entered in the
R register maintained by the Hong Kong Monetary Authority under section 20
S of the Banking Ordinance as that of a person engaged by the registered
institution in respect of regulated activities.

A *The Applicant's grounds of review* A

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C 15. On 14 November 2019, the Applicant – pursuant to section 217 of the
D Ordinance - sought a review of the SFC's decision. In doing so, he put forward three
E grounds of review which may be summarised as follows –

F (a) While the Applicant had been a senior member of UBS management, the
G SFC had fallen into error in finding that he had also been the 'Principal' or
H the 'Sponsor Principal', that is, the leader of the transaction team appointed
I by UBS for the China Metal listing. It was the Applicant's assertion that he
J had never been appointed to head the transaction team. There was no direct,
K unequivocal evidence of his appointment or indeed of any person's
L appointment, to that position: no memorandum of appointment or anything
M similar. As for the indirect evidence, it was at best ambiguous and, viewed
N in the round, was insufficient to permit any adverse inference being drawn
O against him.

P (b) That in any event the SFC had fallen into error in finding that the Applicant
Q had breached his duties under the Code of Conduct and/or the Sponsor
R Guidelines (or any other duties) bearing in mind the limited extent of his
S duties of supervision and his entirely reasonable reliance on the extensive
T due diligence efforts carried out by UBS and the Co-Sponsor, CMS, and, in
U particular, the Equity Commitment Committee of UBS ("the ECC").

V (c) That, in respect of the sanctions imposed, they were manifestly excessive
and wholly disproportionate when considered in light of the role of the
Applicant in the China Metal's listing transaction and the nature of his
conduct in fulfilling that role.

The role of the Tribunal in this review

16. The Tribunal is required to make a full merits review, conducting the review
as if it is the original decision-maker. As to the standard of proof required to determine any
question or issue before the Tribunal, section 218(7) of the Ordinance directs that it shall

A be the standard of proof applied in civil proceedings, that is, proof on a balance of
B probabilities.

C 17. As to the burden of proof, in light of the fact that the Tribunal’s role is to
D conduct the review as if it is the original decision-maker, it follows that the SFC – as the
E party which has made findings and imposed sanctions - must still bear the burden of proof.

F 18. In this review, with the agreement of the parties, the Chairman of the
G Tribunal sat alone.³

H *The ‘fit and proper’ guidelines*

I 19. As set out above, one of the matters challenged by the Applicant is the
J determination made by the SFC that, by reason of his various acts of negligence while
K acting as the leader, that is, the Principal, of the UBS transaction team, he had shown
L himself not to be a ‘fit and proper’ person pursuant to the relevant Guidelines to remain
M licensed.

N 20. The purpose of the ‘Fit and Proper Guidelines’ issued by the SFC is to
O ensure that persons applying for licences and registrations under the Ordinance are able to
P satisfy the SFC on a continuing basis that they are, and remain, fit and proper persons to
Q be licensed or registered. As the guidelines express it:

R “In simple terms, a fit and proper person means one who is financially sound,
S competent, honest, reputable and reliable.”

T 21. Guidelines issued by the SFC are not exhaustive. They act as a pointer to
U appropriate conduct and levels of endeavour. They set out the broad range of matters which,
V depending on the nature of each and every case, the SFC will look to in determining
whether individual persons are, at the time they are given their statutory authority, and
thereafter remain, fit and proper persons to discharge that authority.

³ See section 31 of Schedule 8 of the Ordinance.

A *The nature (and importance) of ‘sponsorship’* A

B
C 22. In Hong Kong, a corporation seeking a listing on the Stock Exchange is
D required to appoint at least one sponsor. A sponsor, often an investment bank, must hold a
E licence to advise on matters of corporate finance⁴. A sponsor, essentially an expert
F corporate guide, is required to provide advice to the listing applicant to ensure that its
G prospectus, and any accompanying materials, have met the requirements of all relevant
H regulations and rules. A sponsor must undertake all necessary due diligence to seek to
I ensure the accuracy and adequacy of the materials upon which a listing application is
J founded to enable potential investors to come to an informed opinion of the financial
K condition of the applicant seeking to list. To discharge this obligation, a sponsor must not
L only work closely with an applicant, challenging that applicant when legitimate questions
M arise, but it must use all reasonable endeavours to address matters raised by the Stock
N Exchange in connection with the application. O

J 23. The importance of the exercise of due diligence by corporate financial
K advisers acting as sponsors has been emphasised by the SFC on a number of occasions,
L particularly in a document entitled Consultation Conclusions on the Regulation of Sponsors
M and Independent Financial Advisers published in October 2004:
N

M “Due diligence by sponsors is important because... the Exchange (‘the
N Stock Exchange’) places significant reliance on this work. The Exchange
O does not have the resources or mandate to gain the detailed knowledge of
P an issuer’s business which the sponsor is expected to have accumulated
Q through its preparation of the applicant for listing. Consequently, the
R Exchange and the market are entitled to rely on the competence and integrity
S of the sponsor in assisting the issuer to prepare and present the listing
T application and listing documents.” U

Q 24. In an earlier determination in 2014⁵, this Tribunal confirmed the central
R importance of the role of a sponsor –

R “It is clear to us that the regulatory framework insisting on the exercise of
S due diligence by each and every sponsor is critical to the orderly and
T

T ⁴ A Type 6 regulated activity.

U ⁵ Sun Hung Kai International Limited and the Securities and Futures Commission, judgment dated 27
V January 2014, paragraph 44.

A transparent working of the market. That is why emphasis is placed on the
B dual obligation of a sponsor, an obligation not only to the client but, equally
C importantly, to the integrity of the market. In an orderly and transparent
D market, investors must be able to place trust, first, in the fact that the listing
E of a company has been founded by the Stock Exchange on the consideration
F of full and accurate information and, second, that the information contained
G in the prospectus is also full and accurate. The route to ensuring such trust
H must rest principally on the sponsor, the party responsible for the
I management of the listing. It must rest principally on the conduct of an
J objective, professional and scrupulous investigation of all material relevant
K to the listing and the initial public offering; in short on the conduct of
L reasonable due diligence. All investment involves risk. The point is that
M investors must be able to assess the risk by relying on accurate and relevant
N information. If they are unable to do that then trust in the market is
O undermined.”

H *The role of management in discharging the responsibilities of a sponsor*

I 25. It is of course the management of a sponsor that is ultimately responsible
J for the supervision of all necessary due diligence undertaken in order to ensure compliance
K with relevant rules, regulations and codes. In the present case, the Applicant was at all
L material times a member of the senior management of UBS.

L 26. The Sponsor Guidelines issued by the SFC⁶ say the following in respect of
M sponsor work –

N “...the Management of a sponsor is ultimately responsible for the
O supervision of the sponsor work undertaken by the firm, as well as
P compliance with all relevant rules, regulations, codes and guidelines. While
Q the Management may delegate the operational functions to the staff of a
R sponsor, the Management remains responsible for the discharge of those
S functions and such responsibilities cannot be delegated.”

Q 27. Of particular relevance in this matter, the guidelines state that management
R has an obligation to ensure that there is no confusion as to division of responsibility –

R “Reporting lines should be *clearly identified*, with supervisory and reporting
S responsibilities assigned to the appropriate staff members.” [emphasis
T added]

U ⁶ See paragraph 1.2.4.

28. In respect of the China Metal project, however, as will be seen later in this Determination, there was a clear failure to identify reporting lines, more particularly in identifying who had been appointed to lead the transaction team.

The role of Sponsor Principals

29. The Sponsor Guidelines set out what is expected of a Principal or, if more than one is required, how the co-Principals are to be jointly and severally responsible for discharging their roles –

“As a general guidance, a Principal is expected to be in charge of the supervision of the Transaction Team. The Principal should be involved in the making of the key decisions relating to the work carried out by the Transaction Team and must be aware of the key risks in such work and responsible for the measures to address them. For example, in respect of conducting due diligence review on a listing applicant, the sponsor should ensure that the Principal is involved in determining the breadth and depth of the due diligence review, the amount of resources to be deployed for carrying out such work, making a crucial assessment of the results of the due diligence and overall assessment of the adequacy of the due diligence review, and ensuring that steps have been taken to properly resolve all issues arising out of such review. The Principal is also expected to be fully conversant with the key issues in each sponsorship appointment and be able to respond and react promptly to the requests of the regulators on such issues and to properly advise the applicant.”

30. To carry out the functions of a Sponsor Principal, a member of the management of a corporation must first receive approval from the SFC. Approval is evidence of the fact that the SFC considers that person to have the necessary qualifications and experience to act as a Principal, that is, to act as the leader, or co-leader, of a transaction team as and when appointed to fulfil that role.

31. A number of members of management may be approved by the SFC to act as a Principal. This was the case with UBS. In this regard, an internal UBS bulletin dated 30 January 2008 said the following:

“Currently, we have 8 Principals approved by the SFC and are in the process of application for 4 proposed Principals.”

32. However, it is only when each of those members of management is appointed to join a sponsorship transaction team that they take on the role of Principal or co-Principal of that team.

33. The relevant UBS internal guidelines issued in January 2008 (“the UBS Bulletin”)⁷ gave the following guidance as to the duties of a Principal:

“A Principal is the person in charge of supervision of the transaction team, and is also the primary point of communication between UBS’s senior management and the regulators. The Principal should be involved in the making of the key decisions relating to the work carried out by the transaction team and must be aware of the key risks in such work and responsible for the measures to address them.”

34. The UBS Bulletin continued by stating the following –

“Currently, we have 8 Principals approved by the SFC and are in the process of application for 4 proposed Principals. Deal team should approach the approved Principals (i.e. David Chin, Heidi Yang, Henry Cai [the Applicant], Johnson Ngie or Tim Cen) and seek their agreement to act as Principal on a specified HK IPO. If circumstances require, there may be more than one Principal in each transaction team, who will be responsible jointly and severally for discharging their duties.”

35. On the basis of the UBS Bulletin, therefore, it was for the ‘deal team’, that is, the transaction team, once constituted, to approach a member of management approved by the SFC to act as *a* Principal and to ask that person to act as *the* Principal of the team. On the basis of the UBS Bulletin it is to be inferred that UBS did not have in place a dedicated committee or similar group given the task of determining who was to be appointed Principal in respect of each and every sponsorship project. Instead, as stated, it appears to have been the case that it was incumbent on the transaction team/deal team⁸ put together for a particular sponsorship project to approach one of the persons in UBS approved to act as a Principal to seek their agreement to act in that capacity.

36. The UBS Bulletin continued by saying –

⁷ The full description is: Legal & Compliance Bulletin 09-005: Reminder on Guidelines for Sponsors and Compliance Advisers for HK IPOs.

⁸ The terms appear to have been employed on an interchangeable basis.

A “In light of the responsibilities of a Principal, the Project Sponsor or Project
B Director of an IPO deal team will be the Principal for the deal. The name of
C the Principal should be indicated in the BRG form⁹ for a HK IPO after
D seeking their prior consent. The Principal should be added to any
E distribution lists (DLs or OLs) set up for the deal, *attend each ECC meeting*
F and sign all correspondence with the SEHK [the Stock Exchange] including
G the A1 application, submissions, and undertakings to the SEHK.” [emphasis
H added]

E 37. The requirement of a Principal, once he or she had agreed to be appointed,
F to attend all meetings of the ECC¹⁰ refers to the meetings of the Equity Commitment
G Committee. The ECC is an internal UBS committee established to review the general due
H diligence undertaken by UBS in discharging its obligations as a sponsor in relation to each
I and every listing project as well as discharging its obligations to determine specific issues
J of concern put before it in respect of any listing project.

I *The need to draw inferences*

J 38. As already indicated, and as will become evident later in this Determination,
K no unequivocal source material was put before the Tribunal to show that the Applicant had
L been appointed as the Principal (or the co-Principal) in charge of the China Metal
M transaction team. Nor was any unequivocal documentary material put before the Tribunal
N to show that the Applicant had acknowledged that he had taken up that position. The
O determination of this central factual issue has therefore depended essentially on a
P consideration of indirect evidence and the drawing of inferences from that evidence.

O 39. As to the drawing of inferences, in an earlier determination¹¹ this Tribunal
P has said the following:

Q “In reaching its determination, it has been necessary for the Tribunal to draw
R inferences from facts it is satisfied have been proven. In this regard, the
S Tribunal has directed itself that any conclusions reached by it must be
T plainly established as a matter of inference from facts it is satisfied have
U been proved. The proceedings being civil in nature, it would not be right to
V say that the requisite standard prescribes that any inference drawn is to be

⁹ The initials BRG stand for Business Review Group; the initials EBRG stand for Equity Business Review Group.

¹⁰ See the phrase in italics in paragraph 36.

¹¹ *HSBC Private Bank (Suisse) SA*, Application to the SFAT number 3 of 2015.

A the only inference that can be drawn, that being the standard which applies
B to criminal matters. However, an inference must be established as a
C compelling inference.”

C *The generalised use of the word ‘Principal’ within UBS*

D 40. It was never disputed by the Applicant that, if appointed to act as *the*
E Principal of a transaction team, he would then become the leader of that team, making
F executive decisions and directing its day-to-day work¹².

G 41. However, as stated earlier, it was the Applicant’s case that he was never
H appointed to lead the China Metal transaction team. That did not mean, however, that he
I was entirely removed from the work of the transaction team. As a senior member of UBS
J management – indeed, the Chairman of the investment banking division for Asia - he would
K of course have been required to discharge a broad supervisory role. From time to time he
L would therefore be required - together with other members of senior management - to give
M advice related to the workings of the transaction team. In addition, as a member of senior
N management approved to act as a Principal by the SFC, he would also from time to time be
O requested to place his signature on important documents passing from UBS to the SFC.

L 42. As the Tribunal has understood it, it was therefore the Applicant’s case that,
M while his discharge of this broad - and limited - supervisory role may have led to confusion
N in the eyes of some others, it did not constitute in any way the leadership of the China Metal
O transaction team.

O 43. In support of this contention, counsel for the Applicant submitted that
P within UBS the word ‘Principal’ would often be used in such a way as to result in ambiguity.
Q A member of staff who had been approved by the SFC to act as ‘Principal’ would be
R described, no doubt as a form of shorthand, as ‘Principal’ even though he or she was not at
S that time appointed to lead any particular transaction team. When appointed to head a
T transaction team, the same title would be used, namely, ‘Principal’. In the result, so it was
U submitted - unless the context otherwise made it clear - the mere use of the description
V

T ¹² The Applicant’s application form submitted to the SFC for approval to act as a Principal stated that:
U “Principal means a responsible officer or executive officer appointed by the firm to be in charge of the
V supervision of the transaction team”.

A 'Principal' did not of itself mean that the UBS member must at the time have been the
B appointed leader of a transaction team.

C *The core issue*

D 44. The core issue therefore was a factual one: was the SFC able to prove on a
E balance of probabilities that the Applicant had been appointed as *the* Principal or *the* co-
F Principal of the China Metal transaction team?

G *Conflicting reports given by UBS to the SFC*

H 45. Central to matters that have fallen for consideration by the Tribunal is
I evidence relating to two reports sent by UBS to the SFC. They are important because, on
J their face, they are both the result of internal research. Both reports speak of leadership of
K the China Metal transaction team. Those reports, however, conflict with each other.

L 46. The first report submitted by UBS to the SFC was drawn up by the UBS
M Legal & Compliance Department. That report was dated 7 January 2010. It was composed
N therefore within a few months of the China Metal listing when memories would have been
O relatively fresh. An indication of the importance of the report is the fact that it was signed
P by two senior members of the Department. The report clearly addressed itself to the
Q question of who had been appointed as *the* Principal of the China Metal transaction team
R and who had held other supporting roles. The manner in which this report came to be
S written can be explained as follows:

- T (a) On 29 December 2009, as part of its formal investigation, the SFC served a
U notice to produce records and documents on UBS. The records that were
V requested included a list of staff members who had been involved in the new
listing application of China Metal, that list to include persons who had been
involved in the preparation and approval of the prospectus and related due
diligence.

(b) The SFC notice specifically placed on UBS the requirement to state the respective areas of responsibility of each staff member and to state their positions.

(c) On 7 January 2010, UBS replied. In that reply, two senior members of the UBS ‘Legal & Compliance’ team set out a list of the relevant staff of UBS who had been involved in the listing application, giving their titles and their roles (“the staff table”). The staff table was headed: ‘UBS Deal Team Members’. UBS emphasised that the staff table included –

“the core deal team and members of the relevant committees that directly assisted in the preparation and approval of the prospectus and the related due diligence work; (b) staff who are included in the working group for the transaction; and/or (c) staff who were included in the UBS internal email distribution list in relation to the transaction.”

47. Before looking to the make-up of the staff table, it is important to note that the table does not describe anybody at all as holding the position of ‘Principal’ or ‘co-Principal’ of the transaction team.

48. As for the Applicant, while he is listed in the table, he is *not* described as discharging an area of responsibility that would make him the ‘Principal’ of the team. Indeed, he is not described as holding any particular position within the team that gave him any particular importance within it. He is simply described as being a member of ‘senior management’ – as, it would appear, counsel for the Applicant sought to describe him during the course of submissions.

49. That is not to say, however, that the members of the UBS Legal & Compliance team responsible for drawing up the staff table were culpable of failing to identify a team leader. In this respect, the report identified a man by the name Michael Ngai as holding that position. Michael Ngai’s name is the first name in the staff table and his details are set out as follows –

Michael Ngai	Managing Director, Investment Banking Department	Project Sponsor Ngai was a core member of the deal team
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A 50. Michael Ngai is not here described as the ‘Sponsor Principal’ or ‘Principal’.
B Nor is he described in prosaic terms as being ‘team leader’ or similar. He is instead
C described as the ‘Project Sponsor’. Nobody else in the table is described in the same way.
D This begs the question: what does the term ‘Project Sponsor’ mean?

E 51. To answer this question, reference needs to be made to a bulletin issued by
F the Legal & Compliance Department of UBS on 11 January 2007: some two years *before*
G the listing of China Metal. In that bulletin (issued generally to staff), the following was said

H –
I “A ‘Principal’ is the person in charge of supervision of the transaction team,
J and is also the primary point of communication between UBS's senior
K management and the regulators. Please make sure a Principal is assigned to
L each Hong Kong IPO and, if circumstances require, there may be more than
M one Principal in each transaction team who will be responsible jointly and
N severally for discharging their duties. Currently we have three principles
O approved by the SFC who are Robert Rankin, David Chin and Matthew
P Koder, and five proposed principles are in the process of application,
Q namely: Heidi Yang, *Henry Cai*, John Sturme, Mark Williams and Glenn
R Fok.” [emphasis added]

S 52. It will be seen that at this time, that is, in January 2007, the Applicant was
T one of five new proposed ‘Principals’ waiting for SFC approval.

U 53. No doubt bearing in mind the number of senior management personnel who
V would be able to act as a Principal, and to ensure clarity, UBS, in its bulletin of 11 January
2007 said that, when a qualified member of senior management was appointed as team
leader, that is, as *the* Principal of a team, he or she would be known as the ‘Project Sponsor’.
In this regard, the bulletin said (continuing from what has been said in paragraph 51 above)

–
“In light of the responsibilities of a Principal, the *Project Sponsor* of an IPO
deal team will be the ‘Principal’ for the deal.” [emphasis added]

54. On this basis, if the directions were followed, from January 2007, the head
of a transaction/deal team would be known as a ‘Project Sponsor’. That would avoid any
confusion arising out of the title ‘Principal’. It was therefore the ‘Project Sponsor’ who
would be the person in charge of supervision of a transaction team and the primary point
of communication between senior management of UBS and the Hong Kong regulators.

55. In its response to the SFC dated 7 January 2010, in giving to Michael Ngai the description of responsibility of ‘Project Sponsor’, the Legal & Compliance Department of UBS was therefore reporting that, on the basis of their internal enquiries, Michael Ngai had held the appointment of ‘Principal’, that is, the ‘team leader’ of the China Metal transaction team. Within the staff table, the Applicant was not described as a ‘Project Sponsor’. More than that, he was given no title that suggested he held a position of any particular authority; he was given no particular role within the transaction team.

56. The first eight names in the staff table prepared by the Legal & Compliance Department of UBS were as follows –

[Personnel drawn from the] Investment Banking Department

Michael Ngai	Managing Director, Investment Banking Dept	Project Sponsor Ngai was a core execution member of the deal team
Alan Fung	Director, Investment Banking Dept	Project Director Fung was a core execution member of the Deal team until he left UBS Fung was no longer an employee of UBS as of 31.10.09
Vivian He	Associate Director, Investment Banking Dept	He was a core execution member of the deal team
William Zhou	Non-officer, Investment Banking Dept	Zhou was a core execution member of the deal team
Joe Zhang	Managing Director, Deputy Head of IBD, China Head of REL&L (Asia), Investment Banking Dept	Zhang was one of the client coverage bankers of the deal team
Julia Xiao	Director, Investment Banking Dept	Xiao joined the deal team on 12.02.2009
Jing Qian	Executive Director, Investment Banking Dept	Member of the deal team
Henry Cai [Applicant]	Managing Director, Chairman of IBD Asia, Investment Banking Dept	Senior Management

A 57. In the same table, under a sub-heading indicating that certain members of
B the transaction team had been drawn from the UBS ‘Equity Capital Markets Group’, other
C members of the deal team were listed. Some were described as being ‘core’ or ‘key’
D members. By way of example –

James Fleming	Executive Director, Head of Equity Syndicate (Americas), Investment Banking Dept	Fleming was a key syndicate member of the deal team (and head of Equity Syndicate (Asia) at the time)
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F 58. In looking to the staff table prepared for the SFC in January 2010, what
G cannot be ignored is that one person only was named as being the Project Sponsor, that is,
H the leader of the UBS transaction team guiding the listing of China Metal - that person
I being Michael Ngai. His name is set first in the table. The second name listed was that of
J Alan Fung who was described as a “core execution member of the deal team” (until his
K resignation shortly after the successful listing) and as ‘Project Director’: the latter
description suggesting an active day-to-day role in directing, that is, in supervising the
work of the team.

L 59. As for the Applicant himself, he was described simply as being the
M Chairman of the Investment Banking Division for Asia and being a member of senior
N management, at worst, therefore, of having a general, unspecified role in the workings of
the Transaction Team.

O 60. When the Applicant was formally interviewed by the SFC on 29 December
P 2015 – some five years after the compilation of the report – he said that, to the best of his
Q memory, Michael Ngai had been the leader of the transaction team. In this regard, he said
(in English translation):

R “My understanding is that Michael [Ngai] was the leader of this project. He
co-ordinated a lot of the internal affairs.”

S 61. The Applicant went on to say that Alan Fung was possibly the one who
T “really did the project”, which the Tribunal takes as meaning that, as the Applicant
U remembered it, Alan Fung, as a member of the China Metal transaction team, had been the
main driver in ensuring due diligence and therefore a successful listing.

A 62. On 20 November 2015, a further report was sent to the SFC which was
B related to the issue of leadership of the UBS China Metal transaction team. This report was
C written on behalf of UBS by its solicitors, Herbert Smith Freehills. This report came nearly
D six years later than the original report detailed above. In this second report, the following
statement was made –

E “Based on the document productions reviewed to date, Henry Hongping Cai
F [the Applicant] was the Principal in relation to the Company's IPO, at least
for the period from 28 February 2008.”

G 63. The assertion in this second report constituted a complete *volte face*. In the
H first report, the Applicant had been identified as holding no particular position in the China
I Metal transaction team; he had been identified simply as being ‘senior management’. In
the second report, however, he was identified as being *the* Principal, that is, the team leader,
at least from February 2008.

J 64. What then was the evidential support for this change? No unequivocal
K source document was put forward by UBS, no contemporaneous memorandum confirming
L the Applicant's appointment as the Principal or anything similar; indeed, no direct evidence.
M According to the solicitors who wrote the letter on behalf of UBS, the only evidence in
N support of the contention was an internal email written by Vivian He, an Associate Director
of the Investment Banking Department, on 28 February 2008¹³. The solicitors said that,
aside from this email –

O “...we have *not* seen any internal UBS emails in relation to Mr Cai's
appointment as the Principal for the company's IPO.” [emphasis added]

P 65. The *volte face*, therefore, had been made on the basis of a single email
Q exchange that was not based on any stated source.

R 66. What then were the contents of the internal email written by Vivian He on
S 28 February 2008 and what were the circumstances in which it came to be written?

T
U ¹³ See paragraphs 34 and 35 above.

A 67. On 28 February 2008, three to four months before China Metal's first (and
B inconclusive) application for listing, Eva Cheung, a senior member of the Compliance
C Department of UBS, sought to clarify matters as to the independent standing of UBS in its
D role as sponsor. In this regard, she sent an internal email to Vivian He, seeking answers to
E a number of questions. One question was worded as follows:

E "Please advise who is the Principal for this IPO – ASAP."

F 68. Vivian He, who in the January 2010 report to the SFC was described as an
G Associate Director in the investment banking division and apparently a "core execution
H member of the deal team"¹⁴, replied that same day, stating:

H "Mr Henry Cai [the Applicant] is the Principal for this deal ..."

I 69. Vivian He, however, gave no grounds to support this plain assertion.
J Accordingly, considered in isolation, that is, without the incorporation into her email of
K other contemporary evidential materials, the best that can be said is that this was her belief
L at the time.

L 70. That said, however, the email did not stand entirely on its own. It is of note
M that, in respect of this internal email exchange, there was a 'cc' addressee, namely: 'OL-
N Metal'. On the evidence, it appears that the Applicant was the possessor of that address or,
O at least, was one of the possessors. It was submitted therefore that surely the Applicant
P would at least have cast his eye over what was said and would have objected if he had been
Q inaccurately described. That is a point of some substance.

P 71. It must be remembered, however, that in a busy office not everybody copied
Q into an email pays particular attention to that fact. In addition, it was emphasised on behalf
R of the Applicant that he was on occasions referred to as 'Principal' not because he had been
S appointed as the team leader responsible for leading the project but simply because he was
T known to be duly authorised to act as a Principal if required and because he held a rank of

T ¹⁴ Vivian He was described in this manner in a detailed list of UBS Deal Team Members dated 7 January
U 2010.

A considerable seniority which required him to give occasional advice or to sign important
B documents addressed to the SFC.

C *Looking to the broader evidence*

D 72. As per the requirements of the UBS Bulletin, it was for each specific
E transaction team to approach a member of management who had been approved by the SFC
F to act as a Principal and to seek that person's agreement to act in that capacity, that is, as
the leader – *the* Principal – of the team.

G 73. If that was in fact the approved methodology, it is surprising that no record
H was created to prove the fact of an appointment: the assumption surely would be that at
I least an internal memo or email¹⁵ would have been issued. Apart from anything else, how
J were members of the transaction team (and others working with the team) to be informed?
A record would be unequivocal proof. It would ensure the integrity of reporting lines. But
it seems that no such record was kept.

K 74. That said, the numbers of people working in the China Metal transaction
L team, or working closely with it, were not extensive. Can it be inferred, therefore, that once
M an appointment was made on an informal unwritten basis, it was assumed that – by way of
N word-of-mouth - the fact of that appointment would soon be known to everybody with an
O interest in the matter? Informality, of course, was not the prescribed methodology: the very
P opposite was the case. The Sponsor Guidelines dictated that supervisory responsibilities
Q assigned to the appropriate staff members should be clearly identified. There is good reason
for that guideline. Identification of responsibilities by way of word-of-mouth is liable from
the outset to be subject to distortion. In the absence of an unequivocal source document, all
assertions are simply statements of individual belief that may or may not be subject to that
distortion.

R 75. In the view of the Tribunal, on a consideration of the evidence, the danger
S of distortion was very much present.

T
U ¹⁵ In this regard, see especially paragraph 27 of this Determination.

A 76. In addition to the email exchange between Eva Cheung and Vivian He
B (detailed in paragraphs 66-69 above), much of the intra-office correspondence indicating
C that the Applicant was the Principal of the China Metal transaction team was authored by
D Vivian He. By way of illustration –

E (a) In a further email dated 28 February 2008, Vivian He said the following to
F Eva Cheung:

G “Project Metal is a HK IPO and the full name of the ListCo is China Metal
H Recycling (Holdings) Ltd. It is a Cayman incorporated company and the
I main operating entities of the ListCo are based in Mainland China. I will try
J to get the required docs and info back to you before close of business next
K Monday. Mr Henry Cai is the Principal¹⁶ for this deal and we plan to file
L A1 around middle of March.”

M (b) In an internal email dated 23 May 2008, Vivian He again sent out an internal
N email, this time to Annie Cheng and Karen Lok, both of the UBS investment
O banking division, seeking an ECC meeting in respect of the China Metal
P matter. In the email, Vivian He wrote that the Project Principle was ‘Mr
Q Henry Cai’ and the Project Director was ‘Alan Fung’.

R (c) In an internal email dated 25 March 2009, Vivian He wrote to Jennifer Lee
S (a member of the investment banking division) concerning a telephone
T conference that was to take place the next day in respect of the China Metal
U project. In it, she alerted Jennifer Lee that the Applicant had to be a party,
V saying:

“FYI. Coz Cai Zong [the Applicant] is our principal, he needs to join the
call.”

(d) In a further internal email dated 9 April 2009, Vivian He wrote to another
member of UBS, Angela Kwan, confirming that in another scheduled
telephone conference:

“Yes... Alan is presenter, Principal is Henry.”

¹⁶ In the various emails, the word ‘Principal’ was constantly misspelt as ‘Principle’.

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(e) On 19 May 2009 - just a month or so before the second – successful – application for listing of China Metal, Vivian He sent an email to the Applicant which read:

“Given you are the Principal of ‘Project Metal’ [the China Metal sponsorship project], would you please kindly approve us to use the registered ID and password registered with SX [the Stock Exchange] for WPIP submission?”

The Applicant replied the same day. He did not dispute the assertion that he was the Principal of the sponsor project. He replied simply:

“Approved”.

77. It appears, however, that when Vivian He was interviewed by the SFC in December 2015 - albeit more than six years later - she was not so certain as to who had been the leader of the China Metal transaction team. When asked who had been the main person in executing the project, she did not say that it had been the Applicant. Instead, she replied:

“ Mainly, Michael then, Michael Ngai.”¹⁷

78. According to the Applicant, of course, Michael Ngai had been the leader of the transaction team, that is, the person responsible for day-to-day supervision of the sponsorship project.

79. In the same interview, shortly thereafter, when reminded of the Applicant’s name by the interviewer, Vivian He did not correct herself and say that, yes, he had been the Principal, that is, the leader of the team. Instead, the following exchange is recorded:

“A. He is also, he should be the signing principal of this deal...Seems to be, yes.
Q. Was he the signing principal?”

¹⁷ The transcript of the interview includes utterances that do not make words (for example, ‘err’ or ‘orr’). They have not been included here as, in the opinion of the Tribunal, they do not change the essential meaning of what has been placed into this Determination.

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A. He should be...Was it he or Michael? Or both? I can't remember clearly."

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80. During the course of submissions, it was emphasised on behalf of the Applicant that Vivian He's description of the Applicant's role within the team as that of the 'signing principal' fitted with what the Applicant himself said had been his role; namely, because he was authorised by SFC to act as a Principal, and because of the fact that he was a member of senior management of UBS, he would be asked from time to time to sign more important, formal documents that were to be forwarded to the SFC. This, however, was a limited role, essentially a formal role which went together with a broad supervisory role as a member of senior management, a role to be contrasted with that of day-to-day executive control of the workings of the China Metal transaction team.

81. Later in her interview with the SFC, no doubt in attempting to clarify matters, Vivian He was asked who had supervised her in her work in the transaction team. She replied that it would have been Henry Cai [the Applicant], Michael Ngai and Joe Zhang: not one person but three. She then qualified this assertion by saying:

"All three of them, maybe on the deal, but Michael [Ngai] may work more on the deal execution-wise."

82. Here again, according to her memory, Vivian He was referring to Michael Ngai as the team leader. When asked why Michael [Ngai], to the exclusion of the other two, would have been more deeply involved in the execution of matters, Vivian He replied that the Applicant was more senior and accordingly, in respect of the day-to-day execution of matters, the team members would *not* report to him but would look instead to Michael Ngai.

83. This again was a statement which counsel for the Applicant emphasised went more to supporting the Applicant's case than that of the SFC. In the judgment of the Tribunal, Vivian He's words (given in the interview) were directly in line with the Applicant's defence, namely, that at his rank, and in his position, he would not have been made the team leader of a sponsorship project such as that of China Metal (which was, in money terms, not a major initial public offering). The position he held with UBS did not require him to make day-to-day executive decisions. In respect of the China Metal

A transaction team, that kind of responsibility would instead have been given to Michael Ngai or somebody like him.

84. The assertion that, having regard to his senior position in management, the Applicant would not have been the first one consulted is consistent with the Applicant's assertion made during the course of his interview with the SFC that, if he was to be described as a Principal at all, it would have to be as a 'passive Principal', that is, not as an approved Principal making day-to-day executive decisions as *the* Principal of the China Metal transaction team, but rather, in the execution of a passive role, the person required to sign formal documents being sent to the SFC on the basis that he was an authorised principal.

85. In considering the Applicant's true relationship to the China Metal transaction team, counsel for the Applicant made the point that there was very little evidence of actual involvement on the part of the Applicant in the day to day advance of the sponsorship project. As it was put by counsel:

"Very few, if any, emails concerning due diligence were copied to Cai [the Applicant]."

86. In the judgement of the Tribunal, the point is a strong one. If the Applicant had in fact been the leader of the team, if he had been given the day-to-day responsibility of advancing the sponsor project, of overseeing due diligence and of making executive decisions, the probabilities suggest that there would be evidence of very considerable internal email traffic dealing with such issues. To the contrary, however, as counsel put it, there were very few, if any, emails (and the like) concerning such matters of due diligence.

87. There were, however, other exchanges in which it appears to have been accepted that the Applicant was the Principal of the China Metal transaction team. By way of example, in an email exchange dated 14 April 2009, Vivian He sent an internal email stating that the Applicant had been one of the people present at a teleconference meeting concerning China Metals. In response, Carolyn Wingard, at one time Secretary of the ECC, the body which appeared to oversee listing applications generally, replied:

“As he should have been as Principal of this IPO. He joined late. FYI only – please note in the minutes.”

88. In the minutes of the ECC dated 26 March 2009 - related to a teleconference dealing with China Metal - the Applicant was described as one of the members attending in the following terms:

“Henry Cai (Principal)”

89. There was other evidence too – again, evidence of an indirect nature - indicating that the Applicant was the Principal of the China Metal transaction team.

90. If a member of management was appointed as *the* Principal of a transaction team, it was – among other duties - incumbent on him or her to attend all meetings of the ECC – the Equity Commitment Committee, the body which appeared to oversee listing applications. In respect of this obligation, the UBS Bulletin states that “the Principal should... attend each ECC meeting”. In respect of the China Metal project, the evidence showed that the Applicant – either in person or by way of teleconference connection - attended all five of the ECC meetings held in May, September and October 2008 and in March and April 2009.

91. The records indicate that he was not able to attend the ECC meeting in September 2008, the minutes recording his absence and given his position as that of ‘Principal’. The relevant part of the minute reads:

Members

David Chin (Chairman)
Mark Williams
Ronald Tam
Karen Lok (ECC Secretary)
Teck-Yion Chong (Legal)
Eva Cheung (Compliance)
Carolyn Wingard (ECC Secretary)

Guests

Alan Fung (Presenter)
Vivian He (Presenter)
William Zhou (minutes)
Rebecca Chan

Principal – Henry Cai (was not able to attend due to last minute meeting with management)

92. It was, of course, the Applicant's contention that he had never been appointed the Principal of the China Metal transaction team and that another member of the UBS management, Michael Ngai, held that position. Michael Ngai – through his written statements to the SFC - denied this and the evidence showed that he had only attended one of the ECC meetings held between May 2008 and April 2009.

93. That said, if the Applicant was attending all meetings of the ECC in his capacity as the leader of the China Metal transaction team - and his appointment was a known fact - it might be expected that the minutes of important meetings would reflect that fact. However, this does not appear to have been the case. For example, in a formal – printed - presentation to the ECC in May 2008, under the heading of 'Transaction Overview' – the names of those persons having some role in the presentation are listed. The names, however, are listed, according to their banking division within UBS and nothing is written concerning leadership of the deal team –

IBD	AIG	ECMG	Syndicate
Henry Cai	Michael Ngai	Mark Williams	Sam Kendall
Jing Qian	Alan Fung	Joseph Chee	James Fleming
Vivian He		Rebecca Chan	Steve Lam
William Zhou		Zhiyu Zhang	

94. It will be seen that the first name appearing under the heading 'IBD' is that of the Applicant, the first name under 'AIG' is that of Michael Ngai. As to which of those two - or a third party - is the leader of the deal team, an important appointment, is left unspoken.

95. As set down in the UBS bulletin, and as indicated earlier in this Determination, a second fundamental role of the Principal of a transaction team was to sign correspondence with the Stock Exchange – certainly important correspondence. In this regard, on 24 February 2009, UBS submitted a 'Sponsor's Undertaking' to the Stock Exchange. Some three months later, on 9 June 2009, it submitted a 'Sponsor's Declaration'. Both were documents of fundamental importance in the sponsorship process.

96. Both documents, however, were signed by both the Applicant and Michael Ngai. Their signatures were placed next to each other, not one above the other. The

A signatures were identified by name and by the position held within UBS not within the
B China Metal transaction team. Nothing of evidential value therefore appears on the face of
C these particular signature endorsements to show who, if anybody, was signing as the
Principal of the transaction team.

D 97. The Applicant accepted that he had signed both the ‘Sponsor’s Undertaking’
E and the ‘Sponsor’s Declaration’ together with Michael Ngai. Both documents, he said,
F although important in the listing process, were nevertheless essentially standard in that they
G were required to be filed in all applications for listing. As with other similar documents, he
H said, he would have been asked to sign not because he was the appointed Principal of the
China Metal transaction team but because two signatures were required and he ‘fitted the
I bill’ - he was approved by the SFC to act as a ‘Principal’ and held a senior position as head
of investment banking for Asia.

J 98. The Applicant accepted that his signature was tendered in order to guarantee
K the fact that all due diligence had been completed; the relevant data had been collected,
L checked and found correct. That was why, he said, before placing his signature, he would
seek assurance that due diligence had been done and that the documents he was being asked
to sign had been approved¹⁸.

M 99. When interviewed by the SFC in February 2016, Michael Ngai denied that
N he had ever held the position of ‘Sponsor Principal’ or ‘Principal’ or ‘Project Sponsor’ of
O the China Metal Project. During the interview he asserted that the Applicant had held the
position of ‘Sponsor Principal’ and had thereby been the leader of the China Metal project.

P 100. Concerning the signing of the undertaking and the declaration, in his
Q interview Michael Ngai indicated that he had not signed the documents in his capacity as
R leader of the project team; he had signed because the internal rules of UBS required such

S ¹⁸ When questioned, both the Applicant and Michael Ngai gave evidence essentially to the same effect,
T namely that they believed they had authority to sign because they had been approved to act as ‘Principals’
U by the SFC; that it was not necessary for them to have been appointed to a particular transaction team and
to have supervised that team before they were able to sign. As it was put by the Applicant in his interview
with the SFC: “I was a passive principal because the Company [UBS] required two people to sign a
document, it cannot be signed by just one person...”

A documents to be signed by two officers of the bank. He had therefore signed as the second
B signatory.

C 101. The Applicant's case was exactly to the contrary. Michael Ngai had signed
D in his capacity as the team leader while he had signed as effectively the second signatory
E because of the internal requirements of UBS. It was the Applicant's case that it was not
F unusual for him to be asked to sign documents on the basis that he was approved to
G discharge the duties of a 'Principal'. On this basis, he agreed with the SFC that, when he
H signed documents in furtherance of the listing of China Metal, and documents in
I furtherance of the listing of other companies, it could accurately be said that he had done
J so as a 'passive Principal'.

K 102. That description, said the Applicant, meant no more than that, as a senior
L member of management approved by the SFC to fulfil the functions of a 'Principal', he
M would, if approached to do so, and after assuring himself of the integrity of relevant
N documentation, put his signature on that documentation as part of the formalities of
O forwarding the listing application.

P 103. As to the issue of whether co-Principals were appointed to supervise the
Q work of the China Metal transaction team – those co-Principals perhaps being the Applicant
R and Michael Ngai – there was no evidence presented to the Tribunal that co-Principals had
S been appointed. In addition, as mentioned earlier in this Determination, it is apparent that
T within UBS the China Metal project was not considered to be a large one and therefore (on
U the probabilities) was not a project demanding of co-Principals.

V *Leadership of the China Metal team: has the SFC discharged the burden of proof?*

104. Determining the factual issue of whether the Applicant, to his own
knowledge, was the appointed team leader, that is, the Principal in charge of the China
Metal transaction team, has not been the easiest matter. In the result, however, on a
consideration of all relevant evidence, the Tribunal has been drawn to the conclusion that,
taken at its highest, the evidence presented has shown that it was as likely as not that the
Applicant was, albeit on an informal basis and at an uncertain time, appointed leader of the
transaction team and that he was aware of that fact.

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105. That conclusion, however - that it was as likely as not - is not sufficient in law. As stated at the beginning of this Determination, the standard of proof required is proof on a balance of probabilities; not therefore that it was as likely as not but that the balance of probabilities has demonstrated that the Applicant was, to his own knowledge, the appointed leader.

106. In coming to this Determination, a number of matters have been evident –

- (a) The Applicant at all times denied being appointed to the leadership of the China metal transaction team, whether in respect of the first application for listing or the second.
- (b) There was no formal internal documentation disproving his denial; no documentary material unequivocally stating the fact of the Applicant’s appointment as *the* Principal of the China Metal transaction team. Nor was there any such formal documentation stating the fact - in respect of either of the two applications for listing - that he would be responsible for any particular supervisory responsibility. Without such evidence, the Tribunal was left with indirect evidence only. The greater weight of that evidence, however, was founded on the assertions of individuals, those assertions being essentially unsubstantiated.
- (c) In the circumstances, with the preponderance of the evidence pointing to the fact that there was no formal appointment of a team leader (nor any clear process of such appointment), it is as likely as not that some members of UBS may have assumed that the Applicant was the team leader while other members may have assumed that leadership had been given to another party, for example, to Michael Ngai. The fact that more members may have assumed on an unsubstantiated basis that the Applicant was the team leader does not constitute evidence (on the balance of probabilities) that he was so appointed.

A (d) Importantly, two reports submitted by UBS to the SFC were unable to
B resolve the issue of whether there had ever been a leader of the transaction
C team and, if so, who that person was. Indeed, as stated earlier in this
D Determination, the two reports ended up being directly contradictory, the
E earlier report (the one nearest to the events in question) stating
F unequivocally that the Applicant had not been the Principal while the other
G report (compiled only several years later) stated equally unequivocally that
H the Applicant had been the principal.

I (e) At best therefore the evidence showed that there were a number of members
J of UBS who believed (or understood) that the Applicant was the team leader.
K Vivian He was one such person and she conveyed her belief to a number of
L others. At no time, however, on the evidence put before the Tribunal, did
M she seek to give authority for her belief. As to the weight to be given to her
N belief, it is worrying that several years later, when questioned by the SFC,
O her recollection as to the single issue of leadership was nowhere near as
P precise; indeed, in several respects it appeared that her evidence lent more
Q towards the Applicant's own assertions.

R (f) Reduced to its basics, therefore, the essential body of evidence against the
S Applicant was founded on what other individuals believed to be the case
T although there was no evidence of any specific and unequivocal nature that
U gave convincing support to that belief. Accordingly, while isolated incidents
V of evidence were, on their face, persuasive in *both* directions, the Tribunal
was unable to reach any conclusion as to appointment (or absence of it)
either by way of a direct consideration of all the evidence or by way of a
conclusion plainly established as a matter of inference from the proven facts.

Does this finding, however, mean that the Applicant is unable to be found personally liable?

107. On the basis that it has not been demonstrated that the Applicant was at any
time the leader of the China Metal transaction team, the person given the day-to-day
responsibility of ensuring due diligence, the Tribunal does not see how he can be held

A personally responsible for the failings of the team, more especially to the exclusion of other
B individuals, for example, Michael Ngai.

C 108. The disciplinary proceedings instituted against the Applicant by the SFC
D were clearly founded on the basis that he was given, and accepted, responsibility for
E overseeing the transaction team and, integral to that role, was required to employ
F reasonable endeavours to ensure the exercise of due diligence. However, it has not been
G proved that he was given, and accepted this responsibility.

This Tribunal's rulings

H 109. The Applicant's application for review being successful, the sanctions
I imposed upon him by the SFC pursuant to its written 'Decision Notice'¹⁹ of 3 October 2019
are set aside.

J 110. Costs will be in the cause, the Applicant being awarded his costs.
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Michael Hartmann
(Chairman)



Q Dated: 2 June 2021

R Mr Victor T.S. Lui, instructed by Li & Partners
for the Applicant

S Mr Jenkin Suen, SC leading Ms Tinny Chan, instructed by the SFC
for the Respondent
T

U ¹⁹ See paragraph 14 of this Determination.