

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, GBS, Chairman

Date of Hearing: 6 December 2022

Date of Ruling: 9 December 2022

RULING

The application

1. This an application by Mr. Choi Chi kin, Calvin (Mr. "Choi") to expunge various passages, together with the exhibits referred to therein, in the witness statement of Mr. Andy Lee filed with the Tribunal by the Securities and Futures Commission (the

A “Commission”) on 19 October 2022. Having joined UBS AG (“UBS”) on 15 April 2019,
B Mr. Andy Lee is the managing director and head of APAC Investment Bank Compliance
C and Operational Risk at UBS. He was not personally involved in the report made by UBS
D to the Commission on 11 April 2017 nor in the investigation commissioned by UBS and
E conducted by Davis Polk & Wardwell (“Davis Polk”), which report was forwarded to the
F Commission on 3 August 2017. He said that he was familiar with the internal requirements
G of UBS with respect to conflicts of interest, in particular the relevant policies and
H procedures in force at the material time.
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J 2. The application was initiated by letter to the Tribunal of Mr. Choi’s
K solicitors, Jingtian & Gongcheng LPP, dated 8 November 2022.¹ The substantive hearing
L of Mr. Choi’s application for Review is fixed to commence on 12 December 2022 and
M continue until 16 December 2022, which dates were fixed by the Tribunal’s Directions on
N 20 April 2022.

O *Notice of Application for Review*

P 3. By a Notice of Application for Review, filed with the Tribunal on
Q 4 February 2022, pursuant to section 217 of the Securities and Futures Ordinance (“SFO”),
R Mr. Choi said that he was a person aggrieved by the specified decision of the Commission,
S namely a Decision Notice, dated 14 January 2022 in which Mr. Choi said that it was alleged
T *inter alia* that he:

U “2. ...was involved in the business of LR capital Management Company
V (Cayman) Ltd (“**LR Cayman**”) and/or its group companies (**collectively**
“**LR Capital Group**”) between around November 2014 and December
2015 during his employment at UBS AG; such involvement exceeded the
scope of a typical coverage banker, potentially placing him in a position of
conflict with UBS AG and/or its clients;

3. ... failed to disclose to UBS AG the actual or potential conflicts of
interest;”.

¹ Mr. Andy Lee's statement, paragraphs 20, 21, 44-48, 58, 64-67, 89 and a phrase in paragraph 90.

A 4. The Notice stated that it was alleged that Mr. Choi was “guilty of
B misconduct and not fit and proper to be a licensed person” and that the Commission had
C decided to prohibit him from doing various acts.”²

D 5. As relief, Mr. Choi sought declarations that various acts of the Commission
E were *ultra vires* its statutory powers, namely:

- F • the investigation commenced by the Commission, pursuant to section
G 194(1)(b) of the Ordinance;
- H • the Notice, dated 17 October 2017, issued pursuant to section 183(1) of the
I Ordinance, requiring Mr. Choi to attend an interview;
- J • the Notice of Proposed Disciplinary Action (the “NPDA”), issued pursuant
K to sections 194 and 196 of the Ordinance, dated 16 December 2020; and
- L • the Decision Notice, issued pursuant to sections 194 and 196 of the
M Ordinance, dated 14 January 2022.

N 6. In addition, Mr. Choi sought that the Notice, dated 17 October 2017, the
O NPDA and the Decision Notice be set aside.

M *The Tribunal’s Directions: the filing of evidence*

N 7. On 10 March 2022, the Tribunal issued Directions for the conduct of the
O proceedings. Pursuant to those Directions, on 25 May 2022 the Commission filed with the
P Tribunal, “...such evidence as they seek to rely upon”. That material included 28,736 pages
Q of documents, but no witness statements. On 29 June 2022, Mr. Choi filed the evidence
R that he sought to rely on, namely the witness statements of Mr. Kingsley Chan, Mr. Gao
S Yau and Mr. Cong Lin. Having obtained leave to serve its evidence in reply later than the

S ² “Applying to be licensed or registered;
T Applying to be approved under section 126(1) of the Ordinance, as a responsible officer of a licensed
U corporation;
V Applying to be given consent to act as an executive officer of a registered institution under section 71C
of the Banking Ordinance; and
Seeking through a registered institution to have your 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 regulated activity.”

A required date of 27 July 2022, the Commission filed a witness statement of Mr. Andy Lee,
B together with related exhibits, as required on 19 October 2022.

C *Mr. Choi's application*

D *(i) Letter of 8 November 2022*

E 8. In their letter to the Tribunal, dated 8 November 2022, Messrs Jingtian &
F Gongchen, Mr. Choi's solicitors, invited the Tribunal to expunge stipulated passages in Mr.
G Andy Lee's statement which related to Mr. Choi's "...failure to disclose his family
H connections or relationships to his former employer, UBS AG."

I 9. In support of that application, it was contended that the Commission was
J not entitled to rely on that alleged failure of Mr. Choi, given the basis on which Mr. Choi
K had been disciplined by the Commission as set out in the NPDA and the Decision Notice.

L 10. In the NPDA, the Commission had stated:³

M "Whilst the SFC does not consider that disciplinary action is warranted in
N relation to the allegation in paragraph 9(a) above, the available evidence
O suggests that your involvement in the business of the LR Capital Group
P exceeded that of a typical coverage banker, potentially placing you in a
Q position of conflict of interest with UBS AG and/or its clients, and you
R failed to disclose to UBS AG the actual or potential conflicts of interest."

S 11. Earlier in the NPDA the Commission had stated that UBS AG had reported
T the matter to the Commission on 11 April 2017, including their suspicions as to Mr. Choi's
U conduct, in particular that he was suspected of:

V "... breaching the Code of Conduct by reason of:

- (a) your failure to declare connections of your family members in certain transactions in which the LR Capital Group was involved as investor (actual or potential) of UBS AG's clients; and
- (b) your involvement in the day-to-day business of the LR Capital Group."

12. In its Decision Notice, the Commission stated:⁴

³ NPDA, paragraph 13.

⁴ Decision Notice, paragraph 43.

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“As stated in paragraph 13 of the NPDA, we do not consider that disciplinary action against you is warranted in relation to your failure to declare connections of your family members in the transactions in which the LR Capital Group was involved as investor (actual or potential) of UBS AG’s clients. Contrary to your understanding of the allegations against you, we did not allege in the NPDA that the interests of your father, mother, brother and brother’s fiancée give rise to a material interest for you in the transactions. Instead, our disciplinary action is based on your own involvement in the business of the LR Capital Group which exceeded the scope of a typical coverage banker, potentially placing you (rather than your father, mother, brother or brother’s fiancée) in a position of conflict of interest with UBS AG and/or its clients.”⁵

13. By reference to those statements of the Commission, it was asserted on behalf of Mr. Choi that:

“...it is plain that the Commission did not invoke its disciplinary power against the Applicant on the basis that he failed to disclose his family connections to UBS; nor did the SFC make any allegation (let alone any finding) in this respect, whether in the NPDA or the DN. Indeed, the SFC expressly disavowed this as a ground warranting disciplinary action against the Applicant.”

14. In consequence, it was submitted that:

“...allegations concerning his alleged failure to disclose family connections are outside the scope of these reviews proceedings and therefore irrelevant, in that: (i) the present review is solely concerned with the merits of the SFC’s findings in support of its disciplinary actions against the Applicant; and (ii) the SFC made no finding in respect of the aforesaid failure, let alone based its disciplinary actions upon it.”

15. Finally, it was submitted of the impugned passages in the witness statement of Mr. Andy Lee that, “... are inadmissible and should therefore be expunged.”

16. It was asserted that the application to the Tribunal was made only after correspondence on 1 and 3 November between Jingtian & Gongchen and the Commission,

⁵ There is no dispute that was a reference to Representations made by Mr. Choi’s then solicitors, Messrs Tang, Lai & Leung, in a letter to the Commission, dated 16 April 2021. Those Representations included the assertion:

“The main basis for the claimed conflict of interest in relation to both projects appears to be the claim that the interests of Mr. Choi’s father, mother, brother and brother’s fiancée gave rise to a material interest for Mr. Choi in the transactions. This is questionable for three reasons.”

A in which the latter had declined to confirm that it would not rely on Mr. Choi's "...alleged
B non-disclosure as a basis for upholding its disciplinary decision" at the hearing.

C 17. It was contended that, as a result, the Commission had, "...evinced a clear
D intention to invoke (Mr. Choi's) alleged non-disclosure of family relationships to justify
E its disciplinary action". In consequence, it was claimed that thereby Mr. Choi had been
deprived of the "opportunity to properly address those allegations in the evidence filed."

F *(ii) The applicant's submissions*

G 18. In the applicant's written Reply Submissions, dated 21 November 2022, Mr.
H Paul Shieh SC asserted that it was only in its Opening Submissions, dated 14 November
I 2022, that the Commission "...does now positively rely on the non-disclosure of family
J connections as giving rise to a conflict of interest".

K 19. It was Mr. Shieh's primary submission that allegations of non-disclosure of
L family connections fell outside the scope of the review. That went to the Tribunal's
M jurisdiction. So, the passages identified in Mr. Andy Lee's statement, which addressed
N those matters, were inadmissible and irrelevant and fell to be expunged. In the alternative,
O he argued that they were not otherwise relevant or properly admitted. Further, Mr. Choi
P had been prejudiced by the manner in which the Commission conducted its case.

Q 20. In support of those submissions, Mr. Shieh advanced four heads of
R argument:

- S (i) Jurisdiction of the Tribunal;
T (ii) the evidence was irrelevant to other grounds;
U (iii) the evidence was outside of the scope of leave to reply; and
V (iv) prejudice to Mr. Choi.

(i) Jurisdiction

21. Mr. Shieh acknowledged that there was no dispute that the review was to be
approached by the Tribunal *de novo* in a "full merits review", which the Tribunal may

A conduct “as if it were the original decision-maker”.⁶ However, he submitted that that did
B not mean that the Tribunal had the power, “...to engage in a roving enquiry of whatever
C matters which the SFC may seek to put before it”, regardless of whether they were matters
D to which the SFC had regard in making the disciplinary decision.

D *Relevant statutory provisions*

E 22. Of the relevant statutory provisions, Mr. Shieh invited the Tribunal to note,
F that section 216(1) provided that the Tribunal had jurisdiction to review “specified
G decisions” and submitted that the powers of the Tribunal under section 218(2) and (3) were
H incidental to a review of a specified decision. The broad powers of the Tribunal under
I section 219 may only be exercised “for the purposes of a review”.

J 23. Section 215 provided that a “specified decision” included decisions of the
K Commission, as set out in Part 2 of Schedule 8 of the Ordinance. For current purposes, the
L relevant specified decisions were the decisions of the Commission, pursuant to section 194
M and section 196 of the Ordinance, namely its determination that Mr. Choi was not a “fit
N and proper person” and the order that Mr. Choi be prohibited from applying to be licensed
O or approved of in various capacities or to have his name entered in a Monetary Authority
P register.

Q 24. Section 198 (1) provided that the Commission shall not exercise its powers,
R *inter-alia*, under section 194 and section 196 without first giving the person, in respect of
S whom the power is to be exercised, the reasonable opportunity of being heard. In
T compliance with that provision, the Commission had provided the NPDA to Mr. Choi.

U 25. Section 198(3) required that when the Commission exercised its powers,
V *inter-alia*, under section 194 and section 196 it was required to give notice in writing to the
person in respect of whom the power was exercised, including, *inter-alia*, “...a statement
of the reasons for which the decision is made”. In compliance with that provision, the
Commission had provided the Decision Notice to Mr. Choi.

⁶ *Tsien Pak Cheong, David v Securities and Futures Commission* [2011] 3 HKLRD 533, at paragraphs 32 and 52.

A 26. Mr. Shieh submitted that necessarily encompassed in that requirement was
B a requirement that the Commission state the factual basis for the decision. He contended
C that it followed that a review by the Tribunal:

D "...ought not to venture into an enquiry beyond the factual basis upon
E which the SFC made the specified decision, or to seek to uphold the decision
F on a basis that was not relied upon (let alone expressly disavowed) by the
G SFC in its decision. Otherwise, the SFC would be going beyond its function
H of reviewing the specified decision."

I 27. In support of that submission, he cited the statements made by the Tribunal
J in its Reasons for Determination in *Moody's Investors Service Hong Kong Limited v*
K *Securities and Futures Commission*⁷, of which Mr. Michael Hartmann NPJ was Chairman.
L There, having acknowledged that the Tribunal was required to make a full merits review,
M conducting it as if it is the original decision-maker, it was stated:⁸

N "...this does not mean, of course, that the Tribunal has jurisdiction to
O commence a new general enquiry if it so wishes, striking out into uncharted
P territory. The full merits review is limited to matters relevant to the SFC's
Q findings".

R 28. Subsequently, the Tribunal acknowledged of its powers, "...it does not
S follow that it has the power to broaden the matters on to which it is obliged to enquire."⁹

T (ii) *The evidence was outside the scope of leave to file evidence in reply*

U 29. Having invited the Tribunal to note that in its Directions, dated 10 March
V 2022, the respondent Commission had been permitted to file material in reply, "...in
response to that filed by the applicant", Mr. Shieh said that the none of the three witness
statements filed by Mr. Choi on 27 July 2022, addressed the issue of Mr. Choi's, "...alleged
failure to disclose family connections." It followed that, in so far as Mr. Andy Lee's
statement addressed matters that were not raised in those three witness statements, it was

⁷ *Moody's Investors Service Hong Kong Limited v Securities and Futures Commission* (SFAT No. 4 of 2014; unreported, 31 March 2016.)

⁸ *Ibid.*, at paragraph 121.

⁹ *Ibid.*, at paragraph 154.

A not a response to the evidence filed by Mr. Choi. Accordingly, that evidence was outside
B the parameters of the leave to file such evidence as stipulated in the Directions.

C *(iii) the evidence was irrelevant to the other grounds of review*

D 30. Mr. Shieh submitted that, if the Tribunal was to determine that the
E allegations regarding non-disclosure of family connections, were outside the scope of this
F review, then the evidence regarding Mr. Choi's family connections was irrelevant to the
G other grounds of review. In the first place, Mr. Andy Lee had no personal knowledge of
H any of the relevant events or of the Commission's investigation or of the Notice issued to
I Mr. Choi requiring him to attend an interview. There was no dispute that Mr. Andy Lee
J did not become an employee of UBS AG until 15 April 2019.

K 31. The suggestion by the SFC that Mr. Choi had raised belatedly a defence,
L through the account of events in the witness statements of the three witnesses, was
M disingenuous. In the Representations made by his then solicitors in the letter, dated 16 April
N 2020, to the Commission the ambit of Mr. Choi's role as a 'coverage banker', providing
O support for LR Capital's business was canvassed at length. In particular, it had been
P asserted that that role was "...liable to give rise to some level of conflict with UBS's other
Q customers", and it was contended that UBS AG "...did not appear to impose strict limits
R on the assistance a relationship banker might provide to a client."¹⁰

S *(iv) Prejudice to Mr. Choi*

T 32. Mr. Shieh submitted that Mr. Choi had suffered clear prejudice in the
U preparation of his case given the position taken by the Commission in both the NPDA and
V its Decision Notice that it did not intend to rely on allegations of non-disclosure of family
connections in exercising the power to discipline Mr. Choi. The three witness statements
filed in Mr. Choi's case had been prepared on that basis. The fact that amongst the more
than 28,000 pages of documents filed in its case by the Commission on 25 May 2022
contained material that evidenced the fact of Mr. Choi's familial connections was nothing
to the point. In essence, the rhetorical question was posed: why should Mr. Choi anticipate

¹⁰ Messrs Tang, Lai & Leung's letter to the Commission, dated 16 April 2021, at paragraph 24.

A that the Commission would seek to rely on material that supported an allegation that had
B been expressly disavowed by the Commission?

C 33. Although Mr. Andy Lee's statement had been filed on 19 October 2022,
D relevant to the fact that those representing Mr. Choi only raised the issue of whether or not
E the Commission proposed to rely on allegations of family connections and failure to
F disclose them in its letter to the Commission of 1 November 2022 was the fact that, without
G any notice to him, Mr. Choi's previous solicitors had ceased business and Mr. Choi had not
H engaged his current solicitors until 18 October 2022. In those circumstances, the matter
I had been raised as soon as might realistically be expected.

J 34. Mr. Shieh said that in those circumstances, Mr. Choi faced a dilemma: to
K seek an adjournment or to seek, under pressure of time, to address the position now adopted
L by the Commission. That dilemma itself was unfair prejudice.¹¹

M *The Commission's submissions*

N *Futility*

O 35. At the outset of his oral submissions, Mr. Lawrence Li SC submitted that
P Mr. Choi's application to expunge various passages in the witness statement of Mr. Andy
Q Lee was an exercise in futility. It was futile because, as he readily acknowledged, in his
R statement Mr. Andy Lee primarily sought only to give focus to underlying documentation
S that had been filed by the Commission as its case on 25 May 2022. Having become an
T employee of UBS AG on only 15 April 2019, he was unable to give first-hand evidence of
U any of the relevant events.

V 36. No issue was taken by Mr. Shieh with the accuracy of the Annotated version,
handed to the Tribunal during oral submissions, of the Appendix filed in Mr. Choi's reply
submissions, helpfully setting out the passages in Mr. Andy Lee's statement it was sought
to expunge. The Annotated references provided supporting references, from the underlying
documents filed by the Commission, of the statements made in the various paragraphs in

¹¹ *Wise Union Industries Limited v Hong Kong Science and Technology Parks Corporation* (HCAL 12 of 2009, 21 September 2009-A Cheung J at paragraph 9.)
Jose Miranda da Costa Junior v Lorenzo Yih (HCA 156 of 2010, 28 April 2014-Deputy High Court Judge Le Pichon, at paragraph 18.)

Mr. Andy Lee's statement in respect of which issue was taken. Merely expunging the passages in the statements left the underlying material extant.

Jurisdiction

37. As relevant to the understanding of the ambit of a hearing *de novo* in a full merits review, Mr. Li invited the Tribunal to note the description of the nature of a hearing *de novo* given in the judgment of Dawson J in in the High Court of Australia in *Harris v Caladine*¹²:

“That means that the court reviewing the order begins afresh and exercises for itself any discretion exercised below by the Registrar. The parties commence the application again, subject to any restrictions in the rules upon the calling of evidence or provisions relating to the use before the court of evidence called before the Registrar. A hearing *de novo* involves the exercise of the original jurisdiction and ‘the informant or complainant starts again and has to make out his case and call his witnesses’.”

38. Dawson J, went on to give a comparative description of the various forms of appeal that come before the courts ¹³:

“In an appeal *stricto sensu* the question is whether, upon the material before the tribunal below, the conclusion which was reached was correct. An appeal by way of rehearing involves the rehearing of the matter as at the date of the appeal, but upon the evidence called before the tribunal below, subject to a power to receive further evidence. On an appeal by way of rehearing the rights of the parties must be determined by reference to the circumstances, including the law, as they exist at the time of the rehearing. But an appeal by way of rehearing does not call for a fresh hearing as does a hearing *de novo*; the appeal court does not hear the witnesses again.”

39. Mr. Li submitted that there was no jurisdictional limit on the scope of the review before the Tribunal “...to only the basis on which the SFC came to its original decision”. He contended that the arguments advanced by Mr. Shieh incorrectly involved treating the application as an appeal *strictu sensu* or by way of rehearing. On the contrary, the essence of a full merits review was the power of the reviewing body to substitute a decision. That implies addressing all issues, so that it is in no way bound by what has gone before. In support of those submissions Mr. Li invited the Tribunal to note the observations

¹² *Harris v Caladine* (1991) 172 CLR 84, at page 124.

¹³ *Ibid*, at page 125.

A of the Editors of *'The Securities and Futures Ordinance (Cap. 571) Commentary and*
B *Annotations (2019)'*, at paragraph 217.08.

C *The proper reading of the Decision Notice*

D 40. Mr. Li submitted that it was incorrect to suggest on behalf of Mr. Choi that
E the Commission had excluded consideration of Mr. Choi's personal and familial
F connections to the LRC Group. In the Representations made to the Commission on Mr.
G Choi's behalf, those connections were not disputed.¹⁴ Rather, they were accepted, but it
H was argued that they did not give rise to any material interest on his part or to a conflict of
I interest. In its Decision Notice, the Commission had stated, "We do not consider that
J disciplinary action against you is warranted in relation to your failure to declare
K connections of your family members in the transactions in which the LR Capital Group
was involved as investor (actual or potential) of UBS AG's clients." Although the
Commission had chosen not to base its disciplinary action on Mr. Choi's failure to disclose
those connections, it had not excluded them. In any event, the Tribunal was not bound by
"...the SFC's reasoning or choice of bases for drawing its conclusion. Certainly, the
Tribunal must be able to consider (or reconsider) all the matters which the SFC considered".

L 41. The breadth of Mr. Li's invitation to the Tribunal is made apparent in the
M SFC's Opening Submissions, for the substantive hearing, dated 14 November 2022.¹⁵

N *Relevance of the evidence of Choi's familial connections*

O 42. In his oral submissions, Mr. Li submitted that, in any event, evidence of Mr.
P Choi's familial connections was relevant in five ways:

- Q (i) in relation to the relief sought by Mr. Choi- that the investigation
R commenced by the Commission; the Notice pursuant to section 183, dated
S 17 October 2017, to Mr. Choi that he attend an interview; the NPDA and
T the Decision Notice, namely that they were *ultra vires* and that the latter
U three notices be set aside;

T ¹⁴ The letter of Tang, Lai & Leung, dated 16 April 2021

U ¹⁵ *SFC's Opening Submissions*, paragraphs 136-141, 143.4, 146, 154, 157 and 164.4.

V 141 "... There was at least a real risk of conflict between Choi's personal and familial connections and MSPE and Xinte's interests in Project Oasis and Project Frontier."

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- (ii) in relation to the defence of consent of UBS's clients to Mr. Choi's conduct;
 - (iii) in relation to the requirement that the consent of UBS's clients was insufficient, it being necessary that UBS be informed of the circumstances so that they could decide if Mr. Choi's disclosure was sufficient;
 - (iv) in relation to an assessment of Mr. Choi's assistance to LR Capital; and
 - (v) in relation to the SFAT's duty to consider whether the evidence of Mr. Choi's conduct warrants disciplinary action.

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Prejudice to Mr. Choi

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43. Mr. Li submitted that the contention that Mr. Choi had suffered prejudice was without merit. The issue of the relevance of his familial relationships was a live matter in the investigation. It was detailed in the Davis Polk report. Although the Commission did not rely on Mr. Choi's familial connections as a basis for its decision, it had included documents and emails relevant to his familial connections in the material filed on 25 May 2022, being evidence upon which the Commission sought to rely. No application had been made to expunge that material. Mr. Choi must be taken to have known of the relevance of that evidence. He had not denied the evidence of familial connections. Rather, in his Representations it was argued that they did not give rise to a material conflict of interest. Insofar as Mr. Choi chose not to address that evidence in the evidence he filed, he bore the consequences.

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A consideration of the submissions

Jurisdiction

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44. There is no dispute that the review before the Tribunal is in respect of the Commission's specified decisions made, pursuant to section 194 and section 196, determining that Mr. Choi was not a fit and proper person and, in consequence, making various prohibition orders. It is clear that in the course of the investigation and then its consideration of the material, the Commission had available to it a large volume of material. Much of that material was provided by UBS and Davis Polk. Although the Commission's ultimate findings were relatively narrow, it is clear that they were made having regard to all the material available to it. As noted subsequently, the Commission found that Mr. Choi

A had acted improperly both as a deal team member advising UBS's clients as well as a
B coverage banker for the LRC Capital Group.

C 45. The statement made in the Reasons for Determination by this Tribunal in
D *Moody's* that this Tribunal does not have jurisdiction to "...commence a new general
E enquiry", but rather a full merits review is limited to "...matters relevant to the SFC's
findings" is apposite. The moot question is the ambit of matters relevant to its findings.

F 46. It is to be remembered that in the NPDA, the Commission had articulated
G its preliminary view as being that Mr. Choi was guilty of misconduct and not fit and proper
to be a licensed person because Mr. Choi:¹⁶

H "(a) (was) involved in the business of LR Capital Management Company
I (Cayman) Ltd (**LR Capital**) and/or its group companies (together,
J **LR Capital Group**) between around November 2014 and December
2015 during your employment at UBS AG; such involvement
exceeded the scope of a typical coverage banker, potentially placing
you in a position of conflict of interest with UBS AG and/or its
clients; and

K (b) (had) failed to disclose to UBS AG the actual or potential conflicts
L of interest."

M *Decision Notice*

N 47. In considering the issue of the jurisdiction of the Tribunal in this review it
O is important to take note of the matters to which the Commission said it had regard in
P reaching its determination. At the outset, the Commission addressed at great length the
Q Representations made on behalf of Mr. Choi in the letter of Tang, Lai & Leung, dated 16
R April 2021. It was noted that in inviting the Commission to withdraw the NPDA, arguments
S were advanced on the basis of (a) illegality; (b) irrationality; and (c) procedural impropriety.
T Those arguments were reflected in headings in the body of the Tang, Lai & Leung letter
and had been canvassed in the text: (a) paragraphs 2-10; (b) paragraphs 11-16; and (c)
U paragraphs 17-23.

V 48. Of Mr. Choi's familial connections, the Commission noted the assertion in
paragraph 26 of the Representations it was asserted that Mr. Choi's family interests in the

¹⁶ NPDA, paragraph 5.

A LR Capital Group did not raise any question of conflict.¹⁷ Then, it addressed the contention
B made at paragraph 31 of the Representations, namely:¹⁸

C “The main basis for the claim conflict of interest in relation to both projects
D appears to be a claim that the interests of Mr. Choi’s father, mother, brother
and brother’s fiancée gave rise to a material interest for Mr. Choi in the
E transactions.”

F 49. Noting that it was asserted that there were three reasons why that was
G questionable, the Commission summarised the arguments advanced in the
H Representations:¹⁹

I “(i) These types of familial relationships do not necessarily give rise to a
J relevant material interest as a matter of principle. UBS’ policies did
K not identify that the family and personal relationships of its employees
L might give rise to conflicts of interest with it and its clients.

M (ii) It is not clear that your mother’s interest in LRC Belt and Road
N Investments Limited, a cornerstone investor in Xinte’s IPO, could
O ever give rise to a conflict. It was in the commercial interests of Xinte
P to procure cornerstone investment.

Q (iii) Your father and brother only became shareholders of LR Capital
R subsequent to your resignation from UBS.”

S 50. Having identified the ambit of the Representations made on behalf of Mr.
T Choi, the Commission responded to those matters *seriatim*. In the context of Mr. Choi’s
U criticism of the Commission’s use of the Davis Polk Report, the Commission said, “... we
V have reviewed the underlying emails referred to in the Davis Polk report, including the
Emails.”²⁰ The term “Emails” was a reference specifically to emails between Mr. Choi and
Mr. Devon Fu, identified at paragraphs 20 to 39 of the NPDA.²¹ The Commission went on
to say, “...in reaching our preliminary view of your conduct in this matter, we considered
that the totality of the evidence (including the Davis Polk report and your evidence) before
us.”

¹⁷ Decision Notice, paragraph 13(c)(ii).

¹⁸ Decision Notice, paragraph 13(f).

¹⁹ Decision Notice, paragraph 13(f).

²⁰ Decision Notice, paragraph 37.

²¹ Decision Notice, paragraph 14.

A 51. Specifically, in respect of the 'Emails' exchanged between Mr. Devon Fu
B and Mr. Choi the Commission determined:²² B

C "The emails show that you acted improperly, in a manner beyond and C
D inconsistent with the scope of your responsibilities both as a deal team D
E member advising UBS's clients in Project Frontier and Project Oasis as well E
F as the coverage banker for the LR Capital Group. You failed to explain why F
G no questions of likely or actual conflicts arose out of your conduct. We do G
H not see any reason to refrain from taking the disciplinary action proposed in H
I the NPDA." I

F 52. Subsequently, the Commission repeated that finding²³ and added: ²⁴ F
G G

H "... your dealings with the LR Capital Group based on the available H
I evidence-the Emails show that you directed the decision-making of LR I
J Capital Financial Holdings Limited (**LR Capital Financial**) in connection J
K with Project Frontier-went beyond the proper scope of your employment K
L and role as coverage and relationship banker, and UBS was not aware of L
M your conduct at the time." M

N 53. Of course, in making that finding, the Commission is not to be taken as N
O having made it in isolation on the basis only of the Emails themselves. No doubt, they were O
P given context by all the other evidence to which the Commission had regard. P
Q Q

R 54. The statement made by the Commission in the NPDA that it did not consider R
S that disciplinary action was warranted in relation to the allegation made in the Davis Polk S
T Report, that Mr. Choi had failed to declare connections of his family members in certain T
U transactions in which the LR Group was involved as investor (actual or potential) of UBS U
V clients, is to be taken for what is stated in terms. No disciplinary action was warranted V
thereby. It did not state that the evidence of connections of Mr. Choi's family members
was irrelevant. It did not state that the fact that Mr. Choi did not declare them was irrelevant.
The fact that Mr. Choi's representatives engaged the Commission broadly on that issue in
the Representations evidenced their understanding that was the case. Obviously, that

²² Decision Notice, paragraph 14.

²³ Decision Notice, paragraph 37.

²⁴ Decision Notice, paragraph 38.

A engagement by Mr. Choi's representatives went beyond the matters the Commission stated
B it was considering. That resulted in those concerns being rebutted in the Decision Notice:²⁵

C "...we did not allege in the NPDA that the interests of your father, mother,
D brother and brother's fiancée give rise to a material interest for you in the
E transactions. Instead, our disciplinary action is based on your own
involvement in the business of the LR Capital Group which exceeded the
scope of a typical coverage banker..."

F 55. Again, it is to be noted that the Commission's statement were measured. It
G was not alleged that Mr. Choi's familial connections gave rise for him of a "material
interest" in the transactions. It did not state that they were irrelevant.

H 56. Clearly, evidence of Mr. Choi's familial connections relevant to the
I transactions was part of the extensive body material available to and considered by the
J Commission in making its determination. It was not alleged that it gave rise to a material
interest in Mr. Choi in the transactions.

K 57. There is a strong element of common sense in Mr. Li's submission that
L expunging references to evidence of Mr. Choi's familial connections from the witness
M statement of Mr. Andy Lee would be futile, since a very significant element of his evidence
N relevant to the issue of Mr. Choi's conduct was derived from and based on the primary
O documentation filed by the Commission in support of its case on 25 May 2022. There is no
P application to expunge the primary evidence.

Q 58. There is no dispute that Mr. Choi did not declare to UBS his familial
R relations. The controversial issue is whether he should have done so and whether, given
S the position that the Commission stated to Mr. Choi in the NPDA it took to that matter, it
T was relevant. Mr. Andy Lee stated in terms that he addressed "...the matters that *should*
U have been disclosed by Mr. Choi by reference to UBS's policy and procedures in place
V during the Relevant Period." (Emphasis added.)²⁶ In doing so, he gave his opinions as to
what disclosure ought to have been made by Mr. Choi.²⁷ Clearly, that evidence is highly
controversial.

²⁵ Decision Notice, paragraph 43.

²⁶ Mr. Andy Lee's witness statement, paragraph 59.

²⁷ Mr. Andy Lee's witness statement, for example at paragraph 65.

A 59. It is to be noted that in *Moody's* the issue of the jurisdiction of this Tribunal
B in the review was addressed in its Reasons for Determination, not in a Ruling in advance
C of the substantive hearing. That was a course that Mr. Li recommended to the Tribunal in
his oral submissions.

D 60. I do not accept that in filing Mr. Andy Lee's statement with the Tribunal the
E Commission did so outside the ambit of the leave to file evidence in reply given in the
F Tribunal's Directions. In filing the three witness statements with the Tribunal as evidence
G relied on in his case, Mr. Choi raised the issue of consent by the clients of UBS.²⁸ In his
witness statement, Mr. Andy Lee addresses that matter and seeks to give the issue relevant
context.

H 61. Further, I am satisfied that parts of the impugned passages of Mr. Andy Lee
I statement are relevant in any event on that issue. Relevant to the issue of consent are
J multiple matters, including: what was disclosed? To whom? What was not disclosed? What
should have been disclosed? Whose consent was required and for what?

K 62. I do not accept that Mr. Choi has suffered prejudice such that it can only be
L redressed by this Tribunal expunging the impugned passages in the witness statement of
M Mr. Andy Lee. As noted earlier, the primary documentary evidence to which Mr. Andy
Lee gives focus in his witness statement was filed with the Tribunal by the Commission as
evidence it relied on in its case on 25 May 2022. That included the Davis Polk report.

N *Conclusion*

O 63. Having regard to the submissions and in all the circumstances I refuse the
P application that the witness statement of Mr. Andy Lee be expunged in the manner sought.



Michael Lunn

Mr. Michael Lunn
(Chairman)

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²⁸ The witness statement of Gao Yu, dated 29 June 2022; page 11 834, at paragraph 10.
The witness statement of Cong Lin, dated 29 June 2022; page 11845, at paragraph 13.

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