

**IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL**

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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

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BETWEEN

CHOI CHI KIN, CALVIN Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

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Tribunal: Mr. Michael Lunn, GBS, Chairman

Date of Ruling: 29 September 2023

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**RULING**

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1. In a letter to the Tribunal, dated 25 April 2023, Mr. Choi's solicitors, Jingtian & Gongcheng, invited the Tribunal to place no weight on a Confidentiality Agreement between Xinte Energy Co., Ltd ("Xinte"), UBS AG ("UBS") and GF Capital (Hong Kong) ("GF Capital") dated 24 August 2014, which had been provided to the Tribunal by Xinte in a letter dated 14 April 2023. Complaint was made that Mr. Choi's

A legal advisers did not have the opportunity to review the Confidentiality Agreement before  
B it was produced by Xinte.

C 2. It was contended that the Confidentiality Agreement "...forms no part of  
D the SFC's case, whether in the Notice of Proposed Disciplinary Action, or the Decision  
E Notice, or indeed in the SFC's submissions." It was stated that if the Tribunal was inclined  
F "to place any weight, reference or reliance" on the Confidentiality Agreement, it was  
G requested that Mr. Choi be afforded "...a reasonable opportunity to address the Tribunal  
H on any suggested line of relevance or reliance, including by making written and/or oral  
I submissions and/or submitting further evidence to the Tribunal in respect of the  
J Confidentiality Agreement."

### H *Background*

I 3. The Confidentiality Agreement had been provided by Xinte in its letter,  
J dated 14 April 2023, in response to the Notice of the Tribunal, dated 6 April 2023, pursuant  
K to section 219(1)(b) of the Securities and Futures Ordinance, Cap. 571.

L 4. Following the conclusion of the oral hearings on 16 December 2022, it  
M became apparent to the Tribunal that the Confidentiality Agreement, dated 24 August 2014,  
N to which reference was made specifically in the Engagement Letter, dated 19 March 2015,  
O between Xinte Energy, UBS and GF Capital, which was included in the Hearing Bundles,  
P was not included. By a letter to the parties, dated 2 March 2023, the Tribunal invited the  
Q parties to indicate where, in the material served on the Tribunal, the document could be  
R located.

S 5. Throughout, the Tribunal provided copies to the Commission and Jingtian  
T & Gongcheng, of all the correspondence, service of Notices and the replies of the recipients  
U the Tribunal received.

V 6. By a letter to the Tribunal, dated 3 March 2023, the Commission indicated  
that the Confidentiality Agreement was not in the material provided to the Tribunal nor in  
the possession of the Commission. The Commission offered to approach UBS to obtain a  
copy of the document. By a letter to the Tribunal, dated 3 March 2023, Jingtian &  
Gongcheng, informed the Tribunal that the document was not in the Applicant's possession

A and acknowledged having received the letters sent between the Commission and the  
B Tribunal that day.

C *Notices pursuant to section 219 (b) of the Ordinance*

D *(i) UBS*

E 7. In a letter to the Commission, dated 3 March 2023, the Tribunal thanked the  
F Commission for its offer of assistance and asked that a Notice to UBS to produce the  
G document, pursuant to section 219 (b) of the Securities and Futures Ordinance (the  
H “Ordinance”) , be drafted for the Chairman’s signature. The Tribunal issued a Notice  
I signed by the Chairman, dated 7 March 2023 directed to UBS to produce the document and  
invited the Commission to serve the Notice on UBS. In a letter to the Tribunal, dated 31  
March 2023, UBS AG informed the Tribunal that it was unable to locate a copy of the  
document.

J *(ii) GF Capital and Xinte*

K 8. In a letter to the Commission, dated 4 April 2023, the Tribunal asked for the  
L assistance of the Commission to draft Notices to produce the document directed at each of  
M GF Capital (Hong Kong) Limited and Xinte Energy Co., Ltd. The Tribunal issued Notices  
to each of those parties signed by the Chairman, dated 6 April 2023, directing each of them  
to produce the document and invited the Commission to serve the Notice on them.

N 9. In a letter to the Tribunal, dated 14 April 2023, Xinte produced to the  
O Tribunal a copy of the Confidentiality Agreement, dated 24 August 2014, pointing out that  
P it had been entered into by Xinte’s controlling shareholder, TEBA Co., Ltd. The agreement  
Q was in Chinese characters. By an email, dated 19 April 2023, GF Capital (Hong Kong)  
Limited informed the Tribunal that they were unable to locate a copy of the Confidentiality  
Agreement.

R 10. In a letter, dated 18 April 2023 the Tribunal provided the parties with a copy  
S of the Confidentiality Agreement and invited the Commission to provide an English  
T translation of the document.

11. In a letter from the Commission, dated 26 April 2023, an English translation of the Confidentiality Agreement was provided to the Tribunal.

*Directions*

12. In response to the request made in the letter of Jingtian & Gongcheng, dated 25 April 2023, that Mr. Choi be afforded a reasonable opportunity to address the Tribunal, in a letter, dated 27 April 2023, the Tribunal replied:

“Subject to any submissions to the contrary by the respondent, the Chairman is minded to accede to that request and invites you to consult the respondent to arrive at an estimate of the likely time required for an oral hearing and to provide that estimate to the Tribunal, together with any suggested timetable for the provision of written submissions and further evidence.”

13. By a letter to the Tribunal, dated 28 April 2023, the Commission set out its position:

“We have no objection to the Request in that the Applicant be given a reasonable opportunity to address the Tribunal regarding any suggested line of relevance or reliance. If the Applicant applies to adduce further evidence, the Respondent will address any such application when made.”

14. No response having been received by the Tribunal to its letter to Jingtian & Gongcheng, dated 25 April 2023, by a letter, dated 9 June 2023, the Tribunal issued Directions to the Applicant, namely that:

“... if the applicant wishes to make any further submissions to the Tribunal on that issue the applicant is to file such submissions with the Tribunal on or before 5 pm on 15 June 2023.”

*The Applicant’s submissions*

*Relevance*

15. In written Supplemental Submissions, dated 15 June 2023, Mr. Shieh submitted that the Confidentiality Agreement “...is wholly irrelevant to the determination of this Application, because it forms no part of the SFC’s charges against Mr. Choi, and

A the SFC does not and cannot now rely on it in an opposition to the Application.” Mr. Shieh  
B pointed out that the Confidentiality Agreement was not in the evidence adduced by the  
C Commission in the review and formed no part of the Commission’s case in the NPDA,  
Decision Notice or submissions made by the Commission to the Tribunal.

D *Jurisdiction*

E 16. In addition to that primary submission, Mr. Shieh submitted that the  
F Tribunal did not have jurisdiction to rely on the Confidentiality Agreement. To do so,  
G would be to “commence a new general enquiry.” The Tribunal did not have the power,  
“...to broaden the matters into which it is obliged to enquire”<sup>1</sup>. That was impermissible.

H *Prejudice*

I 17. Mr. Shieh submitted that reliance on the Confidentiality Agreement at this  
J stage would cause prejudice to Mr. Choi. He was entitled to have been informed of the  
K charges and the allegations against him in good time, so that he could take advice and  
consider what evidence to call.

L 18. Notwithstanding the fact that no application had been made to the Tribunal  
M for leave to file any evidence, attached to the Supplemental Submissions was a witness  
N statement of Madam Guo Junxiang, dated 13 June 2023. For his part, Mr. Shieh informed  
O the Tribunal that, if the Tribunal was “inclined to place any weight, reference or reliance”  
on the Confidentiality Agreement, Mr. Choi “...seeks leave to file and to rely on the  
attached witness statement of Guo Junxiang in respect of the Confidentiality Agreement”.

P *The Commission’s submissions*

Q 19. In written Supplemental Submissions, dated 26 June 2023, Mr. Li opposed  
R the application to adduce the witness statement of Madam Guo “...in the strongest terms”.  
S He described it as being, “...nothing but a thinly disguised, belated and desperate ploy to  
T reopen wholesale his case on Project Oasis.”

U <sup>1</sup> *Moody’s Investors Service Hong Kong Limited v Securities and Futures Commission* - SFAT 4/2014  
V (31 March 2016) at paragraphs 121 and 154.

A 20. Of the Commission’s position on the Confidentiality Agreement, Mr. Li  
B said that it was straightforward:

C “The SFC has not previously relied on it, does not need to rely on it, and  
D also does not propose to rely on it either.”

E 21. Perhaps, fearful that there might be a doubt as to the position taken by the  
F Commission, described as straightforward and articulated above, throughout the written  
G Supplemental Submissions Mr. Li felt it necessary to re-assert the position taken by the  
H Commission as to the Confidentiality Agreement, namely that: (i) it does not rely on it;<sup>2</sup>  
I (ii) it does not need to rely on it<sup>3</sup>; (iii) it does not propose to rely on it.<sup>4</sup>

J 22. Separately, Mr. Li said of the Confidentiality Agreement that the  
K Commission, “...does not invite the Tribunal to rely on it either.” He went on to submit,  
L “...the Tribunal does not need to rely on the Confidentiality Agreement to find against  
M Choi.”

N *Relevance*

O 23. Of the relevance of the Confidentiality Agreement, Mr. Li said that the  
P Commission, “...does not accept Choi’s submissions that the Confidentiality Agreement  
Q is altogether “irrelevant” to the matters which the Tribunal has to decide.” Given that it had  
R been, “... expressly incorporated into the Engagement Letter between UBS and Xinte, the  
S confidentiality obligations it imposed on UBS would be pertinent to the relationship  
T between UBS and Xinte.”

U *Jurisdiction*

V 24. Mr. Li invited the Tribunal to reject Mr. Shieh’s submission that having  
regard to the Confidentiality Agreement was outwith the Tribunal’s remit to consider  
evidence that was not referred to in the NPDA and Decision Notice. That was too narrow  
approach. In an hearing *de novo* the Tribunal had power to receive fresh evidence. The  
Tribunal would not be embarking on a “new general enquiry”, if it was to consider the

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<sup>2</sup> The Commission's Supplemental Submissions: paragraph 4; paragraph 15; paragraph 21; and paragraph 44.

<sup>3</sup> The Commission's Supplemental Submissions: paragraph 5; paragraph 20.

<sup>4</sup> The Commission's Supplemental Submissions: paragraph 20; paragraph 30.

A Confidentiality Agreement in its determination. The issue of the conflict between Mr. A  
B Choi's role as Xinte's advisor and his assistance to LR Capital was always the B  
C Commission's case. The Confidentiality Agreement was merely another piece of evidence C  
relevant to that issue.

D *Prejudice* D

E 25. Mr. Li submitted that there was no merit in the complaint that Mr. Choi E  
F would suffer prejudice if reliance was placed on the Confidentiality Agreement. The F  
G confidential nature of the term sheet and the draft SPA was never disputed. The existence G  
H of the Confidentiality Agreement was in evidence. The only new development was that the H  
provision of the document established the terms of the Confidentiality Agreement .

I *The Tribunal's own initiative* I

J 26. Mr. Li submitted that it lay within the Tribunal's jurisdiction and remit on J  
K its own initiative to "consider, refer to, and/or rely on the existence and contents of the K  
L Confidential Agreement in its determination." If the Tribunal did so, that would not afford L  
M a basis for Mr. Choi to adduce Madam Guo Junxiang's witness statement into evidence. M  
N Only one part of the witness statement dealt with the uncontroversial fact that the parties N  
had executed the Confidentiality Agreement of 24 August 2014. The rest of the statement  
was, "...in reality an application to adduce fresh post-hearing evidence which has nothing  
to do with the contents of the Confidentiality Agreement."

O *The Applicant's Reply Submissions* O

P 27. In the Applicant's Reply Submissions, dated 28 June 2023, it was submitted P  
Q that, given that the Commission did not rely on the Confidentiality Agreement, "...the Q  
review jurisdiction of the Tribunal does not permit it to place weight" on that document.

R *A consideration of the submissions* R

S 28. As is readily apparent from the nature of the objections made on behalf Mr. S  
T Choi to the Tribunal placing "any weight, reference or reliance" on the Confidentiality T  
U Agreement, and having regard to the chronology of events set out earlier, it is clear that U  
V

A objection could have been taken to the process initiated by the Tribunal at the outset on  
B 3 March 2023. That was not done. B

C 29. I am satisfied that the Confidentiality Agreement is relevant to the C  
Tribunal's considerations. It is clearly intimately linked to the Engagement Letter, dated D  
19 March 2015. The fact that the Confidentiality Agreement was not amongst the material D  
sought and obtained in the responses by UBS to the multiple Notices served on UBS E  
appears to have been overlooked by the Commission. The Engagement Letter, dated 19 E  
March 2015, was provided to the Commission by UBS in a response, dated 3 August 2018.<sup>5</sup> F  
That, was in response to a specific request for that document in a Notice, dated 24 July F  
2018. The obvious relevance of the Confidentiality Agreement to the confidentiality clause G  
in the Engagement Letter was readily apparent. Of course, UBS was a party to both the G  
Confidentiality Agreement and the Engagement Letter. H  
H

I 30. I am satisfied that the Tribunal has jurisdiction to receive and consider the I  
document and that the Tribunal has power to do so, and to do so on its own initiative. J  
J

K 31. Nevertheless, having regard to the strident objections made in the K  
submissions on behalf of Mr. Choi, together with the repeated statements made in L  
submissions on behalf of the Commission that the Commission has not relied on and does L  
not propose to rely on the Confidentiality Agreement, in conjunction with the M  
Commission's specific submission that it does not invite the Tribunal to rely on the M  
Confidentiality Agreement, in my judgement it would not be appropriate for the Tribunal N  
to "receive and consider" the Confidentiality Agreement, as provided by sections 219(1)(a) N  
of the Ordinance. For the avoidance of any doubt, given that the Tribunal has been provided O  
with a copy of the Confidentiality Agreement by Xinte, the Tribunal will not give any O  
weight to or place any reliance on that document at all. P  
P

Q 32. In light of that determination, the contingent application to adduce the Q  
witness statement of Madam Guo Junxiang falls away. R  
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U <sup>5</sup> Bundle 2, page 626 at A. 1) and Bundle 3; pages 1191-1209, at page 1199 clause 2 (b). U



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*Costs*

33. Given that no application has been made in fact on behalf of Mr. Choi to adduce the witness statement, there is no merit in Mr. Li's submission that the Tribunal should "dismiss Choi's application to adduce Guo WS with costs."

34. Having regard to the fact that the submissions of the parties resulted from the initiative of the Tribunal itself, in my judgement it is appropriate to make no order as to costs.



Mr. Michael Lunn, GBS  
(Chairman)



Mr. Paul Shieh, SC and Mr. José Maurellet, SC, leading Mr. James Man, Mr. Keith Chan and Mr. Cedric Yeung, instructed by Jingtian & Gongcheng LLP,  
for the Applicant

Mr. Laurence Li, SC, leading Mr. John Leung and Mr. Jonathan Fung, instructed by the SFC,  
for the Respondent.