CITATION: Feng v. Ontario Securities Commission, 2025 ONSC 2268
DIVISIONAL COURT FILE NO.: DC 717/23
DATE: 20250508

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, LeMAY and SHORE JJ.

BETWEEN:	)	
	)	
JIUBIN FENG and CIM INTERNATIONAL GROUP INC.	)	*Tina Kaye* and *Rohit R. Kumar*, for the Appellants
	)	
Appellants	)	
	)	
– **and** –	)	
	)	
THE CHIEF EXECUTIVE OFFICER OF THE ONTARIO SECURITIES COMMISSION	)	*Adam Gotfried* and *Amethyst Haighton*, for the Respondent
	)	
Respondent	)	**HEARD at Toronto:** June 26, 2024

REASONS FOR DECISION

D.L. Corbett J.

[1] This is an appeal from decisions of the Capital Markets Tribunal (the "Tribunal") finding that the Appellants engaged in a course of conduct that they knew or ought to have known perpetrated a fraud on investors, by raising investment funds to be used exclusively on the "Bayview Creek Project" and then using those funds for other purposes, contrary to s. 126.1(1)(b) of the *Securities Act*, RSO 1990, c. S.5 (the "Act") [the "Merits Decision" dated March 15, 2023] and ordering [in the "Sanctions Decision" dated November 14, 2023] that the Appellants:

(a) pay an administrative fine of $500,000 each;

(b) disgorge $7,630,000, payable jointly and severally;

(c) pay costs of $206,769.34, payable jointly and severally; and

(d) be permanently restricted from participating in the capital markets, subject only to the appellant Feng being permitted to trade his personal registered accounts once the payments in (a), (b) and (c) have been made.

[2] In respect to liability, the Tribunal concluded as follows:

> The respondents raised funds from investors to be used exclusively to develop a specific real estate project, but then misapplied investor funds for purposes other than what was disclosed in the offering documents which ultimately caused investors to suffer significant losses. (Merits Decision, para. 1)

[3] In the Sanctions Decision, the Tribunal found (a) that fraud is egregious non-compliance; and (b) that the Appellants' conduct in this case, while not the most egregious of frauds, was still very serious misconduct (Sanctions Decision, para. 35, 46, 47).

[4] As explained below, the Tribunal correctly stated and applied the law, made necessary factual findings available on the record, and exercised its discretion on proper principles and in accordance with the jurisprudence. No error in principle and no palpable and overriding error of fact has been shown by the Appellants. Thus, I would dismiss the appeal.

Issues on Appeal

[5] The Appellants' statement of issues is found in the listed headings in sections (C) and (D) of their factum:[1]

A. In respect to the Merits Decision:

   i. whether the Tribunal erred in applying the *mens rea* element of the test for fraud;

   ii. whether the Tribunal erred in finding that the *actus reus* element of the fraud test was met;

   iii. whether the Tribunal erred in not considering Feng's limited English proficiency;

   iv. whether the Tribunal applied a stricter standard of scrutiny to Feng's evidence; and

   v. whether the Tribunal erred in finding that $3.39 million of the Offering Proceeds were diverted.

B. In respect to the Sanctions Decision

   i. whether the Tribunal erred in failing to adequately consider the mitigating factors in ordering sanctions and costs;

[1] The Appellants' brief "statement of issues" in their Factum is a boilerplate characterization of the subsequently enumerated issues.

ii. whether the Tribunal erred in ordering that the trading carve-out should only take effect after sanctions and costs are paid;

iii. whether the Tribunal erred in ordering disgorgement of $7,630,000; and

iv. whether the administrative penalties and costs ordered were excessive and contrary to the jurisprudence.

Jurisdiction and Standard of Review

[6] This court has jurisdiction over this appeal pursuant to s. 10(1) of the Act.

[7] An appellate standard of review applies to this appeal: correctness for questions of law and palpable and overriding error for questions of fact. Questions of mixed fact and law are reviewed on the deferential standard of review aside from "extricable questions of law" which are reviewed on a correctness standard: *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65; *Housen* v. *Nikolaisen*, 2002 SCC 33.

[8] A "palpable" error is one that is "plainly seen" or "clearly wrong" or "unreasonable" or "unsupported by the evidence" (*Housen*, paras. 5-6; *HL* v. *Canada (A.G.)*, 2005 SCC 25, paras. 55-56. An "overriding" error is one that is sufficiently significant to vitiate the impugned factual finding (*Waxman* v. *Waxman* (2004), 186 OAC 201, 44 BLR (3d) 165 (CA)). Findings of credibility "attract a very high degree of deference on appeal" [*R.* v. *GF*, 2021 SCC 20, para. 99; *R.* v. *Griffin*, 2023 ONCA 559, para. 81; *R.* v. *Aird*, 2013 ONCA 447, para. 39; *Kitmitto* v. *Ontario (Securities Commission)*, 2024 ONSC 1412 (Div. Ct.), para. 11].

[9] It is not for this court, on appeal, to retry the case, re-weigh the evidence, or substitute inferences for those drawn by the Tribunal. In the absence of a palpable and overriding error of fact, this court is required to defer to the factual findings of the Tribunal: *Quadrexx Hedge Capital Management Ltd.* v. *Ontario Securities Commission*, 2020 ONSC 4392 (Div. Ct.), para. 86. As stated by the Court of Appeal in *Finkelstein* v. *Ontario (Securities Commission)*, 2018 ONCA 61, para. 101:

> The function of a reviewing court, such as the Divisional Court, is to determine whether the tribunal's decision contains an analysis that moves from the evidence before it to the conclusion that it reached, not whether the decision is the one the reviewing court would have reached: *Ottawa Police Services* v. *Diafwila*, 2016 ONCA 627, at para. 66…. [T]he Divisional Court]… impermissibly re-weighed the evidence and substituted inferences it would make for those reasonably available to the [tribunal]. That was an error. The findings of fact made and inferences drawn by the [tribunal]… were reasonably supported by the record.

[10] This court will defer to the Tribunal's Sanctions Decision unless the Tribunal erred in principle or the sanctions are clearly unfit. Sanctions are "clearly unfit" where it is shown that a sanctions decision is "manifestly deficient or excessive and is a substantial and marked departure from penalties in similar cases." See *Khan* v. *Law Society of Ontario*, 2022 ONSC 1961, para. 77.

"Facts" on Appeal

[11] In their factum, the Appellants set out their statement of facts, cited to the record before the Tribunal, running for 82 paragraphs over 21 pages.

[12] The "facts" in this court are the facts as found by the Tribunal. The "Facts" section of a factum should set out the facts as found below. When a party argues that there are palpable and overriding errors of fact, the starting position is to set out the facts, as found by the Tribunal, and then to identify those findings of fact that are challenged on appeal. It is not helpful to set out a version of the facts cited to the record, not cited to the Tribunal's findings, as the factual overview of the case. An appeal is not a "re-do" before this court based on the record below, but rather a review of the decision below. See *H.H.* v. *Canada (Attorney General),* 2005 SCC 25, para. 4.

Factual Overiew

[13] A summary of material facts is set out below, cited to the Merits Decision. Except to the extent that this court finds that any of these findings should be disturbed as a result of reviewable error, addressed later in these reasons, the factual findings of the Tribunal summarized below are the facts before this court.

(a) The Appellant Feng

[14] Feng is a real estate developer. Feng was involved in multiple distinct real estate projects (each a distinct "Project"), and Feng owned and controlled the general partner of each Project (Merits Decision, paras. 5, 6 and 51).

(b) The Appellant CIM

[15] The appellant CIM was a junior mining company listed on the TSX Venture Exchange. In 2016, Feng took over CIM by means of a reverse takeover (Merits Decision, para. 8). Feng became CIM's Chairman and CEO and controlled 40.88% of CIM's common shares (Merits Decision, para. 5). Feng was CIM's principal directing mind and was "intimately involved in all its dealings" (Merits Decision, paras. 2, 69).

[16] Feng shifted CIM's business from mining to real estate development: CIM's "only significant business" after the reverse takeover was making investments or loans to Projects controlled by Feng (Merits Decision, para. 6).

(c) The Bayview Creek Project

[17] Feng controlled the Bayview Creek Project, which was a planned townhouse development in Richmond Hill, Ontario (Merits Decision, paras. 7 and 13).

(d) CIM's Loans to Feng's Projects

[18] CIM borrowed much of the money it invested in Feng's Projects from the Bayview Creek Project. By 2017, CIM had borrowed more than $3.6 million from the Bayview Creek Project (Merits Decision, paras. 7 and 13).

(e) CIM Offering to Raise Capital

[19] CIM announced a proposed offering in a press release issued December 6, 2017, which stated that CIM would:

(a) issue secured debentures to investors;

(b) loan the proceeds of the debentures to the Bayview Creek Project; and

(c) obtain a mortgage over the Bayview Creek Project lands to secure the loans (Merits Decision, para. 7).

[20] Bayview Creek LP could not obtain required consent for the second mortgage to be used to secure the proposed offering, so the proposal was changed to include a revised security package (Merits Decision, paras. 7 – 8).

[21] Between February 6, and August 2, 2018, CIM raised $10 million through the sale of three-year secured debentures from 36 investors in Ontario, Hong Kong and the United Kingdom (Merits Decision, para. 9). The Offering closed in seven tranches, and seven loan advances were made by CIM to the Bayview Creek Project (Merits Decision, para. 11).

(f) Use of Funds by the Bayview Creek Project

[22] Investors were all told that the funds loaned to Bayview Creek Project would be used for the purposes of the Bayview Creek Project (the townhouse development). Feng knew that investors had been told this (Merits Decision, para. 68).

(g) Diversion of Funds

[23] Feng diverted at least $3.39 million of the Offering Proceeds from Bayview Creek Project back to CIM or to Feng's other Projects (Merits Decision, paras. 3, 12, 49, 54, 60). Feng knew that investor funds were being used for unauthorized purposes (Merits Decision, paras. 63, 68, 69).

(h) CIM's Borrowings from the Bayview Creek Project

[24] CIM continued to borrow money from the Bayview Creek Project, and by the end of 2018, CIM owed Bayview Creek Project nearly $7.5 million (Merits Decision, para. 33).

(i) Debt Set-Off and CIM Defaults on Interest Payment Obligations to Investors

[25] Feng caused Bayview Creek Project to demand repayment from CIM, resulting in an offset of the debts (Merits Decision, para. 31). The debt set-off reduced Bayview Creek Project's interest obligations to CIM, and without that interest, CIM was unable to make the required interest

payments to investors: CIM defaulted on these obligations starting on December 16, 2019 (Merits Decision, para. 14).

(j) Bayview Creek Project Grants An Institutional Mortgage

[26] Once Bayview Creek Project had reduced its indebtedness to CIM as a result of the offset in their indebtedness, Bayview Creek Project granted a mortgage to an institutional lender, in breach of the negative covenant it gave to investors in the Offering (Merits Decision, paras. 8, 14).

(k) Investor Losses

[27] Investors suffered losses as a result of the events described above (Merits Decision, para. 61).

Analysis

[28] The Merits Decision is facts-based. The Tribunal found that CIM raised $10 million from investors on the promise that the funds would be loaned to the Bayview Creek Project and used by that Project to fund the townhouse development. The investor loans would attract interest and would be secured by pledges from CIM and Bayview Creek Project. Instead of the money being used for the purposes of the Bayview Creek Project, the funds were re-directed back to CIM and then used for other purposes. Offsetting the debts between CIM and Bayview Creek Project were used to reduce the Project's indebtedness to CIM without repaying that capital to investors. The Tribunal found that Feng was in charge of these dealings and knowingly caused CIM and Bayview Creek Project to breach the terms on which funds were advanced by investors, leading to defaults in interest payments and capital losses to investors.

A. The Merits Decision

(i) Whether the Tribunal erred in applying the *mens rea* element of the test for fraud

[29] The Tribunal stated the test for the *mens rea* requirement for fraud as follows (Merits Decision, paras. 64 and 65):

> 64. The *mens rea* element of the fraud analysis consists of subjective knowledge that one is undertaking a prohibited act and that that act could cause deprivation by depriving another of property or could put another's property at risk [*R.* v. *Theroux*, [1993] 2 SCR 5, p. 15]. The Tribunal has confirmed that a fraud allegation against a corporation is established where the corporation's directing minds knew or reasonably ought to have known that the corporation perpetrated a fraud [*Re First Global Data Ltd.*, 2022 ONCMT 25, para. 347]. A directing mind can be an officer, director or a person who authorized, permitted or acquiesced in the non-compliance [*Re Al-Tar Energy Corp.*, 2010 ONSEC 11, para. 320].
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> 65. The *mens rea* for fraud will be established if Feng "knowingly undertook the acts in question" and was "aware that deprivation, or the risk of deprivation, could follow as a likely consequence" [*R.* v. *Theroux*, [1993] 2 SCR 5, p. 22]. It is no defence for a respondent to maintain that they did not think the acts were wrong, or that they hoped that no deprivation would occur. [footnoted authorities in original included parenthetically]

[30] The Appellants acknowledge that the Tribunal's statement of the test for *mens rea* is correct. They argue that the Tribunal failed to apply this test (Factum, paras. 102-111). In making this argument, they raise the following points:

(i) *The Tribunal "ignored" evidence from the witness Parent that the stated use of the Offering Proceeds was described in the August 2017 Board Resolution, and "failed to address or reconcile" this evidence with its finding that proceeds had to be used on the Bayview Creek Project. The Tribunal was required to explain, and did not explain, why this evidence of Parent did not substantiate Feng's claim that Proceeds were not misused.*

I do not accept this argument. The Tribunal did not "ignore" this evidence. It did not "accept" this evidence from Parent. Since the Tribunal did not accept this evidence, it did not need to otherwise "address or reconcile" it. The Tribunal explained why it did not accept this evidence and did accept most of the rest of Parent's evidence:

> "During the merits hearing, [Parent] demonstrated a clear understanding of his obligations as a witness. Where there may have been some inconsistencies during aspects of his testimony, they were inconsequential, and did not undermine our overall assessment of [Parent]'s credibility. [Parent]'s evidence was generally consistent and supported by documentary evidence and the larger circumstances of the case" (Decision, para. 26).

As noted below, the Tribunal was entitled to accept some, none, or all of a witness' evidence, and did not err when it accepted some of Parent's evidence, but not this piece of his evidence.

(ii) *The Tribunal "did not advert to many other inconsistencies and discrepancies tendered that were critical of Staff's case" and had it done so, the Tribunal would have concluded that Staff had not met its burden to prove mens rea.*

This argument does not require analysis by this court. It is too vague and general, and is an improper invitation to review the entire record in order to re-weigh the evidence. That is not the function of this court on appeal.

(iii) *There was "no evidence" to support the Tribunal's finding that Feng had the benefit of a Mandarin interpreter explaining documents to him, undercutting the Tribunal's finding that Feng understood what the documents said.*

There was evidence that Feng had and used a Mandarin interpreter: as explained below, Parent testified that Feng brought a Mandarin interpreter with him to business meetings, and in any event that Feng read and understood documents in English. Further, no explanation was provided by Feng as to why he would sign documents that he did not understand, nor did he testify that he had read the documents but somehow had misunderstood them. Finally, given the Tribunal's finding that Feng expressly told investors, in Mandarin, that funds would be used for the Bayview Creek Project, there is no factual foundation for an argument that Feng did, in fact, materially misunderstand the documents.

(iv) The Tribunal ignored uncontradicted evidence that Feng was "not heavily involved in the Offering."

The Tribunal reviewed in detail the evidence about the involvement of Feng, Parent, and others in respect to the Offering (Merits Decision, paras. 41-48, and concluded that "Feng, along with other CIM representatives, including [Parent], made oral representations to investors that their investments would be used to finance the Bayview Creek Project" (Merits Decision, para. 48). This finding was available to the Tribunal on the record.

(v) The Tribunal erred in failing to place weight on the fact that there was "no evidence that Feng ever discussed the subscription agreements with any of the investors."

This submission is directly contrary to findings made by the Tribunal: "[Hui] testified that, in the portion of a meeting with her conducted in Mandarin, and at dinners with her and Feng in attendance, she and her family were told, repeatedly, that their investments would go "100% to Bayview Creek". She was shown a PowerPoint presentation about CIM and its projects that stated that the proceeds would be used for the Bayview Creek Project and was told how the secured debentures would work (Merits Decision, para. 44). The Tribunal's findings are supported by [Hui]'s evidence, which the Tribunal was entitled to accept.

[31] The Appellants summarize their overall argument on their *mens rea* argument as follows (Factum, para. 111):

> These overriding and palpable errors coupled with the failure to adequately assess the corroborating evidence from [the witness] Parent of Feng's subjective awareness regarding the use of funds and his lack of involvement in the Offering, were critical errors that directly impacted the Tribunal's finding that Feng had the requisite subjective knowledge required by the *mens rea* element of the test.

[32] On the facts, as found by the Tribunal, there is no error in the Tribunal's application of the test for *mens rea*. Feng knew investors were told that funds were to be used for Bayview Creek Village, he signed the offering documents containing this promise, and he himself made this promise to investors in Mandarin. The Appellants have not established that the Tribunal made any palpable and overriding errors in its findings of fact related to this issue. I would not give effect to this ground of appeal.

(ii) Whether the Tribunal erred in finding that the *actus reus* element of the fraud test was met

[33] The Appellants submit that "[t]he tribunal erred in failing to consider all the evidence in respect of whether the *actus reus* element of fraud was met."

[34] The Tribunal correctly set out the test for fraud (Merits Decision, paras. 35-40). The Appellants do not submit that there is any legal error respecting the Tribunal's statement of the test.

[35] Rather, the Appellants argue the following bases for their submissions that the tribunal "erred" in its finding that fraud took place:

(i) *The Tribunal:*

> *"erred in finding that Feng made the oral Proceeds Representations to investors that the Offering Proceeds would be used exclusively for the Bayview Creek Project by accepting the evidence of Hui (despite the credibility issues raised by Hui's evidence) and outright rejecting the evidence of Feng (even when Feng's evidence was corroborated by Parent or Hui). The Tribunal failed to appreciate the significance of Hui's failure to produce allegedly corroborating documentary evidence (the WeChat messages) that Hui testified existed."*

The Tribunal made a finding of fact based on the testimony of Hui, which it accepted. The Tribunal explained this finding and noted that Hui's evidence better reflected the documents and the structure of the transaction as reflected in those documents. There is no basis for this court to interfere with the Tribunal's credibility findings, and the Appellants have not established that the Tribunal's findings were based upon a palpable and overriding error of fact.

It was for the Tribunal to consider the "absence" of evidence – in this case, the absence of corroborating electronic communications – and it was open to the Tribunal to accept Hui's account of those communications without further proof.

(ii) *There were numerous inconsistencies in the evidence regarding what happened at investor meetings that the Tribunal failed to take into account in its assessment of whether Feng made the alleged oral representations.*

It is not necessary to review each of the so-called inconsistencies in the evidence raised by the Appellants. Evidence as to when a meeting took place may have differed, but this was (i) immaterial; and (ii) easily explicable by the frailties of memory faced by any witness about precise historical dates. Evidence from Hui that a video was shown at a particular meeting, and evidence that Parent did not recall what presentation was shown, was not an "inconsistency" but rather an explicable frailty in one witness' recollection of everything that happened at a particular meeting. Feng's evidence that he was "not involved in the presentation of any material to investors" was not accepted by the Tribunal, and thus is not an "inconsistency" with the Tribunal's findings. The difference between the evidence of Hui and Parent is readily explicable by the fact that Parent does not speak Mandarin and any questions directed to Parent were translated – both as to questions and answers – by Zhao.

> As noted by the Tribunal, the offering documents state that proceeds would be used to fund the Bayview Creek Project (Merits Decision, para. 41). The language in these documents was clear. As noted by the Tribunal, the Appellants did not contest the offering documents, which were reviewed and signed by Feng. Instead,
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> > Feng did not address the import of the language in the documentation; he merely stated what he claimed his subjective understanding was – that he believed that he and CIM were authorized to use investor funds to make loans to or investments in other Feng-controlled real estate projects in addition to the Bayview Creek Project (Merits Decision, para. 42).
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> The documents specified the use to which proceeds would be put. Parent told investors, in English, the use to which proceeds would be put (Merits Decision, para. 43). Feng told investors, in Mandarin, the use to which proceeds would be put. These findings were all available on the record and disclose no palpable and overriding error.

[36] The Tribunal did not err in principle and it made no palpable and overriding error of fact in concluding that the Appellants committed the *actus reus* of the alleged fraud. I would not give effect to this ground of appeal.

(iii) Whether the Tribunal erred in not considering Feng's limited English proficiency

[37] The Tribunal did consider Mr Feng's claim not to be proficient in English. It found, as a fact, that Mr Feng understood that investors were told that proceeds would be used to develop the Bayview Creek Project. The Tribunal found, as a fact, that Mr Feng personally gave this assurance to investors, and in particular, that he gave this assurance to Hui in Mandarin. As stated above, these findings were available to the Tribunal.

[38] The Tribunal found that Feng reviewed offering-related documents with an interpreter and understood their contents, a finding available on the evidence. In particular, Parent testified that Feng had an interpreter who attended business meetings with him, Parent testified that, based on his personal interactions with Feng, Feng's understanding of English was "pretty good", and Parent testified that Feng had reviewed the press release and other documents related to the offering, "always in English" (Parent testimony, September 15, 2022, pp. 51, 61-63, 81).

[39] In short, the Tribunal did "consider" Feng's argument respecting his limited proficiency in English and rejected that argument on the basis of the totality of the evidence. This conclusion was available to the Tribunal on the evidence.

(iv) Whether the Tribunal applied a stricter standard of scrutiny to Feng's evidence

[40] The Tribunal correctly stated the following principles that apply to assessing the credibility of a witness (Decisions, paras. 22 and 23):

> [22] In assessing the credibility and reliability of witnesses, the Tribunal has accepted the guidance that "the most satisfactory judicial test of truth lies in its harmony or lack

> of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case" [*Springer v Aird & Berlis LLP* (2009), 96 OR (3d) 325 (SCJ), para. 14].
>
> [23] We may accept some, all or none of a witness's evidence and we may find the evidence of a witness credible in some respects but not in others.

[41] The Appellants argue that the Tribunal applied a stricter standard of scrutiny to Feng's evidence than it did to other evidence. This argument ignores the Tribunal's clear findings of credibility. The Tribunal did not believe Feng:

> We find [Hui]'s testimony to be credible and Feng's testimony to suffer from a range of deficiencies. While at times [Hui] was unable to remember some specific details of her interactions with Feng, we do not find this to be unusual, and her recollection of substantive matters discussed with Feng appeared to us to be strong. Feng's testimony, on the other hand, was inconsistent with earlier statements he had made to Staff in material aspects, inconsistent with [Parent]'s testimony in important respects, and his main assertions do not accord with reasonable likelihood. His assertion that the transcripts of his earlier interviews with Staff were inaccurate also damages his credibility (Decision, para. 29).

[42] By contrast, the Tribunal found the evidence of the witnesses Fiorini, Parent and Hui to be credible (Decision, paras. 24-26):

> We find Staff's Senior Investigator [Fiorini] to be a credible witness and we accept her evidence. The investigator introduced the findings of Staff's investigation and introduced documents obtained and the financial analysis conducted by Staff. We are able to assess and determine the import of the documents introduced and to accept, reject or modify the financial analysis conducted by Staff as necessary.
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> We also find Staff's remaining two witnesses, [Parent] and [Hui], to be credible and reliable.
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> … During the merits hearing, [Parent] demonstrated a clear understanding of his obligations as a witness. Where there may have been some inconsistencies during aspects of his testimony, they were inconsequential, and did not undermine our overall assessment of [Parent]'s credibility. [Parent]'s evidence was generally consistent and supported by documentary evidence and the larger circumstances of the case.

[43] These credibility findings are firmly rooted in the record before the Tribunal and are entitled to deference in this court. On the basis of these findings, it cannot be said that the Tribunal applied a different level of scrutiny to Feng's evidence than it did to the evidence of other witnesses. The tribunal disbelieved Feng on crucial disputed factual issues, and its disbelief is explained by its credibility findings (Merits Decision, para. 29). I would not give effect to this ground of appeal.

(v) Whether the Tribunal erred in finding that $3.39 million of the Offering Proceeds were diverted

[44] The appellant frames this issue on a standard of correctness. The finding that at least $3.39 million in proceeds were diverted is a factual finding, reviewable in this court on a standard of palpable and overriding error.

[45] There was evidence to support this finding: it is set out expressly in para. 94 of the Affidavit of Louise Fiorini, dated August 4, 2022, and it is further explained and supported in the balance of that affidavit and its exhibits. As noted above, the Tribunal accepted Ms Fiorini's evidence, as it was entitled to do.

[46] The Appellants' bald assertion in their factum that this finding is "incorrect" is made without referencing this evidence before the Tribunal, and without argument as to why the finding was not available to the Tribunal in light of Ms Fiorini's evidence.

[47] Further, the Tribunal made other express findings respecting the misapplication of funds, for example:

> We find that a significant portion of the net proceeds was not used to develop the stipulated real estate project but was instead directed back to CIM by unsecured loans or invested in or loaned to other real estate projects controlled by Feng. (Merits Decision, para. 3)

[48] The Tribunal found a significant misapplication of funds, and accepted Fiorini's evidence that it was "at least" $3.39 million. I see no palpable and overriding error; the record amply supports the conclusion that a significant portion of net proceeds were misapplied, and Fiorini expressly testified to the $3.39 million figure, and explained her testimony to the Tribunal in her affidavit. I would not give effect to this ground of appeal.

Conclusion on the Merits Decision

[49] I would not give effect to the Appellants' arguments respecting the Merits Decision. As found by the Tribunal, Feng and CIM raised money from investors on the basis that it would be used to develop the Bayview Creek Project. Feng knew that this was the premise of the Offering, and he personally gave assurances to this effect to investors. This premise was reflected in the offering documentation, signed by Feng. The "larger circumstances of the case" (Merits Decision, para. 26) were consistent with the Tribunal's conclusions.

[50] The net result – as found by the Tribunal – was that investors understood they were lending to fund the development of the Bayview Creek Project. Instead, investors' money was used by Feng for whatever purpose he directed, and investors' security was extinguished without repayment.

[51] Given the factual findings of the Tribunal, Feng directed these events, and knew that funds had been raised from investors on a basis inconsistent with the use of funds he directed. Feng

benefitted personally from this misapplication of funds, and investors lost promised interest and capital they invested.

[52] The findings of fraud against Feng and CIM were fully justified on the basis of the Tribunal's factual findings, which were available on the record before the Tribunal. I would dismiss the appeal from the Merits Decision.

B. The Sanctions Decision

[53] The Tribunal correctly identified its statutory jurisdiction to impose sanctions (Sanctions Decision, para. 8), and accurately summarized the general principles that apply to the exercise of the Tribunal's jurisdiction to impose sanctions (Sanctions Decision, paras. 8-10).

[54] The Tribunal expressly noted that the respondents' choice to defend themselves at the hearing, and their lack of remorse, "are not aggravating factors in determining sanctions" (Sanctions Decision, para. 32).

(i) Whether the Tribunal erred in failing to adequately consider the mitigating factors in ordering sanctions and costs

[55] As reflected in the language used to express this submission, the Appellants acknowledge that the Tribunal did consider mitigating factors in the Sanctions Decision. I would not accept the Appellants' argument that this consideration was "not adequate". In its detailed reasons, the Tribunal found that:

A. Fraud is "of the most egregious kind" of misconduct (Sanctions Decision, para. 35), but that this case was "not among the most egregious of frauds that have come before this Tribunal." However, the Tribunal also found that the fraud in this case was not "closer to being [merely] misguided or reckless" conduct (Sanctions Decision, para. 17).

B. The duration of misconduct was "not as lengthy as the Tribunal has seen in other instances" but that $10 million was raised from 36 investors over 9 months, and diverted funds were transferred over a period of 9 months, which the Tribunal found to be "still a significant amount of activity during the period."

C. The Tribunal noted that the Appellants argued that 12 mitigating factors ought to guide the Tribunal in determining appropriate sanctions (Sanctions Decision, para. 30). The Tribunal stated that it considered "all of these factors" and noted "throughout our analysis those we find relevant" (Sanctions Decision, para. 31).

[56] In respect to the mitigating factors argued before the Tribunal by the Appellants (summarized at Sanctions Decision, para. 31):

A. *Feng did not personally profit*: the Tribunal found that Feng benefitted indirectly from the fraud in that funds were misdirected to support his other Projects;

B. *There was no evidence that this was a fraudulent scheme intended on defrauding investors*: the Tribunal found otherwise: "[t]he actions of Feng and CIM were deliberate from the start" (Sanctions Decision, para. 17);

C. *This was not a case alleging illegal distributions in addition to fraud*: fraudulent misuse of Offering proceeds was an "illegal distribution;"

D. *Only a portion of investor funds were diverted*: the Tribunal was aware of the extent of misuse of Offering Proceeds and made express findings about the effect of the misapplication on investors;

E. *Feng was inexperienced in the capital markets*: the Tribunal did not address this point expressly in its reasons. However, given the egregious nature of the misconduct, "inexperience" would not have a material bearing on sanctions: the misconduct was no mere technical non-compliance with securities regulations;

F. *The Appellants settled with one investor*: this factor was taken into account by the Tribunal (Sanctions Decision, para. 27);

G. *Feng had brought civil proceedings to attempt to recover some investor funds*: the Tribunal assessed this factor and concluded that no evidence was adduced respecting the potential of recovery for investors if Feng succeeded in the civil proceedings (Sanctions Decision, paras. 61 – 62). This conclusion was available on the record before the Tribunal;

H. *The Appellants had no prior regulatory or disciplinary history with the Tribunal*; this factor was not expressly addressed by the Tribunal;

I. *Strong good character evidence respecting Feng's good character and contributions to the community*: this factor was not expressly addressed by the Tribunal;

J. *Diverted funds were loaned to other legitimate real estate projects*: this factor was addressed by the Tribunal in the Merits Decision. The essence of the fraud here was misapplication of proceeds to Feng's indirect benefit by unauthorized use in Feng's other Projects;

K. *Bayview Creek continued to pay Bayview Creek expenses after August 2018*; this factor was not expressly addressed by the Tribunal;

L. *English is not Feng's first language*; I see no basis on which this point is a mitigating factor in respect to sanctions. This point was addressed in respect to liability issues, and there was no need for the Tribunal to address it further in the Sanctions Decision, given the findings respecting this point in the Merits Decision.

[57] I do not consider that factors J and K required express consideration by the Tribunal. Misapplication of funds to the benefit of the Appellants is a sufficient basis for the Tribunal's over-arching finding that the impugned conduct was "egregious" but not "the most egregious of frauds". Factors J and K do not displace this core finding.

[58] It would have been helpful if the Tribunal had addressed factors H and I expressly in its decision. Prior discipline history and evidence of good character are categories of mitigating factors that are frequently considered in a broad range of sanctioning contexts. That said, I do not

consider them material in the context of this case and the sanctions that were imposed. This was fraud, not technical non-compliance. One would not expect a history of similar misconduct, since it is the kind of misconduct that usually leads to a permanent market ban (and thus no future opportunity to offend). A person's good reputation contributes to the context in which they may be able to persuade others to entrust them with their money. Finally, given that the Appellants argued for twelve mitigating factors, it was no error for the Tribunal to deal with the arguments generically. We may impute from the reasons that the Tribunal did not consider that Feng's discipline history and the evidence of his good character should take away from its core finding that the Appellants committed fraud, investors suffered substantial losses as a result, that this conduct was egregious, but not the most egregious of frauds. Sanctions were ordered based on this assessment. I would not give effect to this argument.

(ii) Whether the Tribunal erred in ordering that the trading carve-out should only take effect after sanctions and costs are paid

[59] The Tribunal considered the arguments respecting market participation bans and found that "[b]y engaging in fraudulent misconduct, the respondents have proven to us that they cannot be trusted to participate in the capital market unchecked." However, the Tribunal also concluded that a permanent trading ban, with no trading carve-out, "should be reserved for the most egregious misconduct" (Sanctions Decision, para. 45). The Tribunal found that the misconduct in this case, being fraud, and egregious, was not "the most egregious" and acceded to Feng's submission that there be a trading carve-out for him in the order (Sanctions Decision, paras. 46 and 47).

[60] The Tribunal declined to give effect to the Appellants' further submissions that (a) a carve-out should extend to Feng serving as an officer or director; and (b) the carve-out should take effect without the Appellants first paying the financial sanctions and costs ordered by the Tribunal. In respect to both points, the Tribunal found that the Appellants did not address these points in their submissions. For the former, the Tribunal found that it could "not entertain" the Appellants' request" in the absence of submissions (Sanctions Decision, para. 46), and in for the latter, the Tribunal found that the Appellants had, effectively, not contested staff's request (Sanctions Decision, para. 48).

[61] The Appellants argue in their factum that the Tribunal "is not bound by whether a respondent makes submissions on a particular order sought (Factum, para. 129). I agree with this submission. However, I do not read the Tribunal's decision as concluding otherwise. Reasons are to be read reasonably and generously. In respect to the breadth of the market participation bans (which were not contested before us on appeal), it is obvious why Feng should be precluded from serving as an officer or director: the Tribunal found that he had "proven to us that [he] cannot be trusted to participate in the capital market unchecked."

[62] In respect to the limited carve-out, the requirement that the Appellants first pay the sanctions ordered reflected the Tribunal's core finding that the Appellants' misconduct was "egregious" but not "the most egregious" of fraud cases. In a case in which the Appellants had apparently raised numerous issues at almost every stage of the analysis, in a case where the controlling documents and the direct testimony of Staff's witnesses directly established fraud, the

Tribunal was entitled to focus its reasons on the many issues that were argued, and not ones that were not argued.

[63] The Tribunal did not err in principle, nor did it impose a sanction that was clearly unfit, when it imposed a requirement that the Appellants pay the ordered sanctions before Feng's trading carve-out would come into effect. I would not give effect to this argument.

(iii) Whether the Tribunal erred in ordering disgorgement in the amount of $7,630,000

[64] The Tribunal found that $10 million was raised from investors, and that $2.37 million was paid as a result of a settlement between the Appellants and one investor (Sanctions Decision, para. 27). The Tribunal ordered disgorgement of the balance of the funds raised.

[65] The Tribunal accurately set out the principles that apply when considering whether, and in what amount, to order disgorgement (Sanctions Decision, paras. 54 – 55 and the authorities cited therein).

[66] The Appellants argued below that only misapplied proceeds should be the subject of a disgorgement order. The Tribunal did not accept that argument. The Tribunal noted that disgorgement may be ordered of "obtained amounts", and that it was not necessary to determine precise amounts that were misused. In the context of this case, this finding was reasonable: the misapplication of funds resulted in losses of interest income, security, and capital losses for all investors (Sanctions Decision, paras. 56-59).

[67] The Tribunal reiterated that the misconduct was egregious and caused serious harm, albeit "not amongst the most serious that has come before the Tribunal" (Sanctions Decision, para. 60). The Tribunal found that there was no evidence respecting "the potential for investors to recover additional funds if Feng is successful in his civil proceeding", a reasonable basis for declining to reduce the disgorgement order on this basis (Sanctions Decision, paras. 61-62). The Tribunal found that specific and general deterrence were factors to be taken into account when making a disgorgement order but accepted that there should not be "undue emphasis" on deterrence: "[w]e must ensure that the sanctions we impose are proportionate to the misconduct at issue" (Sanctions Decision, para. 64).

[68] The Tribunal rejected the argument that disgorgement should only be ordered in respect to amounts that had directly benefitted the person being sanctioned. The Tribunal found that the Appellants benefitted indirectly, and in particular:

> Feng was a director and officer of CIM and a directing mind of CIM, and he also controlled Bayview Creek and the other projects in which CIM had an interest. Feng, indirectly through CIM, obtained the investor funds in connection with the debenture offering (Sanctions Decision, para. 66).

[69] The Tribunal considered its past jurisprudence (*Pro-Financial Asset Management Inc. (Re)*, 2018 ONSEC 18; *York Rio Resources Inc.*, 2014 ONSEC 9; *Limelight Entertainment Inc.*, 2008 ONSEC 28; *Al-Tar Energy Corp.*, 2011 ONSEC 1; *Solar Income Fund (Re)*, 2023 ONCMT

3; *Bradon Technologies (Re)*, 2016 ONSEC 19; *Quadrexx Asset Management Inc. (Re)*, 2018 ONSEC 3, aff'd 2020 ONSC 4392 (Div. Ct.); *Money Gate Mortgage Investment Corp. (Re)*, 2021 ONSEC 10), and found:

> Every case is different. In this case, we decide not to exercise our discretion to lower the disgorgement amount except for the Settlement amount. Our focus is on how the funds were obtained. Unlike *Money Gate* where the misrepresentations were of a general nature, in the case before us funds were obtained through the specific misrepresentation that funds would be used exclusively to finance the Bayview Creek project (Sanctions Decision, para. 69, footnote omitted).

[70] The disgorgement order is consistent with applicable legal principles, is based upon factual findings that do not disclose any palpable and overriding error and is consistent with the applicable jurisprudence. It is not "manifestly deficient or excessive… [nor is it] a substantial and marked departure from penalties in similar cases." I would not give effect to this ground of appeal.

(iv) Whether the administrative penalties and costs ordered were excessive and contrary to the jurisprudence

(a) Administrative Penalties

[71] Before the Tribunal, Staff sought administrative penalties of $750,000 each; the Appellants argued for administrative penalties "of approximately half the amount requested by staff" (ie approximately $375,000 each (Sanctions Decision, paras. 75-79).

[72] The Tribunal noted that fixing administrative penalties "is not a science" and correctly set out factors to be considered when exercising this discretion (Sanctions Decision, para. 73). The Tribunal considered the arguments on both sides and come down in between the positions of the parties, closer to the amount suggested by the Appellants than by staff:

> After reviewing the decisions above, we agree that an administrative penalty of $750,000 against each respondent is excessive. Such amounts may reasonably be viewed as punitive when viewing all of the sanctions globally. However, a 50% reduction would fall short of achieving the necessary deterrent effect of an administrative penalty (Sanctions Decision, para. 80).

[73] I see no error in principle, no palpable and overriding error of fact. The administrative penalties are not "clearly unfit" given the positions taken before the Tribunal by both sides and previous jurisprudence. Thus, there is no basis on which to interfere with the Tribunal's decision on administrative penalties.

(b) Costs

[74] I see no merit to the Appellants' challenge to the Tribunal's costs decision. The Tribunal discounted the claimed partial indemnity costs by 40% on the basis of its assessment of the complexity and merits of the case. This represented a substantial reduction.

Conclusion on the Sanctions Decision

[75] I see no basis on which this court should interfere with the Tribunal's Sanctions Decision. As found by the Tribunal, the Appellants engaged in fraud, and the losses suffered by investors as a result of the fraud are substantial. Defrauding investors and thereby causing serious loss is egregious conduct and deserves serious sanctions. That is what the Tribunal found, and appropriately so. The finding that this fraud was not at the most egregious end of the scale of egregious frauds does not undercut the appropriateness of the sanctions imposed.

[76] The Appellants argued that they could not afford the sanctions ordered and that the Tribunal ought to take this into account. The Tribunal did so: "[t]he [Appellants] have not demonstrated that their ability to pay is a factor we should consider in our analysis because they have not provided any evidence to support their claim" (Sanctions Decision, para. 84). The Tribunal did not err in refusing to take into account a claim of impecuniosity that was not supported by "sufficient evidence" (Sanctions Decision, para. 85).

Disposition

[77] I would dismiss the appeal, with costs to the Respondent from the Appellants fixed at $15,000.00, inclusive, payable jointly and severally within thirty days.

"D.L. Corbett J."

I agree: "LeMay J."

I agree: "Shore J."

Released: May 8, 2025

CITATION: Feng v. Ontario Securities Commission, 2025 ONSC 2268
DIVISIONAL COURT FILE NO.: DC 717/23
DATE: 20250508

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, LeMAY and SHORE JJ.

BETWEEN:

JIUMIN FENG and CIM INTERNATIONAL GROUP INC.

Appellants

– **and** –

THE CHIEF EXECUTIVE OFFICER OF THE ONTARIO SECURITIES COMMISSION

Respondent

REASONS FOR DECISION

D.L. Corbett J.

Released: May 8, 2025