Application No. 4 of 2022

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under sections 194 and 196 of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

CHOI CHI KIN, CALVIN Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Tribunal: Mr. Michael Lunn, Chairman

Dates of Hearing: 19 and 20 April 2022

Date of Ruling: 29 April 2022

RULING

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1. The applicant was a managing director at UBS AG ("UBS AG") and a person licensed by the Securities and Futures Commission ("the SFC") for Types 1, 4, 6 regulated activities, namely dealing in securities, advising on securities and advising on corporate finance. He was licensed as a representative to carry on Type 6 regulated activities and accredited to UBS Securities Hong Kong Limited. Also, he was a 'relevant individual' in all three of those Types of regulated activities accredited to UBS AG Hong Kong Branch.

2. Project 'Frontier, which commenced in May 2015, led to the applicant acting as the Project Sponsor for UBS in its role as financial adviser to the sellers of shares, led by Morgan Stanley Private Equity Asia ("MSPE"), in AMTD Group Company Limited ("AMTD") to a consortium of LR Capital Financial Holdings Limited ("LR Capital Financial"), a wholly owned subsidiary of LR Capital Management Company Cayman Limited ("LR Capital"), and China Minsheng Group. At that time, the applicant was designated by UBS AG as a client coverage and relationship banker of LR Capital. The sale and purchase agreement of the shares was executed on 19 June 2015 and the sale completed in October 2015.

3. Project 'Oasis', which commenced in September 2014, led to UBS Securities Hong Kong acting as Joint Sponsor in the Initial Public Offering ("IPO") of Xinte Energy Company Limited ("Xinte"). UBS AG acted as Joint Global Coordinator, Joint Bookrunner and Joint Lead Manager. The applicant was a member of the deal team. LR Capital China Growth Company Limited ("LR Capital Growth"), a subsidiary of LR Capital, and CM International were pre-IPO investors in Xinte, whilst LRC Belt and Road Investments Limited ("LRC Belt and Road") was a cornerstone investor in the IPO.

Decision Notice

4. Having issued the applicant a Notice of Proposed Disciplinary Action ("NPDA"), dated 16 December 2020, and having received his written Representations in response, dated 16 April 2021, in a Decision Notice, dated 14 January 2022, the SFC found that the applicant's involvement in the business of the LR Capital and its group of companies ("LR Capital Group") exceeded the scope of a typical coverage banker, potentially placing the applicant in a position of conflict of interest with UBS AG and/or

its clients.[1] Further, that the applicant had failed to disclose to UBS AG the actual or potential conflicts of interest.[2]

5. The SFC found that emails to which the applicant was a party showed that he directed the decision-making of LR Capital Financial in connection with Project Frontier[3], of which conduct MSPE was unaware.[4] Although the SFC accepted that the applicant's role in Project Frontier did not involve any regulated activity, nevertheless the SFC found that the applicant had placed himself in a potential conflict of interest with UBS AG and/or its clients, which actual or potential conflicts he had failed to report to UBS AG.[5]

6. In Project Oasis, the applicant had provided assistance and information in relation to another pre-IPO investor's investment to LR Capital, a counterparty to the applicant's client.[6] The applicant's role as adviser to Xinte in its IPO involved advising on compliance with the Listing Rules, which was a Type 6 regulated activity.[7]

7. In consequence, the SFC determined [8] that the applicant's failures constituted breaches of:

> General Principle 6 (Conflicts of interest), paragraph 10.1 (Disclosure and fair treatment) of the Code of Conduct[9]; and
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> paragraph 4 (Conflicts of interest) and paragraph 4.1 (Conflicts of interest) of the CFA Code of Conduct.[10]

8. In the result, the SFC determined that the applicant was not "fit and proper to be a licensed person" and, pursuant to sections 194 and 196 of the Securities and Futures Ordinance ("the Ordinance"), ordered that he be prohibited for two years from doing all or any of the following in relation to any regulated activities:[11]

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[1] Decision Notice, paragraph 43.
[2] Decision Notice, paragraph 23.
[3] Decision Notice, paragraph 40.
[4] Decision Notice, paragraph 38.
[5] Decision Notice, paragraph 23.
[6] Decision Notice, paragraph 14.
[7] Decision Notice, paragraph 21.
[8] Decision Notice, paragraph 21.
[9] Code of Conduct for Persons Licensed by or Registered with the SFC.
[10] Corporate Financial Adviser Code of Conduct.
[11] Decision Notice, paragraph 49.

(a) applying to be licensed or registered;

(b) applying to be approved under section 126(1) of the Ordinance as a responsible officer of a licensed corporation;

(c) applying to be given consent to act as an executive officer of a registered institution under section 71C of the Banking Ordinance; and

(d) seeking through a registered institution to have his name entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance as that of a person engaged by the registered institution in respect of a regulated activity.

Notice of application for review of the Decision

9. In a Notice of Application for Review of the Decision, filed with the Tribunal on 4 February 2022, issue was taken on behalf of the applicant with various aspects of the Decision, including:

- The 'jurisdiction' of the SFC to discipline the applicant, having regard to the context of his conduct: first, that the shares sold in AMTD were shares in a private company and not the sale of 'securities', as defined in Schedule 1 of the Ordinance, so that the transaction was not a regulated activity; secondly, the applicant's role and conduct concerning the sale of Xinte shares occurred pre-IPO and again involved the shares of a private company not the sale of 'securities', so that the transaction was not a regulated activity;
- erroneous findings of fact by the SFC;
- impermissible reliance by the SFC on a written report compiled by the law firm Davis Polk, Wardell ("Davis Polk") on the instructions of UBS AG; and,
- the appropriateness of the prohibitions imposed on the applicant, given the applicant's voluntary undertaking to the SFC not to conduct himself in the manner prohibited.

The anonymity application

10. In addition, in the Notice of Application for Review the applicant applied to the Tribunal for an order that: ("Anonymity application".)

(i) every sitting of the Tribunal be held in private, pursuant to sections 20 and 21 of Schedule 8 of the Ordinance[12];

[12] s.20 of Schedule 8:
"Every sitting of the Tribunal shall be held in public unless the Tribunal, on its own motion or on the application of any of the parties to the review, determines that in the interests of justice a sitting or any part thereof shall not be held in public in which case it may hold the sitting or the part thereof (as the case may be) in private."

(ii) prohibiting publication or disclosure of any material received by the Tribunal, pursuant to section 219 (1)(g) of the Ordinance[13].

In what were described as the 'grounds of this Application", it was contended that the application "...relates only to the identity of the applicant" and therefore "...causes "the least possible interference with the rule of public judicial proceedings, or 'open justice'." If the 'jurisdictional' challenge was to succeed, the identification of the applicant in the hearing as the subject of these proceedings would cause him "unjustifiable and grievous embarrassment", given that such a finding would involve a determination that the SFC never had jurisdiction to investigate and/or discipline the applicant.

The applicant's evidence and submissions in support of the anonymity application

Evidence

11. In support of the anonymity application, Mr. Wong Kwok Kee, a partner of the applicant's solicitors, Tang Lai & Leung filed an affirmation with the Tribunal on 31 March 2022, to which was exhibited a draft, undated and unaffirmed affirmation of the applicant. Mr. Wong explained that the applicant had contracted Covid-19 in Singapore on 30 March 2022 and, as a result of his illness, had been unable to affirm his affirmation so that it could be filed with the Tribunal on that date, in accordance with the Tribunal's directions at the Preliminary Conference held on 9 March 2022. The affirmation would be filed with the Tribunal after the applicant was able to affirm it and send it to his solicitors. In the event, the original affirmation, affirmed by the applicant in Singapore on 11 April 2022, was filed with the Tribunal in the afternoon of 19 April 2022, the first day of the hearing of the application.

12. In his affirmation the applicant described a range of "key positions" that he had occupied in "large organizations, listed companies and public bodies." He was the Chairman and CEO of the AMTD Group, which was listed on the SEHK and whose subsidiary was listed on both the New York and Singapore stock exchanges. He was a director of a large commercial bank in the Mainland, which was also listed in Hong Kong. He had served in various roles on a number of public and charitable bodies. In consequence, he was well known to a wide community of people, in Hong Kong and internationally. As

[13] s.219 (1)(g):
"prohibit the publication or disclosure of any material the Tribunal receives at any sitting, or any part of a sitting, which is held in private."

a result, he and his family had attracted an increased level of interest by the media. Revelation of his identity in the course of the proceedings might result in media reports "...harking back to the unfounded allegations and insinuations against my family members" and would cause "...substantial and irreparable prejudice and damage" to the applicant, such that, even if he was to succeed in the review, he would be caused, "...disproportionate embarrassment and prejudice, if not irreparable unquantifiable harm".

13. Moreover, the applicant asserted that, although the SFC had focused its case on the applicant's conduct alone, the NPDA, the Decision Notice and other material, including the Davis Polk report, contained "a plethora of allegations both direct and indirect, against various individuals and entities", such that they would "inevitably feature in these proceedings". The applicant said that the Davis Polk report made serious allegations of misconduct against two of his former colleagues such that, if they were publicised in the course of the proceedings, they would be caused "...substantial harm and prejudice".

14. The applicant suggested that, if the Tribunal was not prepared to grant the primary orders sought in the anonymity application, in the alternative the Tribunal ought to consider "simply anonymizing my identity together with an order prohibiting disclosure of my identity, and the identity of other implicated parties." In his oral submissions, Mr. Chan suggested that could be achieved by ascribing letters of the alphabet to the applicant, third parties and the companies involved, to which reference could be made at the hearing. That would ensure anonymity.

The applicant's submissions

15. In their written submissions in support of the anonymity application, Mr. Derek Chan SC, leading Mr. Edward Tang, contended that there was sufficient material before the Tribunal for the preliminary conclusion to be drawn that, it is at least arguable, the SFC had acted *ultra vires* in that it sought to regulate conduct of the applicant which was not a regulated activity. Mr. Chan invited the Tribunal to note that in its Reasons for Determination in *Moody's Investor Service Hong Kong Limited v SFC*[14] this Tribunal, of which Mr. Michael Hartmann was chairman, had said that the "primary issue" to be determined was the issue of jurisdiction. Moody's prepared and published a report, which

[14] SFAT 4 of 2014; unreported, 31 March 2016.

it contended was not an activity for which Moody's was regulated. It was not the provision of credit rating services, in respect of which Moody's was licensed. So, the publication of the report was not an activity to which the Code of Conduct applied. The Tribunal noted, "Only if it is determined that the SFC acted within its power will the merits of the finding that Moody's acted in breach of the Code of Conduct fall for consideration."[15]

16. In respect of Xinte, the SFC had elided the difference between two separate and different projects: first, the earlier attempts to introduce private investors to Xinte pre-IPO, when it was still a private company, described as 'Project TB2'; secondly, Project Oasis. The applicant's conduct in the former did not involve advising on corporate finance, namely a Type 6 regulated activity.

17. In support of his submissions Mr. Chan referred to selected excerpts set out in those submissions, said to have been taken from internal emails sent and received by various individuals at UBS on two dates, namely 22 September 2014 and 25 February 2015. No emails were put into evidence. Mr. Chan pointed to what he said were the two separate business opportunities described. First, as noted in the emails of 22 September 2014, a "pre-IPO sell side opportunity", in which the company would "introduce pre-IPO investors". Secondly, the "associated" opportunity arising from, "... the company's contemplated... IPO... targeted for May/June 2015 listing", in respect of which "UBS is acting as a joint sponsor and joint adviser." The suggestion was made in the email, "Deal team to BRG the pre-IPO opportunity separately." Mr. Chan said that was an instruction for the opportunity to be presented "separately" to UBS's Business Review Group for approval. However, it appears from the emails of 25 February 2015, that step was not taken by UBS. Of that issue, the email stated, "Pre-IPO tranche: no brg conducted as there is no role for UBS", adding, "We have not issued any written work or have any formal role." In the result, Mr. Chan submitted that, although there was no mandate for UBS and no work was done in the pre-IPO project, in its NPDA, the SFC had focused entirely on the applicant's purported assistance to the LR Group in respect of its pre-IPO investment in Xinte. That was not a regulated activity.

[15] SFAT 4 of 2014; Reasons for Determination, paragraph 67.

18. Mr. Chan invited the Tribunal to note that the SFC conceded that the applicant's role in Project Frontier did not involve a regulated activity.[16] There was no legitimate basis for the SFC to discipline the applicant where the underlying conduct did not constitute a regulated activity.[17] Unless an anonymity order was made, even if the applicant was vindicated in that submission, he would have suffered prejudice and damage generated by publicity of these proceedings.

19. Secondly, Mr. Chan reiterated the applicant's assertion in his affirmation that the material which would be canvassed during the hearing, including the NPDA, the Decision Notice and the Davis Polk report, contained many direct allegations of the misconduct of others and of collusion by them with the applicant. In support of that contention, the Tribunal's attention was drawn in particular to the references in the Davis Polk report to two former colleagues of the applicant at UBS AG, who continued to be licensed persons. It was alleged against the one, that he was culpable of serious conflicts of interests and, against the other, that there was strongly probative evidence of fraud. No proceedings had been brought against them and they were not in a position to protect their interests. Disclosure of their identities would be seriously prejudicial to their professional reputations. If they were the subject of an investigation, that would give rise to the requirements of confidentiality provided for by section 378 of the Ordinance. If there had been an investigation, and it had been decided not to pursue disciplinary action, it would be most unfair to identify them and to disclose the unfounded allegations.

20. In his oral submissions, for the first time Mr. Chan advanced another limb of what he said was the prejudice arising from the adverse findings against third parties in the Davis Polk report. It restricted the way in which the applicant could run his case in the substantive hearing and that was prejudicial to the applicant. In the NPDA, the SFC alleged that in Project Frontier, in a potential conflict of interest, the applicant had privately provided information and documents relating to the investment opportunity to LR Capital. It was alleged that the applicant had done so, "Unbeknownst to other UBS AG deal team members".[18] Two of the applicant's then colleagues at UBS AG, both persons criticised in the Davis Polk report, were in the email "circle of the applicant's communications with LR Capital" and, if called as witnesses, could give evidence that the applicant had acted "in

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[16] Decision Notice, paragraph 23.
[17] SFAT 4 of 2014; Reasons for Determination, paragraphs 76 and 77.
[18] NPDA, paragraph 33.

the open". Mr. Chan expressed the concern that, if called to give that evidence, those witnesses could be cross-examined by the SFC on the basis of the allegations made in the Davis Polk report. It is to be noted that, in respect of one of those colleagues involved in the email communication, the SFC had noted in the NPDA that he was "not officially on Project Frontier deal team."[19]

21. Mr. Chan readily acknowledged that the principles of law governing his application are not controversial and had been succinctly summarised in the judgment of Cheung CJHC in the Court of Appeal in *Asia Television Limited v Communications Authority*.[20] Open administration of justice is a fundamental principle of common law. It maintains the public's confidence in the administration of justice. Any restriction on open administration of justice represents a compromise between important interests, rights and freedoms and must be justified by considering and balancing all pertinent interests, rights and freedoms. By themselves publicity arising from litigation leading to embarrassment and inconvenience; economic damage; and possible damage to professional reputation do not justify any restriction on open administration of justice. The open administration of justice is just a means to an end and where it would frustrate the ultimate aim of doing justice account must be taken of that consequent in balancing those interests, rights and freedoms in deciding whether open justice should be restricted.[21]

22. For his part, Mr. Chan acknowledged that the burden of establishing that the interests of justice required a derogation from open justice fell on the applicant.

The SFC's submissions

23. Mr. Laurence Li SC, leading Mr. John Leung, for the SFC opposed the applications.

24. Mr. Li submitted that the legal principles governing an application for a hearing to be held in private are well established. The fundamental principle was 'open justice'. It respected the rights of litigants to a public hearing, as provided by Article 35 of the Basic Law. It gave substance to the right of the public and the media to seek knowledge

[19] NPDA, paragraph 22(b).
[20] *Asia Television Limited v Communications Authority* [2013] 2 HKLRD 354.
[21] *Asia Television Limited v Communications Authority,* paragraphs 19-32.

and enjoy freedom of expression. It enabled the public to scrutinise the legal process, thereby maintaining the confidence of the public in the rule of law. Derogation from the principle was permitted only if and only to the extent that the interests of justice required, in particular if the application of open justice would frustrate the ultimate aim of doing justice. Embarrassment, inconvenience and damage to professional reputation, even causing severe economic damage, from publicity arising from open justice were not sufficient reasons for derogation.[22]

25. Mr. Li reminded the Tribunal that these principles had been applied by the Tribunal on a number of occasions in rejecting applications for hearings to be held in private.[23] Those were all rulings by the Chairman, Mr. Michael Hartmann.

26. Mr. Li invited the Tribunal to note that whereas the Notice of Application for Review sought an order of anonymity in respect of "only the identity of the applicant", it was now sought on the additional and extended basis of alleged prejudice to third parties. Of the alleged prejudice to the applicant arising from publicity in these proceedings, Mr. Li suggested that the applicant ought to have stated his "true concerns" as to the prejudicial damage, if they were so serious that they warranted a derogation from open justice. He had not done so.

Third parties

27. Mr. Li submitted that the collateral impact on third parties arising from litigation was recognised to be the price society paid for open justice, freedom of speech and freedom of the press.[24] If hearings were ordered to be held in private every time a third party's name or interests were involved, open justice would become an exception rather than the rule. This Tribunal had ruled that the risk of loss to third-party, innocent investors

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[22] *Asia Television Limited v Communications Authority,* at paragraphs 18-36.
Ng Shek Wai v Medical Council of Hong Kong [2015] 2 HKLRD 121, at paragraphs 59-66.
Registrar of Hong Kong Institute of Certified Public Accountants v Disciplinary Committee of Hong Kong Institute of Certified Public Accountants [2020] 5 HKLRD 262, at paragraphs 80-81.

[23] *Moody's Investors Service Hong Kong Limited v SFC* [SFAT 4 of 2014; unreported Ruling at paragraphs 9-16, 31 December 2014];
Quam Capital Limited v SFC [SFAT 1 of 2016; unreported Ruling at paragraphs 3-5, 13 April 2016];
Christopher James Aarons v SFC [SFAT 1 of 2021; unreported Ruling at paragraphs 19-26, 13 April 2021.]

[24] *Griffiths v Tickell* [2021) EWCA Civ 1882, at paragraph 34; 10 December 2021.

in a fund because of damage to the reputation of an asset manager from proceedings in this Tribunal was not a reason to derogate from open justice.[25]

28. Mr. Li invited the Tribunal to note that the SFC had made no accusations in either the NPDA or the Decision against the two persons identified by the applicant in his affirmation and to whom reference was made by Mr. Chan in his submissions. The conclusions of the authors of the Davis Polk report were their conclusions only. The SFC had made clear that it had arrived at its own independent views on the underlying evidence, not on the conclusions made in the report. It was wholly unclear why reference would need to be made in the proceedings to those impugned excerpts in the report. However, if reference was made, that was a matter of the Tribunal could deal with at the time.

The jurisdictional challenge

29. Mr. Li submitted that a challenge to jurisdiction does not make a matter special or more deserving of anonymity. This Tribunal had rejected such an argument in *Moody's*, observing that if that were the case "a preliminary decision would have to be made in respect of the dispute which forms the very basis of the proceedings themselves."[26] Mr. Li suggested that, at the interlocutory stage, it was impossible to prejudge the issue.

30. In any event, Mr. Li submitted that the applicant's contentions, as to the strength of the jurisdictional challenge, were fundamentally wrong. The applicant had chosen to become licensed and, accordingly, subjected to the regulatory regime of the SFC. He fell within its jurisdiction. In truth, the issue raised by the applicant was whether the SFC were entitled to have regard to his alleged failures or whether they lay outside the SFC's concern. Mr. Li contended that in determining his fitness and properness to be licensed, the SFC was required to have regard to matters both within and outside the scope of a person's regulated activities. The applicant's failures were in respect of basic fiduciary duties. He invited the Tribunal to note that no authority had been cited in which a challenge to jurisdiction had led to an order for anonymity.

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[25] *Christopher James Aarons v SFC,* Ruling at paragraphs 38-39.
[26] *Moody's Investors Service Hong Kong Limited v SFC,* Ruling at paragraphs 15-16.

Discussion

31. At the outset, it is appropriate to set out what material is available now to the Tribunal and, against that, to indicate what the Tribunal has been told as to what material the investigation has generated. Of course, at this stage it is not known what evidence, documents and oral witnesses, the parties will seek to adduce at the substantive hearing. The Tribunal has available to it:

(i) the NPDA;
(ii) the applicant's written Representations to the SFC;
(iii) the Decision Notice; and
(iv) the applicant's affirmation.

The Tribunal has no primary evidence.

32. The Tribunal has been informed that the material identified in the List of Documents, attached to the NPDA and subsequently provided to the applicant, are contained in 18 lever arch box files, of which the Davis Polk report constitutes 53 pages with 184 annexures. The latter material is contained in multiple lever arch box files. Although reference was made to the Davis Polk report in all four of the different documents, described earlier as being available to the Tribunal, and although excerpts of what was said to be contained in parts of the report were quoted in Mr. Chan's written submissions, the Tribunal has no information whatsoever as to the identity of the authors of the report, their terms of reference or the ambit and provenance of the material available to them. No elaboration, elucidation or explanation has been provided to the Tribunal of the bare assertion in the Decision Notice that the investigation conducted by Davis Polk into the applicant's conduct involved "the comprehensive investigation steps set out in paragraph 20 of the Davis Polk report."[27] Similarly, although the List of Documents attached to the NPDA is available to the Tribunal, so that it is possible to identify from whom the SFC may have obtained material as at 16 December 2020, there is no information as to the ambit and content of that material nor whether any material was obtained by the SFC subsequently.

[27] Decision Notice, paragraph 34.

33. In all of those circumstances, Mr. Chan's frank concession, in his written submissions, that "this is not the proper stage of these proceedings before the Tribunal to make any definitive findings of fact" was a considerable understatement.

The Law

34. There is no dispute between the parties as to the principles of law governing this application. They are those set out in the judgment of Cheung CJHC, as Cheung CJ was then, in the Court of Appeal in *Asia Television Limited v Communications Authority*, to which reference was made earlier. The application of those principles in the context of this Tribunal, having regard to the particular circumstances of the respective cases, is clearly illustrated by the Rulings of this Tribunal in *Moody's Investor Service Hong Kong Limited v SFC, Quam Capital Limited v SFC and Christopher James Aarons v SFC*. The burden falls on the applicant to demonstrate that the "interests of justice" require the making of the orders of anonymity he seeks.

35. As Lord Sumption noted, in his judgment in *Khuja v Times Newspapers Limited*[28] in the Supreme Court of the United Kingdom, "...the justification for the principle of open justice... repeated by many judges since" was that given by Lord Atkinson in the House of Lords in *Scott v Scott* [1913] AC 417, at page 463:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."

36. As Dame Victoria Sharp observed in her judgment in the Court of Appeal (Civil Division) of England and Wales in *Griffiths v Tickle*[29]:

> "Publicity for what goes on in court may be embarrassing and painful for those involved and third parties who are indirectly and incidentally affected

[28] *Khuja v Times Newspapers Limited* [2017] UKSC 49, [2019] AC at paragraphs 12 and 13.
[29] *Griffiths v Tickle* [2021] EWCA Civ 1882; unreported, 10 December 2021 at paragraph 34.

> but in general, 'the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public': *Khuja v Times Newspapers Limited* [2017] UKSC 49, [2019] AC [34)2)]."

37. Of the issue of 'jurisdiction', there is considerable force in Mr. Li's submission that at this interlocutory stage the Tribunal is not in a position to make a preliminary decision or prejudge an issue which forms the fundamental basis of the proceedings. There is a very obvious paucity of relevant material before the Tribunal.

38. Whilst the principle of open justice has never been absolute and the law has developed exceptions to its application requiring, if necessary, the exercise of a balancing exercise of competing interests, in my judgement in the circumstances of this case cogent evidence is required to justify the various orders sought by the applicant. None has been forthcoming.

39. Although the applicant has himself been vociferous in his complaints of the risk of harm that he would suffer himself from prejudicial publicity and although Mr. Chan has supported that contention in his submissions, nothing has been identified or particularised that goes beyond the potential personal and professional embarrassment that would be expected from the airing of the allegations and determinations made by the SFC against the applicant. That is the potential inconvenience and hardship that may be visited on someone in the applicant's situation by the application of the open justice principle.

40. The concerns expressed by the applicant about prejudice that might enure to the detriment of his two former colleagues are entirely speculative at this stage. It is not surprising that they found no place in the applicant's Notice of application for Review. If they were to be called as witnesses for the applicant at the substantive hearing, cross-examination of them by counsel for the SFC would be under the control of the Chairman and restricted to proper and permissible limits. Subject to those constraints, such cross-examination of either or both of those witnesses might concern their role in email communications. That may or may not expose them allegations of misconduct and expose them to potential prejudice. But that is the normal circumstance in litigation. There is no reason to think that any attempt would be made to confront them in cross-examination with whatever might be the opinions formed by the authors of the Davis Polk report of their

conduct, but if such an attempt was made, the Chairman would have to rule on the application. Although there are circumstances in which witnesses, for example in sexual cases, are granted anonymity, there is no basis whatsoever at this stage in their case to make any such order.

The Tribunal's determination

41. Accordingly, the applications are refused. Costs will follow the event. I grant a Certificate for two counsel.

Mr. Michael Lunn
(Chairman)

APPEALS TRIBUNAL 證券及期貨事務上訴審裁處

Mr. Derek C.L. Chan SC, leading Mr. Edward H.M. Tang, and Mr. Alan H.L. Lo, instructed by Messrs. Tang, Lai & Leung
for the Applicant.

Mr. Laurence Li, leading Mr. John Leung, instructed by the SFC,
for the Respondent.