IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 252

Magistrates' Appeal No 9173 of 2022

Between

How Soo Feng

… *Appellant*

And

Public Prosecutor

… *Respondent*

Magistrates' Appeal No 9189 of 2022

Between

Iseli Rudolf James Maitland

… *Appellant*

And

Public Prosecutor

… *Respondent*

JUDGMENT

[Criminal Law — Statutory offences — s 340 of the Companies Act (Cap 50, 2006 Rev Ed)]

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v
Public Prosecutor and another appeal

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4, 16 May, 17 August, 4 September 2023

8 September 2023 Judgment reserved.

Vincent Hoong J:

Introduction

1 The multiplication of a negative integer by a positive integer, no matter how large, results in a negative product. The same is true in finance. Entering into a loss-making contract many times over does not make that contract any less loss-making. The appellants, Mr Iseli Rudolf James Maitland ("James") and Ms How Soo Feng ("Sue"), were the directors and majority shareholders of The Gold Label Pte Ltd ("TGL PL"). TGL PL was the sort of company which started its Frequently Asked Questions in its sales pitches with the question: "Is this a Ponzi?"[1] It sold gold buyback contracts which the appellants now do not dispute were loss-making for the company. In terms of

[1] P75 (Record of Appeal (Amendment No. 2) ("ROP") at pp 4783–4788); P76 Question 1 (ROP at p 4791).

having an effect on its balance sheet, TGL PL's product was undoubtedly negative.

2 TGL PL managed to accumulate more than $120 million in revenue over 10 months of operation between 16 December 2009 and 7 October 2010, rewarding its directors handsomely in the process.[2] It did this through a combination of slick salesmanship and the timeless "business model" of using revenue from new gold contracts to fund its payouts under previous contracts. This, perhaps, explains the need for the question "Is this a Ponzi scheme?" in TGL PL's sales materials. It had charts and graphs showing that its business operations were complex – but this was just to hide the fact that even though the gold sold was real, TGL PL's means of generating a profit were entirely imaginary.

3 Of course, such a scheme was ultimately unsustainable. By the time the appellants initiated TGL PL's winding up on 7 October 2010, its liabilities had multiplied and it had accumulated unfulfilled contractual obligations to clients amounting to more than $76 million, with less than $500,000 left in its accounts.[3] The appellants were both charged for fraudulent trading under s 340(5) read with s 340(1) of the Companies Act (Cap 50, 2006 Rev Ed) (the "Companies Act"). They were convicted after trial, and each sentenced to three years' and 10 months' imprisonment. The appellants now appeal against their convictions and sentences. On appeal, they effectively concede that TGL PL was carried on for a fraudulent purpose. They raise a whole number of arguments, however, to show that they were not *knowingly* parties to the carrying on of its business for such a fraudulent purpose.

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2 P74 (ROP at pp 4085–4086).

3 P74 (ROP at p 4087).

4 Having heard parties and considered their submissions, I dismiss the appeals against conviction and sentence.

5 In sum, I find that the appellants' explanations for what they knew of TGL PL's business model do not add up when weighed against the objective documentary evidence and their admissions in their statements. As they knew that each buyback contract was inherently loss-making, their understanding of TGL PL's business model as using cashflow from loss-making contracts to enter into yet more loss-making contracts fundamentally revealed that they knew TGL PL's business model was unsustainable.

Background facts

6 TGL PL was incorporated in Singapore on 28 April 2009 and was in the business of selling gold bars under a buyback scheme (the "Gold Buyback Scheme").[4] Both Sue and James were directors and majority shareholders of TGL PL from 7 July 2009 to 15 November 2010.[5] For much of this time, they held 627,000 of the 1,227,000 ordinary shares in TGL PL between them, with James holding 27,000 shares and Sue holding the other 600,000.[6]

7 Wong Kwan Sing ("Gary") was TGL PL's other director from 20 November 2009 to 3 September 2010.[7] FTEG Pte Ltd ("FTEG PL"), of which

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4 Agreed Statement of Facts ("ASOF") at para 3 (ROP at p 15); James' Skeletal Arguments for the Appellant dated 7 February 2023 ("James' Submissions") at para 9.

5 James' Submissions at para 9.

6 James' Submissions at para 10; Notes of Evidence ("NEs") Day 7 Page 14 Lines 2–9 (ROP at p 570).

7 P2 (ROP at p 2659).

Gary was a director and a major shareholder, owned the remaining 600,000 shares in TGL PL from 24 February 2010 to 3 September 2010.[8]

The Gold Buyback Scheme

8 On 16 December 2009, TGL PL began to sell gold bars under the Gold Buyback Scheme promising guaranteed profits for participating clients.[9] The integral features of the scheme's function were as follows:

(a) TGL PL would purchase gold bars from retail sources at retail prices.[10]

(b) TGL PL would then contract to sell these gold bars to its clients at an average mark-up of 24% above retail price (the "TGL PL Selling Price").[11]

(c) During and/or after the contract term, TGL PL would make pay-outs to its clients equivalent to a percentage of the TGL PL Selling Price.[12]

(d) At the end of the contract term, TGL PL clients had two options. First, they could exercise a contractual sell-back option (the "Sell-Back Option") requiring TGL PL to buy back the gold bars at the

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8 ASOF at para 5 (ROP at p 15); James' Submissions at para 10.

9 ASOF at para 7 (ROP at p 15).

10 NEs Day 7 Page 137 Lines 15–30 (ROP at p 693).

11 ASOF at para 13 (ROP at p 16); P74 at para 69 (ROP at p 4083).

12 ASOF at paras 17–29 (ROP at pp 17–20).

TGL PL Selling Price. Second, in the alternative, they could opt to keep the gold bars.[13]

9 TGL PL sold these gold bars under two different types of plans, namely, Gold Delivery ("GD") and Gold Secured Storage ("GSS") plans, with durations of 3 months and 6 months respectively. Under the GD plan, clients would take physical delivery of the gold bars after entering into the contract with TGL PL and paying the TGL PL Selling Price. Under the GSS plan, the gold bars would be kept in Certis CISCO's bonded warehouse for the duration of the contract.[14] Further details about TGL PL's various plans are set out below:[15]

(a) 3-month GD plan: Clients would receive an initial 1.5% discount on the TGL PL Selling Price. In addition, they would receive a pay-out equivalent to 2% of the TGL PL Selling Price after 3 months. At the end of the contract term of three months, clients could exercise the Sell-Back Option or keep the gold bars. If they exercised the Sell-Back Option, TGL PL would pay the TGL PL Selling Price.

(b) 6-month GD plan: Clients would receive an initial 3% discount on the TGL PL Selling Price but would be charged Goods and Services Tax ("GST") amounting to 7% of the discounted price. In addition, they would receive a first pay-out equivalent to 3% of the TGL PL Selling Price after three months, and a second pay-out equivalent to 3% of the TGL PL Selling Price after six months. At the end of the

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13 ASOF at para 14 (ROP at p 16).

14 ASOF at para 15 (ROP at pp 16–17).

15 ASOF at paras 17–29 (ROP at pp 17–20).

contract term of six months, clients could exercise the Sell-Back Option or keep the gold bars. If they exercised the Sell-Back Option, TGL PL would pay the TGL PL Selling Price plus the amount in GST earlier paid by the client.

(c) 3-month GSS plan: Clients would receive an initial 2.5% discount on the TGL PL Selling Price but would be charged a Storage Service Fee ("SSF"), and GST on this SSF, amounting to 7% of the discounted price. In addition, they would receive a pay-out equivalent to 3% of the TGL PL Selling Price after three months. At the end of the contract term of three months, clients could exercise the Sell-Back Option or keep the gold bars. If they exercised the Sell-Back Option, TGL PL would pay the TGL PL Selling Price plus the amount in SSF and GST earlier paid by the client.

(d) 6-month GSS plan: Clients would receive an initial 3% discount on the TGL PL Selling Price but would be charged a Storage Service Fee ("SSF"), and GST on this SSF, amounting to 7% of the discounted price. In addition, they would receive a first pay-out equivalent to 3% of the TGL PL Selling Price after three months, and a second pay-out equivalent to 6% of the TGL PL Selling Price after three months. At the end of the contract term of three months, clients could exercise the Sell-Back Option or keep the gold bars. If they exercised the Sell-Back Option, TGL PL would pay the TGL PL Selling Price plus the amount in SSF and GST earlier paid by the client.

10 The details of the various plans are summarised below:

	Purchase price	**Pay-out(s)**	**Sell-back price**	**Net profit if Sell-Back Option exercised**
3-month GD plan	TGL PL Selling Price after 1.5% discount	2% of TGL PL Selling Price	TGL PL Selling Price	1.5% of TGL PL Selling Price (initial discount) 2% of TGL PL Selling Price (pay-out)
6-month GD plan	TGL PL Selling Price after 3% discount and 7% GST on discounted price	3% of TGL PL Selling Price (first pay-out) 3% of TGL PL Selling Price (second pay-out)	TGL PL Selling Price plus original GST	3% of TGL PL Selling Price (initial discount) 3% of TGL PL Selling Price (first pay-out) 3% of TGL PL Selling Price (second pay-out)
3-month GSS plan	TGL PL Selling Price after 2.5% discount and 7% SSF and GST on discounted price	3% of TGL PL Selling Price	TGL PL Selling Price plus original SSF and GST	2.5% of TGL PL Selling Price (initial discount) 3% of TGL PL Selling Price (pay-out)
6-month GSS plan	TGL PL Selling Price after 3% discount and 7% SSF and GST on discounted price	3% of TGL PL Selling Price (first pay-out) 6% of TGL PL Selling Price (second pay-out)	TGL PL Selling Price plus original SSF and GST	3% of TGL PL Selling Price (initial discount) 3% of TGL PL Selling Price (first pay-out) 6% of TGL PL Selling

				Price (second pay-out)

TGL PL's expenses

11 TGL PL incurred various expenses in operating the Gold Buyback Scheme. These included ordinary operating expenses such as rental costs and staff salaries.[16]

12 In addition, TGL PL engaged SWM Investment Pte Ltd ("SWM PL") to market the Gold Buyback Scheme on its behalf.[17] For every contract sold, TGL PL would pay SWM PL a sales commission of 1.5% of the contract value each month over the contract's duration.[18] Sue and James each owned one of the four ordinary shares in SWM PL, while James was also SWM PL's Managing Director.[19]

13 TGL PL also paid directors' fees to the appellants (estimated by Sue to be an average of $50,000 a month to each appellant)[20] and to FTEG PL from December 2009 to March 2010. These were based on a percentage of TGL PL's revenue and denominated in Singapore dollars.[21] For every contract sold, TGL PL would pay the appellants 0.5% of the total value of all contracts

16 ASOF at para 33 (ROP at p 20).

17 James' Submissions at para 12.

18 ASOF at para 32 (ROP at p 20); ROP at p 489.

19 ASOF at para 6 (ROP at p 15).

20 NEs Day 25 Page 90 Lines 5–8 (ROP at p 2092); NEs Day 25 Page 82 Lines 2–3 (ROP at p 2091).

21 P96 at p 11 (ROP at p 5133).

sold to clients for the first month, and 0.25% of the total contract value for each subsequent month of the remaining contract duration. TGL PL would also pay FTEG PL 1% of the total contract value for the first month, and 0.5% of the total contract value for each subsequent month of the remaining contract duration.[22]

TGL PL's investing activity

14 TGL PL did not engage in any investing activity except a time deposit of $1.9 million placed with Standard Chartered Bank on 29 June 2010. However, TGL PL fully withdrew the monies by 13 August 2010, before the maturity date of 29 September 2010. As a result, the 0.6% per annum interest under the time deposit was not earned.[23]

Developments

15 Following disputes between the appellants and Gary, Gary decided to leave TGL PL. On 3 September 2010, FTEG PL sold 300,000 of its TGL PL shares to Sue and James each for the sum of $250,000.[24] Gary also resigned as a director of TGL PL on the same date.[25] On 7 October 2010, James and Sue initiated a winding up of TGL PL.[26]

16 On 15 November 2010, Goldvine Investment Pte Ltd ("Goldvine Investment PL") acquired all of the appellants' shares in TGL PL. Goldmine

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22 Oral Judgment on Conviction ("Conviction Judgment") at para 12.

23 ASOF at para 34 (ROP at p 20); P22 (ROP at p 3093).

24 NEs Day 27 Page 51 Lines 22–30 (ROP at p 2310).

25 Respondent's Submissions dated 7 February 2023 ("Prosecution's Submissions") at para 15.

26 P11 (ROP at pp 2731–2748).

Investment PL was a company formed by PW1 Aw Chye Yen Gordon ("Gordon"), a former employee of TGL PL, along with two other investors for the purpose of acquiring TGL PL.[27] The appellants resigned as directors of TGL PL on the same date. TGL PL was eventually wound up through a creditors' voluntary winding up on 8 February 2011.[28]

17 Gary was charged, alongside the appellants, under s 340(5) read with s 340(1) of the Companies Act. His charge was framed in identical terms to the appellants' charges, save that the offending period was between 16 December 2009 and 3 September 2010 (instead of between 16 December 2009 and 7 October 2010). He would have been tried alongside the appellants in the same joint trial but he absconded to Malaysia before trial commenced. By the time he was apprehended, the appellants' trial had already been underway for 8 days.[29] Gary pleaded guilty to his charge and was sentenced by a different court to two years' and 10 months' imprisonment before the conclusion of the appellants' trial below. A second charge under s 103(5)(*c*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), for failing to attend court, was taken into consideration.

The decision below

18 Both appellants claimed trial in the District Court to the following identical charge:

> You… are charged that you, between 16 December 2009 and 7 October 2010, in Singapore, being a director of The Gold Label

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27 NEs Day 1 Page 62 Lines 3–7 (ROP at p 123).

28 P13 (ROP at pp 2752–2754).

29 Prosecution's Sentencing Submissions dated 8 September 2022 ("Prosecution's Trial Sentencing Submissions") at para 37 (ROP at p 6384).

> Pte Ltd (the "Company"), were knowingly a party to the carrying on of the business of the Company for the fraudulent purpose of selling gold bars under a buyback scheme promising returns when in fact the Company did not operate any substantive profit generating business and had no sustainable means to honour its payment and buyback obligations, and you have thereby committed an offence punishable under Section 340(5) read with Section 340(1) of the Companies Act, Chapter 50 (Revised Edition 2006).

19 The decisions of the District Judge ("DJ") in respect of the appellants' convictions and sentences are reported in *Public Prosecutor v Iseli Rudolf James Maitland and another* [2022] SGDC 204 and *Public Prosecutor v Iseli Rudolf James Maitland and another* [2022] SGDC 211 respectively.

20 The DJ observed that the charges under s 340(5) read with s 340(1) of the Companies Act required proof of the following two elements:[30]

> (a) First, that the business of TGL PL was carried on for the fraudulent purpose of selling gold bars under a buyback scheme promising returns when in fact TGL PL did not operate any substantive profit generating business and had no sustainable means to honour its payment and buyback obligations (the "Fraudulent Purpose"). This constituted the *actus reus* of the offence.
>
> (b) Second, that the appellants were knowingly parties to the carrying on of the business of TGL PL for the Fraudulent Purpose. This constituted the *mens rea* of the offence.

21 The DJ was satisfied that both elements were present in the set of offences committed by the appellants. First, the DJ noted that the term "fraudulent purpose" connoted an intention to go beyond the bounds of what

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30 Conviction Judgment at [2].

ordinary decent people engaged in business would regard as honest, or actions deserving real moral blame according to the current notions of fair trading amongst commercial men (see *Phang Wah v Public Prosecutor* [2012] 1 SLR 64 ("*Phang Wah*") at [24]).[31] In the DJ's view, the *actus reus* of the offence was made out for the following reasons:

(a) The Gold Buyback Scheme was inherently unprofitable.[32] Even if only 50% of clients had exercised the Sell-Back Option under the gold buyback contracts, TGL PL's own accounting department projected a loss of over $5.8 million for the period of December 2009 to 30 June 2010, with more than double those losses should all the clients have exercised the option.[33]

(b) TGL PL had no other profit-generating business or investments by which it could meet its obligations under the Gold Buyback Scheme.[34] Not only was no interest earned on the investment of $1.9 million placed with Standard Chartered Bank (see [14] above), the other sources of cash inflows such as liquidating its gold inventory to the market amounted to a total of only 8% of total fund inflow. The DJ further rejected the evidence of PW5 Lim Pei Sze ("Joanne") that TGL PL did investment through the purchase of excess gold bars, as this was contradicted by admissions in her own statement to the Commercial Affairs Department ("CAD"), her own emails to Gary,

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31 Conviction Judgment at [3].

32 Conviction Judgment at [13]–[15].

33 P92 (ROP at pp 5112–5114).

34 Conviction Judgment at [16]–[18].

and the fact that excess gold bars were of insufficient quantity and were retained for too short a time for them to generate returns.[35]

(c) In particular, TGL PL did not run any profit-generating formula ("the Formula").[36] TGL had hinged its sales pitch on its agents being able to explain that the Formula allowed it to be profitable and thus not a Ponzi scheme.[37] Despite this, multiple witnesses attested that either the Formula did not exist, or that it was merely a series of monetary transfers that did nothing to generate profits.[38] Neither was there satisfactory documentary evidence of how the Formula worked to generate profits.[39]

22 Key to these findings as to the financial viability of TGL PL was an unopposed expert report (the "Expert Report") prepared by PW6 Ng Chun Chun, a chartered accountant, which the DJ accepted.[40] The DJ agreed with the findings of the Expert Report that TGL PL was essentially running a Ponzi scheme and was thus carried on for the Fraudulent Purpose.[41]

23 Second, turning to the *mens rea* of the offence, the DJ observed that a finding of dishonesty was required, but noted that the relevant knowledge encompassed a situation where a person had turned a blind eye to the obvious

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35 Conviction Judgment at [18].

36 Conviction Judgment at [19]–[23].

37 Conviction Judgment at [19].

38 Conviction Judgment at [20].

39 Conviction Judgment at [21].

40 P74 (ROP at pp 4064–4698).

41 Conviction Judgment at [23]–[24].

(*Phang Wah* at [25]).[42] The DJ was satisfied that the *mens rea* was also made out for the following reasons:

(a) The Gold Buyback Scheme was modelled on similar gold buyback schemes operated by Genneva Sdn Bhd ("Genneva SB") and The Gold Label Sdn Bhd ("TGL SB") in Malaysia. Prior to the commencement of the Gold Buyback Scheme, the appellants were aware that Bank Negara had commenced criminal investigations into Genneva SB.[43] TGL SB's manager Joseph Goh ("Joseph") had also informed them that TGL SB's gold buyback scheme was unsustainable.[44]

(b) The appellants were aware, while the Gold Buyback Scheme was in operation, that TGL PL was using monies earned from the sale of new contracts to satisfy its obligations under older contracts.[45] The appellants were also aware at the same time that TGL PL had no other profit-generating business or investments.[46]

(c) The appellants had learnt in May or June 2010 that Gary and FTEG PL had stopped running the Formula and that TGL PL was suffering significant losses. Yet, they continued operating the Gold Buyback Scheme. This indifference to whether the Formula was being run belied the appellants' claim that it was crucial to the generation of

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42 Conviction Judgment at [4].

43 Conviction Judgment at [39]–[43].

44 Conviction Judgment at [44]–[46].

45 Conviction Judgment at [47]–[48].

46 Conviction Judgment at [49]–[53].

profits for TGL PL and suggested that they had been aware from the outset of its non-existence.[47]

(d) The appellants' subsequent conduct, in buying out FTEG PL's shares and initiating a winding up of TGL PL, suggested a desperation on their part to cover up their fraudulent scheme.[48]

24 In reaching this conclusion, the DJ considered that the Prosecution had run a consistent case in relation to both the appellants regarding the times at which they acquired the requisite *mens rea*,[49] and that the evidence of the appellants was both internally contradictory to their contemporaneous conduct and externally inconsistent with the objective documentary records.[50] The DJ also placed little to no weight on the evidence of Joanne to the extent that it was materially inconsistent with the documentary evidence.[51] This was mostly material which tended to exculpate the appellants. The DJ also considered that though Gary was an uncooperative witness, his statements that were substituted into evidence under s 147(3) of the Evidence Act (Cap 97, 1997 Rev Ed) (the "EA") did corroborate the other evidence led by the Prosecution that there was no investment activity in TGL PL to invest the proceeds of the gold buyback business.[52]

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47 Conviction Judgment at [54]–[56].

48 Conviction Judgment at [57]–[61].

49 Conviction Judgment at [36].

50 Conviction Judgment at [38].

51 Conviction Judgment at [37(a)].

52 Conviction Judgment at [37(b)].

25 The DJ thus found the appellants guilty and convicted them on the charges. Having done so, the DJ imposed a sentence of three years' and 10 months' imprisonment on each of the appellants for the following reasons:

(a) The foremost sentencing consideration was that of deterrence and retribution. A strong signal had to be sent to deter dishonest practices that profited at the expense of unwitting customers.[53]

(b) In terms of harm, the Gold Buyback Scheme took place on a massive scale and resulted in substantial losses. TGL PL had sold 3,510 contracts to 2,247 unique clients and generated about $121 million in revenue. The total amount of loss caused was $12,918,185. This figure was arrived at by deducting, from the aggregate value of unfulfilled contracts as at 7 October 2010 ($76,632,440), the aggregate value of the affected gold bars ($63,714,255).[54]

(c) In terms of culpability:

(i) The appellants exercised overriding control over TGL PL as its directors and majority shareholders.[55]

(ii) The appellants' sales and marketing efforts were crucial to the sale of contracts under the Gold Buyback Scheme.[56]

(iii) The appellants personally profited from their involvement in the Gold Buyback Scheme. They had received a total of $598,223.65 in directors' fees. SWM PL had also

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53 Oral Judgment on Sentencing ("Sentencing Judgment") at [3].

54 Sentencing Judgment at [5]–[6].

55 Sentencing Judgment at [7].

56 Sentencing Judgment at [7].

earned a net profit of $448,215.85, while Sue's agency received almost $200,000 in sales commission.

(iv) The Gold Buyback Scheme was operated under a deliberate guise of legitimacy. TGL PL had represented itself as a legitimate business which abided by the laws of Singapore.[57]

(d) An uplift from the sentence imposed on Gary would not offend the principle of parity. The appellants had played a greater role than Gary within TGL PL. In addition, Gary's decision to plead guilty had saved significant judicial and prosecutorial resources, especially because it averted the need of a re-trial of the appellants' ongoing case.[58]

(e) The sentence imposed on the appellants was in line with precedents, particularly that of *Lim Hong Boon v Public Prosecutor* [2022] SGHC 200.[59]

The parties' cases

The Appellants' cases

26 The appellants raise several areas of appeal against their conviction, which I summarise below. I set out the parties' submissions in further detail where appropriate. The appellants broadly contend that the DJ erred in making the following two findings.

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57 Sentencing Judgment at [8].

58 Sentencing Judgment at [9]-[13].

59 Sentencing Judgment at [14]-[16].

27 First, they contend that the DJ erred in finding that the business of TGL PL was carried on for the Fraudulent Purpose. The DJ was wrong to find that the Gold Buyback Scheme was inherently unprofitable and that TGL PL had no other profit-generating business or investments by which it could meet its obligations under the Gold Buyback Scheme.

28 Second, they contend that the DJ erred in finding that the appellants were knowingly parties to the carrying on of the business of TGL PL for the Fraudulent Purpose. The DJ was wrong to reject the appellants' defence that they had honestly relied on Gary and FTEG PL to run the Formula for TGL PL.

29 In particular, James argues, *inter alia*, the following:

(a) the DJ erred in finding that James had been concerned about the legitimacy of Genneva SB's business model, when in fact he had been concerned about their being investigated for illegal deposit taking and money laundering activities;[60]

(b) James' financial commitments to TGL PL demonstrate an honest intention to deal responsibly with the business;[61]

(c) the DJ erred in finding that TGL PL seeking a legal opinion on their licensing requirements was meant to superficially lend support to its claim of being a legitimate business;[62]

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60 James' Submissions at para 36.

61 James' Submissions at paras 23–25.

62 James' Submissions at paras 48–61.

(d) James did not know of the unprofitability and/or non-existence of the Formula, and had been deceived by Gary into thinking there in fact was one;[63]

(e) the DJ erred in finding that Gary's statements had corroborative value despite making clear that he placed little weight on them;[64] and

(f) the DJ erred in failing to consider James' actions that were inconsistent with someone who knew he was running a company with no legitimate business, such as requesting for financial reports, contributing his own money, being prepared to stop sales permanently in May 2010, and forgoing his own money to buy over FTEG PL's shares in TGL PL.[65]

30 Sue argues, *inter alia*, the following:

(a) the DJ misconstrued Sue's knowledge and involvement in TGL's business;[66]

(b) the DJ erred in finding that Sue was a knowing party to running TGL PL for the Fraudulent Purpose, as she did not possess this knowledge at the material time, and various Prosecution witnesses gave corroborating evidence that she did subjectively believe that the Formula existed;[67]

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63 James' Submissions at paras 62–78.

64 James' Submissions at paras 79–83.

65 James' Submissions at paras 112, 147 and 171

66 Sue's Skeletal Arguments dated 7 February 2023 ("Sue's Submissions") at paras 10–22.

67 Sue's Submissions at paras 23–49.

(c) the DJ erred in believing portions of Gary's CAD statements despite finding Gary to be an uncooperative witness;[68] and

(d) the DJ erred in rejecting portions of Joanne's evidence, despite her evidence being corroborated by objective evidence and the testimony of other Prosecution witnesses.[69]

31 In relation to the appeal against sentence, the appellants raise the following issues:

(a) the DJ violated the principle of parity in imposing on the appellants sentences that were higher than the two years' and 10 months' imprisonment imposed on Gary. The appellants should instead have received substantially lower sentences than Gary;[70] and

(b) the DJ failed to credit Sue for her strict compliance with her bail conditions.[71]

The Prosecution's case

32 The Prosecution submits that the appeals should be dismissed. It argues that none of the DJ's findings can be said to be wrong or against the weight of the evidence, and further, that the sentences imposed cannot be said to be manifestly excessive.[72]

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68 Sue's Submissions at paras 50–52.

69 Sue's Submissions at paras 53–61.

70 Sue's Submissions at paras 67–69; James' Submissions at para 221.

71 Sue's Submissions at paras 61–66.

72 Prosecution's Submissions at para 4.

33 In relation to the first area of the DJ's decision as to TGL PL's viability, the Prosecution submits that the DJ rightly found that TGL PL's sole business was inherently unprofitable, based on the unopposed analysis of its business model by the accounting expert Ng Chun Chun and the admissions of the appellants.[73] There were also no other sources of profit that TGL PL could rely on, whether in the form of investment activity, cash inflows, or the Formula.[74]

34 As for the DJ's conclusion that the appellants had knowledge of TGL PL's business being carried on for the Fraudulent Purpose, the Prosecution takes the angle that the DJ's ruling in this second area was squarely justified for the following reasons:

(a) There is overwhelming evidence of the appellants' knowledge that there was no such Formula from the very start.[75] Not only did they admit in statements to the CAD that they knew that TGL PL's business model amounted to a mere money circulation scheme,[76] the reports that they would have received and read from PW4 Choy Mee Young ("Janet"), TGL PL's finance manager, would have made it obvious that no investment or profit-generating business was being conducted.[77]

(b) The appellants must have had reason to doubt the viability of the Formula after what had happened with Genneva SB;[78]

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73 Prosecution's Submissions at paras 46–47.

74 Prosecution's Submissions at paras 49–55.

75 Prosecution's Submissions at para 61.

76 Prosecution's Submissions at para 62.

77 Prosecution's Submissions at paras 69 and 73.

78 Prosecution's Submissions at paras 78–85.

(c) The appellants' continuation of operations even after it had been expressly brought to their attention that the Formula did not exist shows that they knew of its non-existence from the start;[79]

(d) The timing and circumstances of the appellants' purchase of FTEG PL's shares in TGL supports the finding that they knew that TGL PL was operating a fraudulent business.[80]

35 As to the appellants' sentences, the Prosecution argues that the sentences are not manifestly excessive as the DJ was correct to consider and place weight on the various aggravating factors present, namely the substantial losses caused by the scheme, the large amount of profit made by the appellants, their role in masterminding the scheme, and the sophistication of their scheme.[81]

CM 33

36 On 3 May 2023, James filed two criminal motions in the form of HC/CM 33/2023 ("CM 33") and HC/CM 34/2023 ("CM 34"). This was one day before his appeal was scheduled to be heard.

37 CM 33 was an application to adduce further evidence in the form of statements given to the CAD by one Shirley Tan ("Shirley"), who was a lawyer from WongPartnership LLP ("Wong Partnership") whom James had met with in 2009. James claimed the Prosecution had withheld from disclosing these statements in breach of its obligations under *Muhammad Nabill bin*

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79 Prosecution's Submissions at paras 94–99

80 Prosecution's Submissions at para 105.

81 Prosecution's Submissions at para 164.

Mohd Fuad v Public Prosecutor [2020] 1 SLR 984 ("*Nabill*") and sought both disclosure of the statements and their admission as fresh evidence on appeal.[82] After hearing from parties on this matter, I dismissed CM 33 on 4 May 2023. I briefly recapitulate my reasons for dismissing CM 33, as they may be helpful in clarifying the extent of the Prosecution's disclosure obligations under *Nabill*.

38 The central issue in CM 33 was whether the Prosecution owed a duty to disclose Shirley's statements to the CAD. *Nabill* sets out the Prosecution's duty in relation to material witnesses, who are defined as "witnesses who can be expected to confirm or, conversely, contradict an accused person's defence in material respects" (*Nabill* at [4]). Where there are material witnesses to a case, the Prosecution owes a duty to disclose their statements to the Defence (*Nabill* at [39]) regardless of whether they are favourable, neutral, or adverse to the accused person (*Nabill* at [41(a)]).

39 James argued that the statements ought to have been disclosed to him under the Prosecution's *Nabill* disclosure obligations. He submitted that *Nabill* had made clear that "witness statements which would have either materially confirmed or contradicted events raised by the accused were disclosable to the accused even before the Trial began".[83] According to James, there was a possibility that Shirley's statements would be able to corroborate James' defence that (a) he genuinely intended to run TGL PL sustainably,[84] (b) did not understand the business model for TGL PL and explained what he could to

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82 Affidavit of Iseli Rudolf James Maitland dated 3 May 2023 at para 3.

83 James' Submissions to Adduce New Evidence dated 3 May 2023 at para 13.

84 James' Submissions to Adduce New Evidence dated 3 May 2023 at paras 8 and 11.

WongPartnership, [85] and (c) he was concerned about Genneva SB because of potentially licensing and money laundering issues.[86]

40 In my view, this submission by James was a mischaracterisation of the holding of *Nabill* in two ways. First, *Nabill* pertains to disclosure of statements of material witnesses, not disclosure of material statements. This distinction is important. In a trial, there may be statements by various witnesses which contradict the accused's defence in material ways. But the *Nabill* disclosure obligations do not apply to these statements by virtue of that fact. They are limited to statements of material witnesses. Second, James' submissions conveniently omitted the requirement that the statements had to be from a witness who *can be expected* to confirm or contradict an accused person's defence. It is not sufficient that there is a mere possibility that a witness could confirm or contradict an accused person's defence; they must be in a position where they "can be expected" to do so.

41 On the facts, I was not convinced that Shirley was a material witness. It was telling that James himself did not attempt to call Shirley as a witness on his behalf. Given that Shirley's evidence would almost entirely pertain to what James would have personally told her, this was not a situation where James would have been prejudiced by the non-disclosure of her statements such that he would not have able to make an informed decision as to whether to call her. This served as strong evidence that James himself did not consider Shirley to be a material witness.

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85 James' Submissions to Adduce New Evidence dated 3 May 2023 at para 9.

86 James' Submissions to Adduce New Evidence dated 3 May 2023 at para 8.

42 I further found that it was unlikely that Shirley would be in a position where she could be expected to confirm or contradict James' defence in showing that he had either a genuine intention to run TGL PL sustainably, or to illustrate that he never fully understood the business model of TGL PL. The ambit of WongPartnership's engagement by TGL PL was limited to advice on licensing requirements.[87] This was an entirely separate issue from whether the business would be financially sustainable. There was no reason Shirley would be expected to have knowledge of James' intention in this regard.

43 Shirley would also not be in a position to confirm or contradict James' defence as to his state of knowledge of TGL PL's business model, as what he knew at the time of meeting with Shirley prior to the drafting of letters by WongPartnership was irrelevant to his defence. This is because a draft memorandum by WongPartnership outlining TGL PL's business model was emailed to James on 22 June 2009,[88] with the final letter from WongPartnership being sent to International Enterprise Singapore ("IE Singapore") on 23 September 2009.[89] Regardless of what James believed TGL PL's business model to be before that, or what he represented to Shirley during their meeting, the fact that were no corrections to the business model of TGL PL outlined in the memorandum and letter showed that James thought the version of the business model outlined in them to be true by the time TGL PL began selling gold bars on 16 December 2009.

44 Shirley was also not in a position where she would be expected to confirm or contradict James' defence in relation to his knowledge or

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87 P28 at para 1 (ROP at p 3141).

88 P27 (ROP at p 3126).

89 P30 (ROP at p 3172).

understanding of what had transpired with Genneva SB. This is mostly because it was never his defence at trial that he had explained his understanding of what transpired with Genneva SB to WongPartnership. This particular aspect of the meeting was not posed to James in examination-in-chief by his own counsel, nor covered in their closing submissions at trial.

45 I thus found that Shirley was not a material witness as she could not be expected to confirm or contradict James' defence in material respects. The *Nabill* disclosure obligations did not apply to her statements to the CAD.

CM 34

46 CM 34 was an application to amend the petition of appeal filed by James to include further points of appeal. The further points of appeal raised by James were as follows:[90]

> a. The learned Trial Judge had erred in adjudicating the matter on the basis of a joint trial where the appellants, James and How Soo Feng were treated as co-conspirators involved in a conspiracy to commit an offence where no such conspiracy element was reflected in the charge that Your Appellant faced.
>
> b. Further to the point of appeal made herein at a), Your Appellant was prejudiced to the effect that:-
>
> i. He did not know that in effect he had to meet a conspiracy charge; and
>
> ii. The Prosecution was in effect excused from having to prove the element of conspiracy; and
>
> iii. And as a result, Your Appellant has suffered severe and irreparable prejudice.

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90 Further Skeletal Arguments for the Appellant dated 3 May 2023 at para 5 (Affidavit of Iseli Rudolf James Maitland at pp 6–7).

47 I allowed CM 34 for reasons detailed in *Iseli Rudolf James Maitland v Public Prosecutor* [2023] SGHC 145 on 16 May 2023. Counsel for James subsequently amended their Petition of Appeal to include these further points.[91]

Decision on conviction

48 Two issues arise for determination on appeal in relation to the appellants' conviction. The first issue is whether the business of TGL PL was carried on for the Fraudulent Purpose. The second issue is whether the appellants were knowingly parties to the carrying on of the business of TGL PL for the Fraudulent Purpose.

Whether the business of TGL PL was carried on for the Fraudulent Purpose

49 As endorsed in *Phang Wah* at [24], the term "fraudulent purpose" connotes an intention to go "beyond the bounds of what ordinary decent people engaged in business would regard as honest" (*R v Grantham* [1984] QB 675) or involving "according to the current notions of fair trading among commercial men, real moral blame" (*Re Patrick Lyon Ltd* [1933] Ch 786 at 790). Based on the appellants' charges, the Fraudulent Purpose that TGL PL had been purportedly carrying on was that it had sold gold bars under a buyback scheme promising returns when in fact it did not operate any substantive profit-generating business and had no sustainable means to honour its payment and buyback obligations. It was not disputed that the Fraudulent Purpose, if true, went beyond the bounds of what ordinary decent people engaged in business would regard as honest.

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91 Letter from James to the Court dated 17 May 2023.

50 The appellants do not appear to seriously deny that the business of TGL PL had been carried on for the Fraudulent Purpose. This is despite Sue's Petition of Appeal stating that the DJ had erred in accepting the Expert Report's finding that the gold buyback contracts were not profitable and that TGL PL had no substantive profit-generating activities.[92]

51 During the trial, both appellants had conceded under cross-examination that the Gold Buyback Scheme was inherently unprofitable.[93] The Agreed Statement of Facts further stated that TGL PL did not engage in any other investing activity except for the aforementioned time deposit, on which no interest was ultimately earned.[94] James ultimately conceded in his closing submissions that "TGL [PL] did not operate any substantive profit generating business and had no sustainable means to honour its payback and buyback obligations to its customers".[95]

52 On appeal, James continues to accept that that the business of TGL PL had been carried on for the Fraudulent Purpose. In his written submissions, James states: "It is not disputed that the business operations of TGL were fundamentally unprofitable. The issue has always been whether James had known of this unprofitability such that James can be said to be dishonest in carrying on the business of TGL PL."[96]

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92 Petition of Appeal of How Soo Feng ("Sue's POA") dated 27 October 2022 at para 8(a) (ROP at p 33).

93 NEs Day 26 Page 45 Line 27 to Day 26 Page 46, Line 6 (ROP at pp 2196–2197); NEs Day 29 Page 11 Lines 13–21 (ROP at p 2467).

94 ASOF at para 34 (ROP at p 20).

95 James' Closing Submissions dated 10 August 2022 at para 6 (ROP p 7617).

96 James' Submissions at para 66.

53 Sue's position, however, is harder to discern. In her Petition of Appeal, Sue disputes the DJ's finding that the business of TGL PL was carried on for the Fraudulent Purpose. Specifically, she takes issue with the DJ's acceptance of the Expert Report, which she says failed to account for Gary's profit-generating "formula".[97] However, these objections are not expanded upon in Sue's written submissions. On the contrary, Sue appears to concede that the business of TGL PL was carried on for the Fraudulent Purpose: "With the benefit of hindsight, while it may seem obvious now that there was no real profit-generating formula to begin with, it is the Appellant's knowledge at the material time that should be considered."[98]

54 In any event, I am of the view that the DJ's finding was amply supported by the evidence. There are a limited number of ways in which the business model of TGL PL could conceivably have made a profit. None of these were successful.

The Gold Buyback Scheme was inherently unprofitable

55 One possibility is that TGL PL could have profited directly from the Gold Buyback Scheme if it earnt more money from an individual client under the scheme than it would have normally distributed to them over the lifetime of each contract. However, the probability of this scenario was negligible, as the cumulative sum of payouts distributed to directors, operating costs, as well as payouts to clients would mean that the initial revenue from each buyback contract was far exceeded by the resulting liabilities. As the Expert Report demonstrated, based on TGL PL's internal documents, all the contracts under

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97 Sue's POA at para 8 (ROP at pp 32–33).

98 Sue's Submissions at para 24.

the Gold Buyback Scheme were inherently unprofitable.[99] It bears repeating that the Expert Report was unopposed, and that the appellants did not call an expert of their own to controvert its findings. The DJ was thus right to find that the Gold Buyback Scheme was inherently unprofitable.

56 I do note that there were conceivable scenarios under which TGL PL could have turned a profit. As noted in the Expert Report, if gold prices appreciated significantly, it would become rational for clients not to exercise the Sell-Back Option as the value of selling their gold bars on the open market would exceed their returns from exercising the option. This would allow TGL PL to retain the profit from the marked-up TGL PL Selling Price. Even if clients did exercise the Sell-Back Option, TGL PL would then be able to liquidate the gold for a higher price on the open market and make a profit.[100] However, the amount by which gold prices needed to appreciate for this to happen was substantial. For a three-month GSS plan, for example, gold prices needed to rise by more than 17.9% over a three-month period.[101] This was several times higher than the average gold price appreciation during the Material Period, which was only 2.91%. There was thus no way that TGL PL could have turned a profit from an appreciation in gold prices during the Material Period. Even without the benefit of hindsight, it was highly improbable that such a drastic appreciation in prices would have occurred, let alone sustainably so. It is telling that there is no evidence in the appellants' internal correspondence between themselves and others in TGL PL that they had (a) possessed any evidence for future gold prices increasing, (b) evaluated for themselves the likelihood of gold prices appreciating, (c) possessed any

99 P74 at para 79 (ROP at p 4088).

100 P74 at paras 51 and 54 (ROP at pp 4078–4079).

101 P74 at para 51 (ROP at p 4078).

subjective opinion on the price of gold increasing, or (d) otherwise approached TGL PL's business on the basis that gold price appreciation was fundamental to their business model, despite bullishly touting the prospect of gold as an asset in their sales materials.

TGL PL did not profit from buying gold at wholesale prices and selling it at retail prices

57 A second possibility is that TGL PL could have profited from arbitrage based on an ability to buy gold at lower prices and sell it at higher prices. TGL PL's representations of its business model in this regard were inconsistent.

58 An initial version of TGL PL's business model was explained in a letter drafted by WongPartnership to the Monetary Authority of Singapore ("MAS") dated 31 August 2009 titled "Proposed Business of The Gold Label Pte. Ltd.". This involved TGL PL purchasing gold from gold factories, and selling it in the wholesale market: [102]

> Upon the receipt of the Purchase Consideration, the Company would utilise the Purchase Consideration to acquire gold from gold factories outside of Singapore (e.g. Switzerland and/or Malaysia) (the told Factories") at a lower factory price (compared to the prevailing market retail price of gold) (the "Factory Gold"), and sell the Factory Gold it had acquired in the wholesale gold market which the Company has access to at the prevailing market wholesale price for gold at a profit (the "TGL Back-End Gold Trade").

59 Another version of TGL PL's business model was outlined in a draft letter to IE Singapore dated 23 September. This described TGL PL as sourcing its gold bars from the wholesale market, and selling them at retail prices: [103]

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102 P24 (ROP at p 3104).

> Upon the receipt of the Purchase Consideration, the Company would utilise the Purchase Consideration to acquire additional gold for its gold stock (the "TGL Gold Stock") from gold wholesalers at a lower wholesale price (compared to the prevailing market retail price of gold) for sale to other Customers by way of the TGL Gold Retail Trade.

60 This second version was how TGL PL claimed to make money in its sales presentations, stating that "every sale of a gold bar creates a spread due to wholesale purchase versus retail sales".[104] TGL PL also made this representation in its compilation of Frequently Asked Questions, stating that how it made a profit "is like any other trade business, we made from a percentage between the retail and wholesale price".[105]

61 Of course, in reality neither version was true. TGL PL had no ability to buy gold at wholesale prices and was forced to buy gold at retail price.[106] It bought gold at retail prices from local retailers such as the United Overseas Bank and the Bank of China.[107] It thus could not profit from any difference between wholesale and retail prices. Moreover, to the extent that TGL PL did charge clients at a mark-up averaging 24% above the prevailing gold market price, this was not sufficient to allow it to turn a profit in individual contracts based on the findings of the Expert Report, as clients could always elect to have TGL PL buy back the gold bars at the marked-up price.[108]

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103 P30 (ROP at p 3174).

104 P75 (ROP at p 4781); P76 Question 2 (ROP at p 4791).

105 P63 (ROP at p 3592).

106 NEs Day 27 Page 18 Lines 19–21 (ROP at p 2277).

107 NEs Day 27 Page 17 Lines 28–32 (ROP at p 2276).

108 P74 (ROP at pp 4064–4698).

TGL PL did not profit through other sources of investment

62 A third possibility is that TGL PL could have made a profit, despite the inherent unprofitability of the Gold Buyback Scheme, by investing the liquid funds it received from selling gold with a rate of return higher than the loss it would make through the scheme.

TGL PL did not profit from investments with external parties

63 The DJ was right to find that TGL PL did not have any other sources of cash inflows, or any other investing activities with external parties besides a time deposit for $1.9 million placed with Standard Chartered Bank on 29 June 2010. This was plain from the Agreed Statement of Facts.[109] TGL PL's Income Statements from 1 July 2009 to 30 November 2010 also documented negligible revenue of less than $2,800 a month coming from "other income" outside the GD and GSS contracts.[110] The Expert Report, after examination of TGL PL's internal documents, concluded that TGL PL had no other investments that could have generated additional income.[111] PW7 Norman Lee Jia Yi ("Norman") and Janet similarly testified that based on their knowledge of TGL PL's activities during their period of employment, there were no other investments made besides the purchase of gold.[112] There was thus a wealth of evidence to prove that no investments with external parties were made by TGL PL.

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109 ASOF at para 34 (ROP at p 20).

110 P93 (ROP at pp 5115–5118); P94 (ROP at pp 5119–5120).

111 P74 at para 74 (ROP at p 4086).

112 NEs Day 11 Page 55 Lines 24–29 (ROP at p 1090); NEs Day 17 Page 112 Line 22 to Day 17 Page 114 Line 6 (ROP at pp 1565–1567).

TGL PL could not profit from the Formula as it consisted of internal transfers of money

64 The DJ was similarly right to find that the Formula could not have been a form of investment for TGL PL. The admissions at trial of various TGL PL employees, namely Janet, Norman, Joanne, and Gordon, cumulatively showed that there was simply no Formula guiding the making of investments for profit. All there was to the Formula was the mere internal transfer of monies amongst TGL PL's bank accounts.[113] To the extent that the Formula was just a series of internal transfers, this could not generate profits for TGL PL.[114]

65 It is convenient at this juncture to discuss the weight assigned by the DJ to Gary's statements to the CAD. As Gary was an uncooperative witness at trial, the Prosecution had applied to treat him as a hostile witness and cross-examine him under section 156 of the EA. After cross-examination, the Prosecution also applied under section 147(3) of the EA to admit Gary's CAD statements into evidence in substitution of his oral evidence, and under section 157(*c*) of the EA to impeach his credit as a witness. Although the DJ admitted these statements, he was "ultimately hesitant to place any significant weight on these statements as Gary was wholly unhelpful in assisting the court to understand the contents of those statements". At the same time, however, the DJ "[agreed] that Gary's statements corroborate the other evidence led by the Prosecution that there was no investment activity in [TGL PL] to invest the proceeds of the gold buyback business".[115]

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113 NEs Day 6 Page 54 Lines 2–12 (ROP at p 520).

114 NEs Day 6 Page 57 Lines 22–24 (ROP at p 523).

115 Conviction Judgment at [37(b)].

66 The appellants contend that the DJ erred in regarding Gary's CAD statements as corroborating evidence.[116] For example, James argues that the DJ alternately "[chose] to disregard" Gary's statement and to "[place] weight on" them as "corroborative evidence".[117] However, in my view, this objection mischaracterises the DJ's approach. The DJ was hesitant to "place any *significant* weight" (emphasis added) on Gary's statements but did not, contrary to James' characterisation, "disregard" them. There was therefore no inconsistency in assigning the same statements some, albeit limited, weight as corroborating evidence.

67 In any event, I am satisfied that there is sufficient evidence from the testimony of the other Prosecution witnesses and the available documentary evidence such that even without the corroborative weight of Gary's statements, the Prosecution had succeeded in proving beyond reasonable doubt that TGL PL had no investments with external parties that would allow it to profit from any interim proceeds from the gold buyback business, nor any ability to profit from the alleged Formula (see above at [63]). For the same reason, it is unnecessary to consider Sue's arguments on appeal regarding the DJ's treatment of Norman's evidence on the Formula.[118]

TGL PL did not profit from buying gold as an investment

68 The DJ rightly found that TGL PL did not profit from accumulating additional gold bars as a form of investment, as claimed by Sue.[119] No purchase of gold bars for investment was in fact made. Not only was this

116 Sue's Submissions at paras 50–52; James' Submissions at paras 196–205.

117 James' Submissions at para 196.

118 Sue's Submissions at para 43.

119 Conviction Judgment at [50].

attested to by Norman,[120] such a claim was contradicted by the documentary evidence.[121] The amount of excess gold bars TGL had in stock was barely sufficient to cover daily sales and could not have been an alternative source of investment.[122] James alleges that there are documents that show that a significant amount of gold was in fact stockpiled by TGL PL.[123] However, as the Prosecution notes, it is not clear if any of this gold was meant for investment.[124] In any case, these documents only show the amount of gold stock on 1 February 2010. By May 2010, this stock had all been whittled down to a marginal amount.[125] This indicates that the gold stock, even if it had been originally earmarked for investment in February, was no longer being used for that purpose by May.

69 James further argues on appeal that the documentary evidence produced by the Prosecution only relates to gold stock between 17 May 2010 to 21 May 2010, which leaves open the possibility that gold was being purchased at an earlier stage.[126] This is unconvincing. Even if gold stock had been accumulated for investment at the outset of TGL PL's business, this stock would have been liquidated by May 2010, which would have registered as incoming funds in the Daily Reports. But no significant incoming proceeds from the sale of gold outside of the buyback contracts were ever recorded in

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120 NEs Day 18 Page 3 Lines 17–32 (ROP at p 1601).

121 P54 (ROP at pp 3263–3319)

122 NEs Day 6 Page 65 Lines 15–18 (ROP at p 531).

123 James' Reply Submissions dated 26 May 2023 ("James' Reply Submissions") at para 11; P90 (ROP at p 5107).

124 Prosecution's Reply Submissions dated 5 June 2023 at para 8.

125 P54 (ROP at pp 3263–3319).

126 James' Reply Submissions at para 10.

the Daily Reports. This indicates that no accumulation of gold for investment was ever made to begin with.

TGL PL could not profit from buying additional gold bars to sell under the Gold Buyback Scheme

70 Finally, I consider that TGL PL could not have turned a profit by using the money from the Gold Buyback Scheme to purchase yet more gold bars to generate more sales. This was how both James and Sue understood the business to work, as recorded in their CAD statements.[127] However, I reiterate my conclusion above at [55] that the gold buyback contracts were all inherently unprofitable. Buying more gold to enter into yet more unprofitable contracts could not have helped TGL PL turn a profit no matter how many clients it had.

71 More specifically, the Expert Report noted that the only way that TGL PL would be able to make a profit was if the price of gold appreciated at an "extreme" rate.[128] As explained at [56] above, this did not happen during the Material Period, nor was such a price appreciation probable.

72 At best, entering into a succession of unprofitable contracts could have created temporary access to cashflow before the gold buyback contracts became due. However, it is clear from the above analysis that even if there was liquidity generated, the resulting funds were not invested in any way that could have offset or exceeded the losses from the Gold Buyback Scheme.

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127 P68 Question 92 (ROP at pp 3759–3760); P56 Question 61 (ROP at p 3340).

128 P74 at para 38 (ROP at p 4072).

TGL PL was carried on for the Fraudulent Purpose

73 Having considered that there was no conceivable way by which TGL PL could have been profitable, the only way that TGL PL would have access to fresh funds to make contractual payouts to existing clients would have to be through the sales generated from new clients. It was, effectively, a money circulation scheme. The unsustainability of this enterprise was eventually shown by its financial situation by the end of the offending period. As of 7 October 2010, TGL PL's unfulfilled contractual obligations to clients amounted to more than $76 million but it only had $452,364.28 in its bank accounts.[129] The DJ did not err in finding that the business of TGL PL was carried on for the Fraudulent Purpose.

Whether the appellants were knowingly parties to the carrying on of the business of TGL PL for the Fraudulent Purpose

74 Actual knowledge is required before a person can be said to be knowingly a party to carrying on business for a fraudulent purpose under s 340 of the CA (*Tan Hung Yeoh v Public Prosecutor* [1999] 2 SLR(R) 262 ("*Tan Hung Yeoh*") at [26] and [27]). This would also encompass turning a blind eye to the obvious (*Phang Wah* at [25], see also *R v Hunter (Peter) and another* [2022] 3 WLR 485 at [129] in the context of the similarly worded s 993(1) of the UK Companies Act 2006 (c 46)).

75 On appeal the appellants maintain their defence, which the DJ rejected at trial, that they lacked any fraudulent intention and had honestly relied on Gary and FTEG PL to run the Formula for TGL PL. For completeness, I note that they are not disputing that they were parties to the carrying on of the

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129 P74 at para 77 (ROP at p 4087).

business of TGL PL, which involves participation in, concurrence with, or the taking of some positive steps in the carrying on business (*Tan Hung Yeoh* at [30]).

76 It is important to note that the Fraudulent Purpose, as specified in the charges against the appellants, was that TGL PL did not operate any substantive profit generating business and had no *sustainable means* to honour its payment and buyback obligations. This is a distinct question from whether TGL PL did in fact honour its payment obligations during the time the appellants were involved in its business. It is therefore irrelevant, as argued by counsel for Sue in oral submissions, that she always believed the company was solvent. A belief in solvency would not necessarily equate to a belief that TGL PL's business model was sustainable. For example, if Sue had thought that TGL PL would be able to pay off its debts as they fell due because it had sufficient revenue from new contracts to pay off its liabilities under old ones (*ie*, a successful Ponzi scheme), this would constitute a belief that TGL PL would be solvent in the short-medium term, but not necessary a belief that TGL PL's business was sustainable.. In this regard, I note that it is crucial for James and Sue's defence that they had to have in mind at least one plausible mechanism by which they believed TGL PL would generate profit – carrying on its business without any such belief would necessarily entail knowing that TGL did not operate any substantive profit generating business and had no sustainable means to honour its payment and buyback obligations. Put another way, one cannot operate a business with a genuine belief as to its financial viability if they have no answer to the question "how is your business profitable?".

The appellants harboured doubts from the outset about the viability of TGL PL's business model

77 Even before the commencement of TGL PL's business, there is good reason to believe that the appellants were aware of problems with TGL PL's business model.

Bank Negara's raid on Genneva SB

78 On 21 July 2009, Bank Negara announced that it had raided and commenced investigations into Genneva SB for suspected deposit-taking and money-laundering activities. As TGL PL's business model had originated from Genneva SB, the DJ was of the view that this news would have raised sufficient cause for concern for the appellants.[130]

79 On appeal, the appellants argue that the DJ erred in so finding. According to them, as Bank Negara's investigations into Genneva SB were for suspected deposit-taking and money-laundering activities, and not for fraudulent trading, they had no reason to doubt the viability of its underlying business model.[131]

80 This claim is inconsistent with the appellants' admissions in their CAD statements and at trial. In his statements, James confessed to advising his clients to "get out of Genneva [SB]" after learning about the raid.[132] He admitted under cross-examination that this was because he was concerned that Genneva SB was not going to fulfil its obligations under its Gold Buyback

130 Conviction Judgment at [39]–[43].

131 Sue's Submissions at para 45; James' Submissions at para 28.

132 P67 Question 49 (ROP at pp 3745–3746).

Scheme,[133] Specifically, James heard rumours that Genneva SB's scheme inherently involved not paying client rebates[134] because its directors would be able to escape their obligations to pay these rebates to clients, whilst simultaneously repeating the benefit of revenue collected from clients.[135] This shows that James' concerns about Genneva SB at the time he started TGL PL were not limited to illegal deposit-taking or money laundering activities, but extended to whether its business model even involved paying back its clients' rebates.

81 Sue also admitted at trial to being concerned that Genneva SB was under investigation by Bank Negara. However, she asserted that she had received confirmation from Bank Negara that Genneva SB's business model was not illegal.[136] The Prosecution invited Sue to produce and admit evidence of this confirmation but Sue did not do so, leading the DJ to reject Sue's "bare allegation".[137] Although Sue contends in her POA that the DJ erred in so doing,[138] I am unable to find any reasonable basis to accept this convenient confirmation in the absence of any evidence for her claim.

82 In my view, both the appellants would have had good reason to doubt whether Genneva SB had been running a viable business model, and would have been aware that the same formula in Genneva SB was being run in TGL PL.

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133 NEs Day 28 Page 111 Lines 9–13 (ROP at p 2445).

134 NEs Day 28 Page 112 Lines 12–18 (ROP at p 2446).

135 NEs Day 28 Page 111 Line 25 to Day 28 Page 112 Line 9 (ROP at pp 2445–2446); P70 Question 273 (ROP at p 3814).

136 NEs Day 26 Page 79 Line 26 to Page 80 Line 20 (ROP at pp 2230–2231).

137 Conviction Judgment at [42(b)].

138 Sue's POA at para 9(bb).

Joseph's assessment of the viability of TGL SB's business model

83 Sometime in December 2009, Joseph informed James and Sue that, in the long-run, TGL SB would not be able to pay clients their returns. The DJ found that this would have raised doubts in the appellants' minds as to the sustainability of TGL PL's business model which, like that of TGL SB, had originated from Genneva SB.[139]

84 On appeal, the appellants rely on a meeting between TGL SB and Bank Negara representatives which took place sometime around August or September 2009. Representatives of TGL SB presented its business model during this meeting and asked if it was in violation of any law. As they were not told that it was, the appellants were satisfied that TGL SB's business model was not unlawful.[140]

85 However, James conceded under cross-examination that Bank Negara never communicated any express approval of TGL SB's business model. He had merely inferred from the general atmosphere at the meeting, which he described as "pretty okay", that TGL SB's business model was not unlawful.[141] I am unconvinced that James could have reached a conclusion on the legality of TGL SB's business model from, in modern parlance, what could at best be described as "vibes". It is therefore implausible that this meeting could have displaced the appellants' doubts as to the sustainability of TGL PL's business model arising from Joseph's negative assessment.

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139 Conviction Judgment at [45].

140 Sue's POA at para 9(ii)(dd) (ROP at p 37); James's Written Submissions at para 40–45.

141 NEs Day 29 Page 62 Lines 5–31 (ROP at p 2518).

The Sheng & Co Document

86 James argues that Gary had, during their initial meeting in a coffeeshop in 2009, brought out a document setting out the Formula for TGL PL. This document ("the Sheng & Co document") apparently was sufficient to convince the appellants that Gary indeed possessed a formula that would allow TGL PL to generate returns.[142] I disagree with James' argument that a plain reading of the Sheng & Co document shows that it sets out a means of generating returns that the appellants would have believed. It is apparent from the face of the document that the "Gold Concept" outlined in the document involved transfers between various entities such as "GCC", "IF", and GG". These entities were clearly internal departments of TGL PL, as they were under the label "Divide to 8 departments". To the extent that these departments were internal, transfers between them could not generate profits. The appellants knew this (see [134]–[137] below). The only other plausible mechanism outlined in the Sheng & Co document by which profits could have been made was through buying gold bars at wholesale prices and selling them at what was labelled "market price". However, this was not the means by which the appellants actually believed TGL PL made profits (see [142]–[144] below). The appellants thus could not have come to a genuine belief of the viability of TGL PL's business model from the information in the Sheng & Co document. Even if they had, the business model outlined in the document is inconsistent with their own explanations of how TGL PL functioned.

142 James' Submissions at para 65; P58 (ROP at p 3356).

The appellants' inquiries with local authorities could not dispel their doubts over the viability of TGL PL's business model

87 The appellants rely on their inquiries through WongPartnership with the MAS and IE Singapore as evidence of their honest desire to conduct TGL PL's business in a lawful manner.[143] However, the DJ found – and the appellants do not now deny – that these inquiries did not pertain to the viability of TGL PL's business model but to the applicability of various licensing regimes.[144] The inquiries thus could not assist in dispelling any doubts the appellants had as to whether TGL PL's business model would be viable.

88 James maintains, however, that these inquiries were suggestive of "the mindset of a proper businessman intending to conduct a lawful business".[145] He argues that these inquiries were conducted at considerable expense and, moreover, that they were commissioned in order to ensure that TGL PL would not be liable for the deposit-taking and money-laundering activities that Genneva SB had been investigated for.[146] It was only after he was so satisfied that the Gold Buyback Scheme was allowed to commence.

89 In my view, this line of argument is fairly tangential to the appellants' case. The fact that the appellants took steps to ensure the legality of TGL PL's business model in some respects does not evince a more general belief on their part that it was compliant with the law in all respects. Indeed, it is unsurprising that the appellants, knowing of Bank Negara's investigations into Genneva

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143 James' Submissions at paras 48–61.

144 Conviction Judgment at [66].

145 James' Submissions at para 60.

146 James' Submissions at paras 48–61.

SB, were keen to avoid liability for the same alleged deposit-taking and money-laundering activities. This does not demonstrate, however, that the appellants possessed an honest belief in the viability of TGL PL's business model. Regardless of the appellants' motives for carrying on the business of TGL PL, they would want to ensure that licensing requirements did not scuttle their plans before they carried out their business, fraudulent or not.

90 Further, it is not at all clear that the inquiries made by TGL PL were made in good faith. It provided no information on the back-end trades conducted by the company.[147] It also misrepresented its ability to buy gold at wholesale prices (see [57]–[61] above). This casts doubt that TGL PL's seeking of advice from WongPartnership was a genuine attempt to seek advice on its business model, rather than for the sake of being able to claim in its sales materials that such inquiries had been made.

91 To the extent that the appellants did seek to conform to the licencing requirements through such inquiries, I agree with the DJ that they did so to create a mere veneer of legitimacy. The appellants contend that the DJ erred in finding that TGL PL actively presented itself as a legitimate business on the basis of its inquiries with local authorities through WongPartnership.[148] James specifically argues that the slide identified by the DJ in TGL PL's sales materials, which states that "TGL abides by the laws of Singapore in its business operations and has sought further clarification with financial authorities", was only the 42nd slide in the presentation,[149] showing that little emphasis was placed on this claim. However, this fails to deal with the context

147 P27 (ROP at pp 3126–3139).

148 James' Submissions at para 55.

149 James' Submissions at para 56.

of where the claim was made – it is the first answer given in response to the Frequently Asked Question "Is this a Ponzi?", an undoubtedly important question that TGL PL would be desperate to answer in the negative.[150] Significant weight was placed on TGL PL's compliance with local regulation to show that it was a not a fraudulent scheme. Even though the references to TGL PL's conformance with licensing requirements were not numerous, they were deployed at key portions of its sales materials to convince potential clients that it was indeed a legitimate business.

92 My finding above is corroborated by the fact that the inquiries with local authorities were used to persuade TGL PL's own employees that it was not a Ponzi scheme. Sue testified of the following conversation with Joanne where she relied on the inquiries as proof of the viability of TGL PL's business model:[151]

> A Because before she joined the company, she actually asked me, "Are we running a ponzi?" I said, "Obviously not, because we have to go to our legal counsel to seek advice". Now if we have gone to WongPartnership and WongPartnership said, "No, Sue, this business model you can't do because you'll probably be running a ponzi", I can tell you now, Mr Wee, I probably would not have done this joint venture with FTEG, for sure, confirm.
>
> Q Okay. So what you are telling us is that prior to joining the company, Joanne had already considered the possibility that TGL was running a ponzi?
>
> A Yes, and that's the reason why she insisted she wants to sit down together with WongP.

93 For the above reasons, I am satisfied that the appellants' inquiries through WongPartnership to local authorities could not dispel their doubts

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150 P75 (ROP at p 4786).

151 NEs Day 26 Page 14 Lines 17–28 (ROP at p 2165).

over the viability of TGL PL's business model, and were in all likelihood carried out to create a veneer of legitimacy for TGL PL.

The appellants had sufficient access to information that would allow them to verify the viability of TGL PL's business model

94 The appellants dispute the DJ's finding that they were involved in TGL PL's business and operations. They contend that there was a clear separation of roles and responsibilities within TGL PL. Whereas they were involved in TGL PL's sales and marketing, Gary was in exclusive control of its business and operations. This separation, according to the appellants, lends credibility to their defence that they were genuinely ignorant of the non-existence of the Formula,[152] and thus of the unviability of TGL PL's business model.

95 Preliminarily, it bears mentioning that it is not a condition of liability that the appellants should have been actively or exclusively involved in TGL PL's business and operations, or that they had to have the same level of knowledge as Gary. Indeed, the DJ accepted that "[o]n a general level… there was a distinction in the roles played by James and Sue on the one hand, and Gary on the other".[153] In assessing whether the *mens rea* of the offence is made out, the question rather is whether a finding of dishonesty, including "blind-eye knowledge", can be supported on the facts (*Phang Wah* at [25]). Such knowledge could have been acquired through an involvement in TGL PL's business and operations but could equally have been acquired through other means.

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152 Sue's Submissions at para 10; James' Submissions at para 96.

153 Conviction Judgment at [31].

96 Bearing this in mind, I find that the appellants' involvement in TGL PL was sufficiently proximate. Though I accept they may not have been privy to the exact numbers calculated by Gary and the FTEG PL team, they had sufficient access to information that showed that TGL PL's business model operated no substantive profit generating business and had no sustainable means to honour its payment and buyback obligations.

97 To begin with, both Sue and James were involved in portions of TGL PL's operations where its business model was explained. Sue was involved in the following ways:

(a) From the outset, Sue attended several meetings with WongPartnership[154] where the business model of TGL PL was explained.[155]

(b) Sue was responsible, in James' words, for the marketing and sales of gold bars.[156] She recruited sales agents and worked with them to do TGL PL's marketing.[157] She vetted the Powerpoint presentations to agents done by the marketing team. She understood the contents of the presentations, which included explanations of the various gold buyback schemes offered by TGL PL.[158]

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154 NEs Day 25 Page 56 Lines 21–26 (ROP at p 2065).

155 P70 Question 354 (ROP at p 3832).

156 P70 Question 300 (ROP at p 3820).

157 NEs Day 25 Page 51 Lines 4–9 (ROP at p 2060).

158 NEs Day 25 Page 62 Lines 4–30 (ROP at p 2071).

98 James argues that his involvement was merely as a nominee director with no involvement in the day-to-day running of TGL PL.[159] I reject this argument. Though Gary and FTEG PL may have been primarily handling the finances of TGL PL, that does not mean that James did not also possess knowledge of TGL PL's operations. The following actions by James show that his level of involvement in TGL PL was more than that of a nominee director:

(a) He attended meetings with Bank Negara before the Material Period to explain the Formula and TGL PL's business model,[160] as well as the meetings with WongPartnership.[161]

(b) Sue described James on multiple instances as being, along with herself, in charge of sales and marketing of TGL PL's Gold Buyback Scheme.[162] She stated as much in her emails to Gary, describing TGL PL as a "Teamwork JV".[163] She also described Joanne as reporting to "the three of us, the directors", referring to herself, James, and Gary.[164] There is no reason why Sue would use such terms if James' involvement had purely been nominal.

(c) James also stated he had a personal interest in "checking [his] own company" and "wanted to know what Gary and Thomson were doing" through looking at the cash balances in TGL PL's bank

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159 James' Submissions at para 86.

160 NEs Day 29 Page 61 Line 23 to Day 29 Page 62 Line 4 (ROP at pp 2517–2518).

161 NEs Day 28 Page 43 Lines 2–25 (ROP at p 2377)

162 NEs Day 27 Page 39 Lines 1–4 (ROP at p 2298); NEs Day 25 Page 54 Lines 8–9 (ROP at p 2063); NEs Day 25 Page 62 Lines 15–20 (ROP at p 2071).

163 P46 (ROP at p 3231).

164 NEs Day 25 Page 59 Lines 16–19 (ROP at p 2068).

accounts.[165] Importantly, he requested daily reports by email (the "Daily Reports") to this effect, the significance of which I examine below.

The Daily Reports

99 The most noteworthy evidence of the appellants' involvement in TGL PL's business is their receipt of the Daily Reports from Joanne and Janet from no later than 22 January 2010. These reports contained information on TGL PL's bank balance, gold orders, and gold stock balance.[166]

100 The appellants claim that they did not pay much attention to Daily Reports, or that the extent of their engagement with these Daily Reports was with the sales figures reported in them. They also argue that it was not obvious from the contents of the Daily Reports that no investment or substantive profit-generating business was being conducted.[167]

101 These arguments were ventilated at trial and, in my view, rightly rejected by the DJ. It was highly unlikely that the appellants paid no attention to these Daily Reports when they were sent daily over a matter of months. Crucially, as Joanne stated in her email on 22 January 2010, the Daily Reports were sent "per James's [sic] request".[168] James himself admitted that this was because he had a personal interest in wanting to know what Gary was doing.[169] It is for this reason that I also reject the appellants' argument that they did not

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165 NEs Day 29 Page 20 Line 17 to Day 29 Page 21 Line 5 (ROP at pp 2476–2477).

166 P54 (ROP at p 3263).

167 Sue's Submissions at para 22; James' Submissions at para 129.

168 P35 (ROP at p 3183).

169 NEs Day 29 Page 20 Line 17 to Day 29 Page 21 Line 5 (ROP at pp 2476–2477).

pay attention to the Daily Reports as they were waiting for a separate financial report from FTEG PL to assess the performance of the Formula.[170] Even if they had been waiting for such a report, there is no reason they would not have had recourse to the Daily Reports as an alternative form of information that James had specifically requested for. Similarly, even though Sue may not have personally requested for the Daily Reports, the suspicions she would have had (detailed at [77]–[86] above) make it highly unlikely that she was unaware of the contents of the Daily Reports which she knew were being sent to her and which she read regularly, even if only in part.[171]

102 To the extent that the Daily Reports may have been read, James contends that they do not touch on profitability or investment plans, and only the gold orders and daily gold stock of TGL PL.[172] I disagree with this. As James admitted under cross-examination, he was aware from the Daily Reports that the only money coming into TGL PL's bank accounts was from cheques cleared from the sale of gold buyback contracts.[173] By his own logic, this was illustrative of there being no other inflows of funds from other investments.[174] The absence of granular details about the exact sources of investment inflows would not have prevented James from reaching the conclusion that no profit-generating investments were being made by TGL PL.

103 I agree with the DJ that the information available in the reports would have shown that there was no investment of TGL PL's cashflow, and that the

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170 James' Reply Submissions at para 40; Sue's Reply Submissions dated 26 May 2023 ("Sue's Reply Submissions") at paras 13–18.

171 NEs Day 26 Page 54 Lines 1–25 (ROP at p 2205).

172 James' Petition of Appeal dated 17 May 2023 at para 5(e) (ROP at p 45).

173 NEs Day 29 Page 22 Lines 11–17 (ROP at p 2478).

174 NEs Day 29 Page 23 Lines 19–22 (ROP at p 2479).

appellants would have read these reports.[175] The evidence sufficiently indicates that the appellants were apprised of TGL PL's business and operations, whatever their precise level of involvement in it.

The appellants knew that TGL PL's business model relied on using cashflow from new sales to pay for the buyback of old contracts

104 Based on the appellants' own explanations of how they thought TGL PL's business model worked, there is evidence that they would have known that TGL PL's business model bore remarkable similarities to a money circulation scheme.

105 I begin by setting out Sue's understanding of the TGL PL business model. Sue confirmed in her statement as well as under cross-examination that she understood the source of TGL PL's profitability to be based on "rolling" the margins made from the Gold Buyback Scheme to purchase more gold bars to sell to new clients ("the rolling scheme explanation").[176] This explanation involved the following steps:[177]

(a) TGL PL would charge a markup of 30% to clients for its sale of gold bars.

(b) TGL would need to leverage on the markup collected from selling gold buys and buy additional gold bars.

(c) The additional gold bars purchased would be sold to new clients at the same markup price.

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175 Conviction Judgment at [53].

176 P59 Question 117 (ROP at p 3361).

177 P61 Question 230 (ROP at p 3404).

(d) With the markup collected from the sale of gold bars to new clients, more gold bars would be purchased for subsequent sale.

106 Sue elaborated that she knew the rolling scheme explanation was completely dependent on the continual influx of new clients in order to be sustainable. She understood that the "whole business model is essentially like a cycle, while the margin is used to purchase more gold bars. These gold bars would then be used to generate more sales".[178] Specifically, she admitted in both her CAD statements and in cross-examination that she knew the gold bars purchased were sold on to new clients. The following example in her statement is indicative of this:[179]

> With high sales volume, more markup would be collected from clients where we can purchase more gold bars. These gold bars would be sold to new clients and more monies can be collected from these clients to purchase more gold bars. The cycle would just continue.

107 Sue further confirmed this under cross examination:[180]

> Q: But I just want to remind you again that in your statements to CAD, you said that the business model was to sell these excess gold bars to your clients under the TGL [PL] buyback scheme. That's what you said.
>
> A: Yes.
>
> Q: So in other words, you are going back to that circular loop of creating more contractual obligations over and over and over again. Do you agree or disagree?
>
> A: That's what I said then, right?
>
> Q: Yes.
>
> A Yes.

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178 P56 Question 61 (ROP at p 3340).

179 P59 Question 119 (ROP at p 3362).

180 NEs Day 267 Page 78 Lines 4–14 (ROP at p 2229).

108 The appellants argue that Sue's CAD statements merely show that she believed that additional gold bars would be accumulated based on the Formula, which would allow TGL PL to generate monies to pay its clients.[181] I do not find this to be the case. Sue's understanding of the Formula in relation to the rolling scheme explanation was simply as a means of allocating the proportion of funds received from clients for various purposes. The only two examples she gave of these purposes were paying out rebates to clients and purchasing additional gold bars which would be used to generate more sales.[182] Read in context, Sue's CAD statements show that she knew that funds from sales under new contracts would be used to either pay out rebates to clients under old contracts, or to purchase more gold bars to generate more sales under new contracts. This is entirely consistent with her understanding of the rolling scheme explanation. There is no indication that she contemplated that gold bars would be accumulated for investment.

109 James in his CAD statements likewise explained that he thought TGL PL profited through the rolling scheme explanation. He related what was told to him by Thomson Lai Meng Shiong ("Thomson"), who was Gary's partner at FTEG PL:[183]

> According to Thomson, TGL PL would only know if it was profitable at the end of 6 months because it takes time to "roll" the gold eg TGL can purchase an additional gold bar for every 5 sales (using a markup of 20%) and this additional gold bar can be sold to a new client at a markup price. However, TGL PL is required to use the sales proceeds collected from this client to purchase gold bars again to replenish TGL PL's stock inventory. This is because based on my understanding;

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181 James' Submissions at para 106.

182 P56 Question 61 (ROP at p 3340).

183 P73 Question 707 (ROP at p 4045); James' Submissions at para 28.

> TGL PL needs to accumulate gold bars by purchasing them using the markup collected.
>
> With more sales, more markup would be collected and hence more gold bars can be purchased. This would be what it means by "rolling" the gold bars.

110 James argues that a reference in his CAD statement that "TGL PL would have accumulated more gold bars over this time" shows that he thought that monies earned by the markup would be used to accumulate gold bars for investment.[184] However, when read in context, the reference to accumulation of gold bars refers to buying more gold bars to sell to new clients. As he elaborated in his answer, his understanding of the business model was that if "we do not have clients to buy gold bars from TGL, we are not able to roll. This is the only way I think the business can work."[185] This articulation of TGL PL's business model was inconsistent with a belief that gold bars were purchased for accumulation as a means of investment. For this reason, I find that the DJ's finding that James knew that TGL was using cashflow from new contracts to service the buyback of old contracts was not in error, notwithstanding that the decision below only made reference to admissions by Sue.

111 James also argues that as he was not cross-examined on his admissions in the above statements, these should not be held against him.[186] While I acknowledge that these specific admissions were not brought up by the Prosecution at trial, it was sufficient that the Prosecution had put to James that he knew during the Material Period that he was aware of the fraudulent nature of TGL PL's business, and that it relied on monies from new investors to pay

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184 James' Reply Submissions at para 21; P68 Question 92 (ROP at p 3759).

185 P68 Question 92 (ROP at p 3759).

186 James' Reply Submissions at para 20.

returns it owed to earlier investors.[187] Given the specific point in question had been put to him, James would thus have had an opportunity to clarify this in re-examination, as well as in reply submissions in the trial below. To this end, I note that James has not on appeal offered any argument or explanation for why these passages in his statements do not show that he knew cashflow from new contracts was being used to pay for the buyback options of old contracts.

112 In addition to the admissions of the appellants highlighted above, there is corroborative evidence that James and Sue would have known that TGL's business was dependent on the sale of new contracts to sustain the cashflow necessary to fund buybacks of old contracts. The DJ found that an email from Joanne to James, Sue and Gary dated 3 August 2010 entitled "TGL Cashflow" highlighted TGL PL's dire financial situation and explained that TGL PL's low sales were "unable to support the cashflow requirement", even before accounting for operational expenses and bonuses.[188] This finding by the DJ is not challenged by either of the appellants on appeal. I make two observations regarding this email. First, the "cashflow requirement" referenced by Joanne arose due to higher numbers of clients exercising their options to have TGL PL buy back their gold bars—these are obligations that TGL PL incurred from old contracts. Second, Joanne did not contemplate any other means of capital injection or profit that would grant TGL PL access to funds. She envisaged sales of new contracts as the *only* anticipated way in which TGL PL would make any profits or provide any injection of funds. It thus would have been clear to the appellants that TGL PL's obligations under old contracts had to be serviced by incoming funds from new gold buyback contracts.

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187 NEs Day 29 Page 56 Lines 4–22 (ROP at p 2512).

188 Conviction Judgment at [48]; P53 (ROP at p 3261).

The appellants knew that individual buyback contracts were inherently loss-making if clients exercised the Sell-Back Option

113 I find that both appellants knew that TGL PL would incur a loss on each gold buyback contract should the client elect to exercise the Sell-Back Option. Sue confirmed that she knew the following material aspects of TGL PL's business model:

(a) Regardless of the markup that TGL PL originally charged clients, clients could still elect to have TGL PL buy back their gold bars at the original marked up price.[189]

(b) The implication of (a) was that the markup collected by TGL PL from clients would ultimately have to be returned to them, should clients so elect.[190]

(c) TGL PL had to pay clients rebates for each sale and pay commissions to sales agents, in addition to the money that it would have to fork out should clients elect to have TGL PL buy back their gold bars.[191]

(d) The implication of (c) was that TGL PL would suffer a net loss equivalent to the rebates and expenses incurred for each sale it made, should clients exercise the option of having TGL PL buyback the gold bars.[192] The exercise of a client's Sell-Back Option would be entirely

189 P61 Question 241 (ROP at pp 3406–3407).

190 P61 Question 245 (ROP at pp 3407–3408).

191 P61 Question 242 (ROP at p 3407).

192 P61 Question 246 (ROP at p 3408).

out of the control of TGL PL since it was contingent on what clients elected to do.

(e) Even if TGL PL were to use the markup originally collected from clients as cashflow to fund the purchase of more gold bars to sell, this would merely incur another round of expenses that TGL PL would have to fulfil.[193]

114 I find that Sue knew all these aspects of TGL PL's business model during the Material Period of 16 December 2009 to 7 October 2010. She explained that her understanding of the rolling scheme explanation in her CAD statements was based on what Gary had told her,[194] which would have pre-dated the Material Period. This is supported by the fact that aspects (a) and (c) were outlined in the draft letter that WongPartnership had emailed to Sue on 22 June 2009.[195] As set out at [142] below, the description of TGL PL's business model in WongPartnership's letters originated from the appellants themselves.

115 James confirmed that he knew the following aspects of TGL PL's business model:

(a) Clients had the option to have TGL PL buy back their gold bars for the original purchase price upon the expiry of the contracts.[196]

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193 P61 Question 248 (ROP at pp 3408–3409).

194 NEs Day 26 Page 51 Lines 6–12 (ROP at p 2202).

195 P27 (ROP at pp 3128–3129).

196 P66 Question 24 (ROP at p 3735).

(b) TGL PL had no discretion as to whether clients exercised the Sell-Back Option.[197]

(c) TGL PL would give clients a rebate on the purchase price, along with any other promotional rebates TGL PL offered at the time.[198] TGL PL would incur costs of between 9–12% of the purchase price in the form of these rebates and commissions to agents upon each sale.[199]

(d) It was not sufficient for TGL PL to sell gold bars at a markup, since clients could always exercise the option to have TGL buy back the gold bars at the marked-up price. The cashflow generated from the markup had to be invested and grown in order to cover the costs of rebates and commissions.[200]

116 James thus knew that the cost of rebates and commissions that TGL PL incurred on each contract had to be covered by investments elsewhere, implying that he was aware that each individual contract would be loss-making in the absence of external sources of profit. I similarly find that James knew these aspects of TGL PL's business model during the Material Period of 16 December 2009 to 7 October 2010, as he was also privy to the draft letter that WongPartnership had emailed on 22 June 2009 and was involved in the explanation of TGL PL's business model to WongPartnership.[201]

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197 P69 Question 149 (ROP at p 3778).

198 P66 Question 24 and 25 (ROP at p 3735).

199 P69 Question 137 (ROP at p 3774).

200 P69 Question 186 (ROP at p 3788).

201 P27 (ROP at pp 3128–3129).

117 As outlined at [56] above, it was conceivably possible, though highly improbable, that TGL PL could have turned a profit if the price of gold had appreciated at an exceptional rate. However, I find that neither of the appellants seriously contemplated that this could be a way in which TGL PL could have profited, given that they did not testify to this effect, make any such reference in their statements nor make any such submission on this issue at trial or on appeal.

The appellants had no basis to believe that clients would not exercise the Sell-Back Option

118 During cross-examination and in her CAD statements, Sue raised the possibility that clients would not exercise the option to have TGL PL buy back their gold bars, which would allow TGL PL to retain the gold bars and thereby profit. I find this explanation unconvincing. Sue acknowledged that TGL PL's gold bars were sold at a mark-up and therefore more expensive than those sold by other suppliers. When asked why clients would be willing to pay more for the same item, she said in her CAD statement that this was "because of the promise of rebates payment as well as the buyback at the markup price".[202] She further acknowledged that clients were "more likely than not" to sell their gold bars back to TGL PL at the end of the buyback contracts.[203] In short, the only reason why TGL PL's gold was marketable at a marked-up rate was the buyback provision, which was the unique selling point of TGL PL's business. Clients would thus have been likely to exercise it, barring an exceptional scenario where gold prices appreciated at an unprecedented rate. This was indeed what transpired. As Sue admitted, the buyback obligation was triggered

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202 P61 Question 273 (ROP at pp 3415–3416).

203 P61 Question 274 (ROP at p 3416).

by most clients during her time as director.[204] Furthermore, there is reason to believe Sue knew her own explanation in cross-examination to be untrue. The number of gold bars retained in stock with TGL PL indicated in the Daily Reports, which Sue admitted she received, was of insufficient quantity for any meaningful returns to be made from an appreciation in the price of gold.[205]

119 James knew that TGL PL's clients were charged a markup of at least 15–20% on gold bars,[206] and knew that the exercise of the Sell-Back Option was at the discretion of clients and not TGL PL.[207] When asked whether this would mean that TGL PL would ultimately need to return the markup it collected to its clients, James confirmed that this was the case.[208] This illustrates that James, to the extent that that he contemplated TGL PL's clients exercising the Sell-Back Option, envisioned it likely that most if not all of TGL PL's clients would choose to do so.

Sue knew that TGL PL's business model as she understood it had to be concealed from clients

120 There is evidence that Sue in particular knew that the rolling scheme explanation she subscribed to appeared suspicious and had to be concealed from clients. This is shown by the inconsistencies between the rolling scheme explanation and the narrative peddled by TGL PL through its sales agents. This was an area of TGL PL's operations that Sue handled.[209] She would look

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204 NEs Day 26 Page 46 Line 31 to Day 26 Page 47 Line 1 (ROP at pp 2197–2198).

205 P101 (ROP at pp 5299–5308); NEs Day 26 Page 77 Line 17 to Day 26 Page 78 Line 2 (ROP at pp 2228–2229); P63 Questions 585–587 (ROP at p 3506).

206 P69 Question 136 (ROP at p 3774).

207 P69 Question 149 (ROP at p 3778).

208 P69 Question 150 (ROP at p 3778).

209 James' Submissions at para 11.

through the training materials for TGL PL's sales agents, and email James reports about sales regularly each month.[210] The Training Guide prepared for sales agents of TGL PL gave a recommended answer to persuade clients that the company's returns were sustainable. This answer relied on exploiting the difference between wholesale and retail prices in order to make investments elsewhere ("the investment explanation"):[211]

> The way that this business is run is similar to a bank. E.g., let's say I put 100k fixed deposit with a bank and the bank gives me 1%pa. What would the bank do with my money? Do you think they are going to sit on your money? Naturally no, they would set a portion of it as cash reserves, and the rest of it will be used to make investments, loans, or into areas of businesses that will make more than 1%pa for themselves. … In this case, the company is also doing exactly the same thing but just with a different instrument. This is not a money bank per se, but more of a gold bank. … When you put in 100k, what will happen to the money? Naturally, a part of it will be set aside as cash reserves as well. The remaining will be used to buy into more gold inventory. The company naturally is able to buy into gold at much lower prices from the wholesale market, which has a very significant profit margin. And these are markets that man on the street is not able to access into as well.

121 TGL PL thus sought to have its sales agents represent that their method of investment was "doing exactly the same thing" as what banks did—investing in "investments, loans, or into areas of businesses", except in this case with increasing its gold inventory. The investment explanation was likewise referenced in the training slides for sales agents for TGL PL which Sue helped to look through.[212]

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210 P60 Question 184 (ROP at p 3383); P68 Question 110 (ROP at pp 3765–3766).

211 P79 (ROP at p 4831).

212 P80 at Slide 22 (ROP at p 4840); NEs Day 25 Page 62 Lines 4–32 (ROP at p 2071); P60 Question 184 (ROP at p 3383).

122 Of course, the investment explanation was a lie. TGL PL never had the ability to buy gold at lower prices from the wholesale market. The gold bars purchased using the margin that was made from charging a markup on retail prices were not used for investment but were sold to clients under the same buyback scheme. There is evidence that Sue knew this. When confronted with why this aspect of TGL PL's business was not represented to clients in its slides, Sue retorted that this was because "we don't need to", because "no clients have ever asked us this question".[213] It is significant that Sue's response to this question was *not* that she genuinely believed the investment explanation outlined in the sales materials to be the correct understanding of TGL PL's business model at the time. Instead, her defensive response betrays that it was an intentional decision to omit the fact that cashflow was being funnelled into more buyback contracts. This is indicative that Sue knew the reality that the investment explanation was a lie, and that to reveal the truth about the rolling scheme explanation as she understood it would not go down well with potential clients because it was an unsustainable business model.

The appellants knew that TGL PL did not profit through other sources of investment

The appellants knew that TGL PL did not profit from investments with external parties

123 James admitted that his understanding of TGL PL's business model did not involve profiting from investments with external parties. As explained to him by FTEG PL, TGL PL did not have any other form of generating profits besides purchasing additional gold bars.[214]

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213 NEs Day 26 Page 51 Lines 13–19 (ROP at p 2202).

214 P69 Question 204 (ROP at p 3794).

124 The Prosecution argues that James was aware that cashflow generated from sales was not being used for investment on the basis of his admission to the CAD:[215]

> From what I understand I felt that there was a need to buy additional gold bars using the markup otherwise, we would not be able to accumulate gold bars. Hence in TGL PL, I was very concerned when I see that there were a lot of cash left uninvested in TGL PL's bank account.

125 I do not agree that this statement is evidence that James knew during the Material Period that TGL PL's cash was not being invested.[216] As James explained at a later point in his CAD statements, this concern about monies left idle was only surfaced by him in June 2010.[217] This specific admission can only be a basis for finding that James knew that there were no investments made for the latter part of the Material Period from June to October 2010.

126 However, there exist other admissions by James that point to him knowing, throughout the entire period of operation of TGL PL, that it did not have any other means of profit besides the gold buyback contracts themselves:[218]

> Question 96: Was TGL PL doing any form of investment with the markup collected from clients?
>
> Answer: Not that I know of. I was not involved.
>
> Question 97: Was there any profit generating activities in TGL?
>
> Answer: Not that I know of. I was not involved.

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215 Prosecution's Submissions at para 69; P67 Question 52 (ROP at p 3747).

216 James' Reply Submissions at para 32.

217 P68 Question 89 (ROP at p 3758).

218 P68 Questions 96 and 97 (ROP at p 3761).

127 I acknowledge that a lack of knowledge that investments were made is not quite equivalent to knowledge that investments were not made. However, for the purposes of establishing what James believed about TGL PL's source of profit, it suffices to note that (a) based on his knowledge of TGL PL's business model, James knew that there was a need to invest the markup made from sales,[219] and (b) James had no grounds to believe that any investment had in fact been made at any point. This rules out that James could have plausibly believed at any point during TGL PL's operations that TGL PL could have been making profits from the investment of its cashflow.

128 James argues that his answers in his CAD statements show an understanding that other forms of investments were being made.[220] However, when read in context it is clear that James' answers simply were an affirmation that any markup TGL PL collected from clients *had to be* invested in order to cover its expenses, and not a statement that he knew that any markup *was actually* invested. In fact, in the very same answer in the statements that James relied upon, he goes on to say that no investment was in fact made.

129 Sue also knew that TGL PL did not profit from any investments with external parties and admitted as much in her CAD statements.[221]

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219 NEs Day 29 Page 12 Lines 29–31 (ROP at p 2468); NEs Day 29 Page 13 Line 27 to Day 29 Page 14 Line 6 (ROP at pp 2469–2470).

220 James' Reply Submissions at para 14; P69 Question 186 (ROP at 3788).

221 P56 Question 60 (ROP at p 3340).

130 Further, the Daily Reports did not give grounds for any belief by the appellants that any investment with external parties was being made by TGL PL. As much was admitted by the appellants at trial.

131 The appellants argue that even if they admitted at trial that the Daily Reports showed that there was no investment being made by TGL PL, this merely shows that they knew this at the time of the trial, and not during the Material Period.[222] The same argument also applies to the admissions in their CAD statements. However, this argument does not affect my finding on this point. Even if I take the appellants' admissions as being limited to showing their state of knowledge at the time of the trial or their statement taking, this is strongly indicative that they had no knowledge of any inflow of profit during the Material Period as well. While it would be possible for the appellants to have not known about any investment during the Material Period but then subsequently acquired new information about investments by TGL PL before their statements had been taken, it is far less likely that the appellants would have known of investment happening during the Material Period but then forget this entirely during their statement recording and testify to the opposite effect that they never knew of any investment that took place.

132 As such, while the appellants' admissions may not show that they knew definitively during the Material Period that no investments were being made, they are sufficient to show that they had no basis for believing during the Material Period that any investments were being made.

133 Moreover, there was nobody in TGL PL who the appellants could have plausibly believed facilitated investment with external parties. It certainly

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222 Sue's Reply Submissions at para 9; James' Reply Submissions at para 19.

could not have been the appellants themselves. It could not have been Gary, who the appellants believed ran a Formula that consisted of mere internal transfers (see below). Neither could it have been the staff of TGL PL, who took instructions from the appellants and Gary.[223]

The appellants knew that TGL PL could not profit from the Formula as it consisted of mere internal transfers

134 Sue's understanding of the Formula did not involve any source of profit independent of the rolling scheme explanation. Based on her own testimony, Gary's "formula" did not encompass anything more than the rolling scheme explanation, and "transfers of monies *within* the bank accounts" [emphasis added] – in other words, mere internal transfers.[224] This was consistent with her elaboration of what she thought the Formula was, which was that it simply dictated the proportion of funds that were divided between different internal bank accounts:[225]

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223 P101 Question 598 (ROP at p 5248); NEs Day 7 Page 131 Lines 6–26 (ROP at p 687).

224 P59 Question 118 (ROP at pp 3361–3362); NEs Day 26 Page 44 Line 25 to Day 26 Page 45 Line 17 (ROP at pp 2195–2196).

225 P61 Question 250 (ROP at p 3409).

> Question 250: So is TGL PL supposed to use the markup to purchase additional gold bars or fund the payment of rebates to clients?
>
> Answer: Both. Let me clarify. The markup collected from selling the gold bars to the clients is to be used for both payment of rebates and purchasing of additional gold bars. This is where Gary's formula come into play. And that is the reason why TGL PL has to maintain several bank accounts for purposes of Gary's formula. The bank accounts are used to segregate the funds meant to different purposes e.g. payment of rebates, operating expenses, purchase of gold bars
>
> The formula is supposed to decide how much the markup collected from selling the gold bars to clients is to be set aside for the various purposes eg e.g. payment of rebates, operating expenses, purchase of gold bars.

135 Sue acknowledged in cross-examination and in her CAD statements that she knew as a matter of logic that mere internal transfers could not generate profit for TGL PL.[226] Based on Sue's own understanding of what the Formula was, she therefore knew that it could not be a source of profit for TGL PL.

136 James also knew that the formula used in TGL SB, which he believed had been adopted by TGL PL,[227] merely involved allocations between internal accounts. As he explained in his CAD statements, it involved four bank accounts which all belonged to TGL SB.[228] He elaborated:

> I recall that the system also involved opening of 4 bank accounts for TGL SB. Monies were to be transferred from one bank account to the other. I did not understand what the purpose of such transfer was. I only recall that Thomson said

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226 NEs Day 26 Page 40 Line 25 to Day 26 Page 41 Line 5 (ROP at pp 2191–2192); P61 Question 318 and 319 (ROP at p 3427).

227 P66 Question 22 (ROP at p 3734); P67 Question 55 (ROP at p 3748).

228 P66 Question 15 (ROP at p 3732).

> that the transfers were part of the system and added that it was to keep track of gold and monies of TGL SB.[229]
>
> To me, I do not think the transfers of monies would generate monies for TGL SB. However, I would assume that it would allocate the monies for various purposes. To me, the generation of monies to pay clients' returns would be using the markup collected from clients to buy additional gold bars to roll as I mentioned earlier.[230]

137 James confirmed that he knew this model was applied in TGL PL, and that he knew this could not be a source of profit:

> And to me, this [the transferring of monies among bank accounts] doesn't help to generate monies at all. At least, I didn't understand how the transferring of monies among bank accounts could help to generate monies. Also, to me, having one bank account would be the same. The bank balances in that one account would equals to the addition of all bank accounts across the 4 bank accounts which TGL PL had.[231]

138 Further, James seems to concede on appeal that he believed the Formula merely consisted of interbank transfers, albeit that Gary had explained this in a complicated fashion.[232] However, regardless of how complicated the Formula was based on Gary's explanation, it is clear that James was aware that these were internal transfers and that no profit would be generated from any of these transactions.

139 I also note that the appellants claiming to rely on Gary's Formula as the sole determinant of profitability of TGL PL is inconsistent with how they acted towards him and FTEG PL. There were no documents setting out Gary's role before the parties went into business. There was nothing in writing to

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229 P67 Question 52 (ROP at p 3747).

230 P67 Question 54 (ROP at p 3748).

231 P69 Question 162 (ROP at p 3781).

232 James' Reply Submissions at para 2.

indicate that Gary was responsible for investing proceeds from the gold buyback scheme. This lack of documentation was odd for two persons with decades of experience in business and sales. Moreover, to the extent that the arrangement between TGL PL and FTEG PL was meant to mirror their Malaysian counterparts TGL SB and FTEG SB, the Malaysian arrangement was documented in the form of an "IT Services Agreement" that mentioned nothing about investment services.[233] If the appellants truly believed that the success of TGL PL hinged precariously on the efficacy of Gary's Formula, it is rather befuddling that they would be so nonchalant in their arrangements with Gary and in their approach to the Formula.

The appellants knew that TGL PL did not profit from buying gold as an investment

140 I find that the appellants knew that TGL PL did not profit from buying gold as an investment. First, both appellants had access to the Daily Reports which showed that insufficient gold was retained to meaningfully serve as a form of investment.[234] Second, to the extent that Sue alleged that gold was being bought as an investment, this was contradicted both by her own belief of the rolling scheme explanation, as well as her own answers in cross-examination (see [122] above).

141 There is no evidence that the documents highlighted by James as purported evidence of gold stock being retained by TGL PL (see [68] above) were in fact seen by James. He gave no evidence to this effect, nor even attempted to argue as much in submissions. I thus consider that, in light of the aforementioned doubts that James would have had about TGL PL's business

233 1D2 at p 197–209 (ROP at pp 6836–6946).

234 P101 (ROP at pp 5299–5308).

model, it is highly unlikely that James would have honestly believed that gold was being accumulated as an investment.

The appellants could not have believed that TGL PL profited from buying gold at wholesale prices and selling it at retail prices

142 I also find that there was no logical way the appellants could have believed that TGL PL profited from arbitrage between wholesale and retail gold prices. As highlighted above at [57]–[61], TGL PL's descriptions of its own model in this regard were inconsistent. Despite representing to the MAS and to IE Singapore through WongPartnership that it purchased gold at factory or wholesale prices, it bought gold at retail prices. These contradictory descriptions of TGL PL's sourcing of its gold bars had to have originated from the appellants. Drafts of both letters to the MAS and to IE Singapore were circulated to the appellants for feedback. Strikingly, WongPartnership's email on 8 September 2009 ("the 8 September email") regarding a draft letter to IE Singapore, copied to both appellants, was addressed to Sue and stated "[f]urther to your and James' elaboration on the company's proposed business during the meeting, please find attached a revised draft of the letter to IE Singapore for your consideration".[235]

143 The appellants argue that there were multiple meetings, and that the explanation of TGL PL's business model had been done by Joseph at an earlier meeting than the one referred to in the 8 September 2009 email.[236] This is unconvincing. The 8 September 2009 email clearly refers to the appellants elaborating on TGL PL's business model – even if the initial explanation of the business model had been by Joseph, it is evident the appellants knew

235 P29 (ROP at p 3156).

236 Sue's Submissions at para 60.

enough to make further representations about the business model at later meetings. I therefore disbelieve the appellants' claims that they had no involvement in the meetings with WongPartnership beyond being passive observers as this is contradicted by the documentary evidence.

144 If the appellants had genuinely believed that TGL PL would have profited from arbitrage between wholesale and retail prices, it is somewhat surprising that they were so inconsistent in their description of this aspect of TGL PL's system for acquiring gold in their explanations to WongPartnership. Their explanations of how and at what price TGL PL would obtain gold simply did not equate with each other. That this system was so indeterminate in the appellants' minds points towards the fact that neither of them genuinely believed that TGL PL's solution to profitability lay in this aspect of their business.

The appellants had incentive to care about the viability of TGL PL's business model

145 I note that the appellants had more than sufficient incentive to verify for themselves that TGL PL's business model would be viable. Sue had invested her own time and effort in handling the sales and marketing operations for the business. She travelled to Singapore from Malaysia monthly despite having children who needed her at home.[237] James had invested $600,000, a significant amount of money, to put into the start-up capital of TGL PL. In view of the appellants' sinking time and money into TGL PL's operations, it is inconceivable that they would be completely apathetic to the viability of the business. While they need not have known the exact

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237 NEs Day 25 Page 51 Lines 15–23 (ROP at p 2060).

calculation of figures involved in its profitability, they would at the very least have needed to have a plausible conceptual model of at least one potential way in which TGL PL could have made money. Based on my findings above, I am convinced that not a single potential means by which TGL PL could have turned a profit could have been plausibly believed by the appellants based on what they knew.

146 As a brief aside, I deal with James' argument on appeal that it would be illogical to put in $600,000 of his own money to invest into a business entity intending to use this to commit fraud.[238] I do not agree with this argument. Certainly, it would not be illogical to put in that amount of money if the potential profit from a fraudulent enterprise could be much greater. This was exactly the case. As noted by the DJ, a total of $1,196,447.30 was paid in directors' fees between July 2009 and March 2010,[239] an amount that could have been even higher if James' involvement in TGL PL had not ended as soon as it did.

147 The appellants also raise the argument that they had satisfied themselves about the viability of TGL PL's operations as they had asked Joseph Goh, a Certified Public Accountant, to spend two weeks assessing the viability of the Formula. He had concluded that TGL PL could work and would make profits.[240] However, it is striking that Joseph never explained to the appellants how the Formula would work, and according to James merely informed them that the business model was "okay".[241] The appellants also did

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238 James' Submissions at para 23.

239 Conviction Judgment at [27].

240 James' Submissions at para 31; Sue's Submissions at para 26.

241 NEs Day 28 Page 100 Lines 13–19 (ROP at p 2434).

not know what materials Joseph had used to make this assessment, and did not know of any experience that Joseph had in gold trading at the time.[242] Sue was not even sure whether Joseph understood the Formula.[243] Given these circumstances, I do not find it convincing that this single word answer by Joseph could have been the bedrock of the appellants' trust in the viability of TGL PL's business model.

148 I note that it is not necessary to find that Sue's or James' understanding of TGL PL's business model was an accurate or complete description of it in all respects.[244] It suffices that each of them knew enough about TGL PL's business model to (a) know that it did not operate any substantive profit generating business and had no sustainable means to honour its payment and buyback obligations, or at the very least (b) give rise to such doubts such that their unwillingness to verify its business model with information available to them despite having sufficient incentive to do so would constitute turning a blind eye to the obvious.

The appellants' subsequent conduct is consistent with them knowing that TGL PL's business was unviable

Email exchanges with Gary

149 Another argument raised by James concerns an email sent to Gary by Joanne on 3 June 2010.[245] In this email Joanne informed Gary, copying the appellants, that since 24 May 2010 there had been no transfers made according

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242 NEs Day 28 Page 97 Lines 11–26 (ROP at p 2431); P62 Question 484 (ROP at p 3479).

243 P62 Question 496 (ROP at p 3482).

244 Sue's Reply Submissions at para 8.

245 P45 (ROP at pp 3224–3225).

to the Formula. According to James, the Prosecution's case was that upon receipt of this email stating that the Formula was not being run, James should have taken steps to cease TGL PL's business, and by failing to do so he was operating the business fraudulently. This conduct by the Prosecution, James says, shows that the charge had not been made out as he could not be engaged in fraudulent trading during the Material Period which commenced much earlier on 16 December 2009.[246] I do not agree with this. In my view, James' failure to cease the business of TGL PL after the receipt of the 3 June 2010 email is corroborating evidence of what he already knew from the beginning of the Material Period, rather than a marker of the start of James' knowledge that TGL PL was carried on for the Fraudulent Purpose.

150 James also contends that an email sent by Gary to Sue on 10 June 2010 shows that FTEG PL acknowledged it was providing the Formula to TGL PL, and that Gary was far more concerned than James and Sue about the continuing receipt of directors' fees.[247] In relation to the former argument, I note that provision of a formula is not inconsistent with the appellants' belief that the Formula consisted of a series of internal transfers between bank accounts, which could not be a source of profit for TGL PL. The fact that FTEG PL had assisted in conducting internal transfers of money does not go far to show how the appellants might have thought that FTEG PL would benefit TGL PL's profitability. As for the latter argument, I find that disagreements between Gary and the appellants about how to carry on the business of TGL PL are not inconsistent with the appellants knowing that TGL PL was carried on for the Fraudulent Purpose. This was an issue of

246 James' Submissions at paras 139–141.

247 P46 (ROP at p 3230).

implementation rather than direction. Furthermore, it is not necessary that the appellants had to be on the exact same page as Gary in relation to TGL PL's business model or possess the same specific intent as him. All that is necessary is that they knew enough to be aware that TGL PL did not have any substantive profit generating business and lacked any sustainable means to honour its payment and buyback obligations, and carried on the business of TGL PL knowing this.

TGL PL's winding up

151 By August 2010, the appellants were aware that TGL PL was facing serious cashflow problems as a result of what they believed to be Gary's refusal to run the Formula on its behalf. Despite this, the appellants bought out FTEG PL's shares in TGL PL for $500,000 on 3 September 2010 and initiated a winding up of TGL PL on 7 October 2010. The appellants contend that these actions were borne out of a desire to responsibly cease the Gold Buyback Scheme, which by this time had proven unprofitable.[248]

152 However, this argument does not meet the DJ's observation that it was illogical for the appellants to have bought out FTEG PL's shares if they had truly believed that it was their failure to run the "formula" which had brought about TGL PL's financial problems. The more likely inference was that the appellants were desperate to wind up TGL PL in order to conceal the fraudulent nature of the Gold Buyback Scheme.[249]

153 On a similar note, such a buying out of FTEG PL is inconsistent with the appellants' case that Gary had deceived them into believing that TGL PL

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248 Sue's Submissions at para 30; James' Submissions at paras 159–179.

249 Conviction Judgment at [57]–[61].

was profitable off the back of the Formula – if the appellants had indeed been deceived, it begs reason why they would react to this by paying off Gary handsomely through FTEG PL for his role in deceiving them.

The appellants knew that TGL PL's business model was not viable

154 While there were multiple possible ways in which TGL PL could have theoretically been financially viable, it is clear by now that none of them were actually carried out, nor did the appellants have in mind any plausible model of how that would work, nor could the appellants have plausibly believed any of these models.

155 Gathering the threads of the above analysis, I summarise my findings as to the appellants' knowledge of TGL PL's business model. From the very beginning, the appellants had reason to doubt the viability of TGL PL's business model, which was borrowed from Genneva SB and TGL SB. They were concerned that Genneva SB's business model was potentially illegal, and that TGL SB's business model was financially unsustainable in the long run. The appellants' inquiries to local authorities through WongPartnership could not have allayed these concerns. An inaccurate description of TGL PL's business model was presented to WongPartnership, and no advice was sought on the viability of the business model itself, as opposed to its compliance with regulatory requirements.

156 What the appellants understood of TGL PL's business model was that the individual gold buyback contracts were inherently loss-making if clients elected to exercise their Sell-Back Options. They had no reason to believe clients would not exercise these options.

157 As such, the appellants were aware that in order to earn profit from these loss-making contracts, the liquidity generated in the interim had to be invested. They knew that no investment was in fact made. They knew that the incoming cashflow from new contracts was not invested with external parties or used to buy gold for investment. They knew that cashflow was funnelled into yet more loss-making gold buyback contracts. The appellants were also aware that to the extent the Formula existed, it consisted of mere internal transfers between TGL PL's bank accounts and could not be a source of profit. The appellants thus knew that TGL PL could not generate profit through either its loss-making buyback contracts or other forms of investments.

158 Noting my observation at [76] in addition to the above, it is clear that the appellants did not have in mind any plausible mechanism by which they believed that TGL PL would generate profit. They continued to carry on the business of TGL PL despite this.

159 Yet another consideration that strengthens my conclusion as to the appellants' knowledge is that even if the appellants were not aware that no investment was in fact being made by TGL PL, they (i) would have had sufficient incentive to verify that TGL PL's business model was sustainable, (ii) would have good reason to doubt that TGL PL's business model was sustainable, (iii) would have known that the investment of TGL PL's cashflow was (based on their understanding of its business model) the sole determinant of its sustainability, and (iv) had access to sufficient information in the form of the Daily Reports to verify whether investments were in fact being made. In view of all these factors, the appellants' claimed ignorance about the lack of investment of TGL PL's cashflow was effectively turning a blind eye to the obvious.

160 Reviewing the evidence as a whole, I thus find that the appellants were knowingly parties to the carrying on of TGL PL's business for the Fraudulent Purpose, as they knew that it sold gold bars under a buyback scheme promising returns when in fact it did not operate any substantive profit generating business and had no sustainable means to honour its payment and buyback obligations. The appeals against conviction are therefore dismissed.

Decision on sentence

161 As to their appeal against sentence, the appellants' principal contention is that their sentences of three years' and 10 months' imprisonment offended the principle of parity as between them and Gary. In addition, Sue contends that the DJ erred in failing to credit her strict compliance with her bail conditions. I consider these arguments in turn.

Parity as between the appellants and Gary

162 Seeking to show that their sentences were calibrated wrongly in relation to Gary, the appellants argue that the DJ erred in imposing higher sentences on them than the sentence of 2 years' and 10 months' imprisonment imposed on Gary for two reasons:

(a) Gary demonstrated a higher level of culpability for the offence; and

(b) The circumstances of Gary's arrest and conviction significantly reduced the mitigating weight of his guilty plea.

The relative levels of culpability

163 Regarding the level of culpability as between the appellants and Gary, the DJ found that the appellants were more culpable for the following reasons:[250]

(a) The appellants, and Sue in particular, drove TGL PL's sales and marketing, which was crucial for the continued subsistence of the Gold Buyback Scheme.

(b) The appellants had overriding control and authority within TGL PL, as evidenced by their ability to override Gary's objections where he disagreed with them.

(c) The appellants were involved in TGL PL to a longer and more substantial degree, especially considering that Gary had stopped his involvement in the offence sometime in May or June 2010. Relatedly, the appellants' period of offending (approximately ten months) was longer than Gary's (approximately nine months) according to their respective charges.

(d) The appellants benefited to a larger extent than Gary, receiving not only directors' fees but also the commissions paid to SWM PL.

164 Engaging with the DJ's finding on appeal, James observes that the appellants exercised their control within TGL PL to reduce the directors' fees payable to themselves and Gary notwithstanding the latter's objection. He says that as this was not an act in furtherance of the criminal enterprise, the DJ

250 Sentencing Judgment at [9].

erred in regarding the appellants' exercise of control "in this manner" as a culpability-enhancing factor.[251]

165 Very much contrary to James' understanding, however, the DJ did not regard the appellants' reduction of directors' fees, notwithstanding Gary's objection, as an aggravating factor. Rather, he inferred from this episode that the appellants exercised overriding control and authority over TGL PL.[252] It was this control and authority which the DJ regarded as an aggravating factor. In any event, the DJ also observed that the appellants had used their control and authority over TGL PL to enrich themselves, for instance in paying commissions to SWM PL's sales agents despite Gary's threat to stop doing so.[253]

166 In my view, therefore, the DJ was entitled to regard the appellants as more culpable than Gary in their commission of the offence, and to justify an uplift from Gary's sentence on this basis.

The mitigating weight of Gary's plea of guilt

167 Not only did the DJ find the appellants more culpable than Gary, he was also of the view that Gary's sentence would have factored in a sentencing discount on account of his plea of guilt. A higher sentence as against the appellants could therefore be justified on the basis that, having claimed trial, no such discount was available to them. Although no written grounds were issued by the sentencing court in Gary's case, the DJ considered that his plea of guilt had saved significant judicial and prosecutorial resources. In the first

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251 James's Written Submissions at para 212.

252 Conviction Judgment at [32].

253 Conviction Judgment at [33].

place, it had obviated the need to prove his charge via a trial. Moreover, and significantly, it had averted the need for a re-trial of the appellants' ongoing case. Considering that the appellants' joint trial eventually lasted 29 days, the amount of resources saved was significant. Conversely, had Gary elected instead to claim trial, the DJ surmised he might have been sentenced to three and a half to almost four years' imprisonment.[254]

168 Now, on appeal, the appellants argue that the DJ erred in adopting the above reasoning. They contend that, as Gary was arrested after absconding, his plea of guilt was not a genuine expression of remorse.[255] However, this misunderstands the basis on which, according to the DJ, Gary would have received a sentencing discount for his plea of guilt. The DJ did not suggest that Gary's plea of guilt was a genuine expression of remorse. Indeed he noted that the Prosecution, in its sentencing submissions against Gary, had argued that Gary's plea of guilt could not be so regarded.[256] Instead, the DJ justified the putative sentencing discount entirely by reference to the resources which Gary's plea of guilt had saved. Although Sue argues that state resources were also expended on Gary's capture and arrest,[257] the DJ cannot be said to have been plainly wrong in forming the view that Gary's conduct led, on balance, to the saving of state resources, and that his sentence would therefore have factored in a sentencing discount.

169 All in all, having regard to the appellants' higher level of culpability for the offence, as well as the unavailability of any sentencing discount in

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254 Sentencing Judgment at [11]–[12].

255 Sue's Submissions at para 60; James' Submissions at para 220.

256 Sentencing Judgment at [10].

257 Sue's Submissions at para 60.

view of their decision to claim trial, I am of the view that an uplift from Gary's sentence was amply justified and was not at odds with the principle of parity.

Sue's compliance with her bail conditions

170 Yet another argument brought by Sue is that the DJ erred in failing to credit her strict compliance with the conditions of her bail. In particular, she relies on the fact that she did not abscond despite having numerous opportunities, as a Malaysian national, to do so. In support of this argument, Sue cites the Court of Appeal's recent guidance in in *Public Prosecutor v BWJ* [2023] SGCA 2 ("*BWJ*") at [43]:[258]

> Some credit therefore should be given for a person who complies strictly with the court's directions even on an individual occasion as when he complies with the law generally on all other occasions. The question is how much credit should be given and that depends of course on an assessment of the merits of compliance in individual cases.

171 *Per* the Court of Appeal's guidance, the amount of credit to be given to an offender's compliance turns on "an assessment of the merits of compliance in individual cases". In *BWJ*, the offender was "a foreigner with hardly any roots in Singapore". After his acquittal in the High Court on a charge of aggravated rape under sections 375(1)(*a*) and 375(3)(*a*)(i) of the Penal Code (Cap 224, 2008 Rev Ed), he was released on bail pending the Prosecution's appeal against his acquittal. For two years and two months subsequently, the offender was not permitted to work. He was also not allowed to return to Malaysia until he was granted permission to attend the funeral of his brother. At the court's direction, he then dutifully returned to Singapore for the hearing

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258 Sue's Submissions at para 64.

of the Prosecution's appeal even though the offence with which he had been charged carried a heavy imprisonment term with mandatory caning of at least 12 strokes.

172 Placing some emphasis on the offender's "special circumstances" in determining the appropriate sentence (*BWJ* at [107]), the Court of Appeal noted both the offender's restricted freedom while on bail and his dutiful conditions with his bail conditions. Thus, despite setting aside the offender's acquittal and convicting him on the charge, the offender received a reduction of his indicative imprisonment term from 14 to 13 years in addition to 12 strokes of the cane (*BWJ* at [98]–[103]).

173 As for Sue, I agree that some credit ought to be given to her compliance in remaining in Singapore for court proceedings, where she has had to pay rent and has not been permitted to work.

174 However, I note that on the facts Sue seems to have much deeper roots in Singapore than the offender in *BWJ*, having worked in TGL PL and travelled to Singapore frequently during the period of her involvement with it. In any event, given the preceding analysis, and Sue's higher level of involvement than James in the sales operations of TGL PL, I am satisfied that Sue's sentence is not manifestly excessive even after taking into account this factor.

Conclusion

175 In mathematics, the multiplication of a negative integer by a positive integer can, on occasion, result in a positive product. This happens when the product of the equation is expressed as an absolute value. In this case, TGL PL's product was merely a cloak for a money circulation scheme. It provided

absolutely no value at all to its customers or society at large. The only semblance of profitability that arose from this enterprise were the illicit profits obtained fraudulently by James and Sue. It was, borne out by the evidence, that TGL PL was carried out for a fraudulent purpose. The appellants knew this.

176 I dismiss the appeals against conviction and sentence.

Vincent Hoong
Judge of the High Court

Nathan Shashidran, Jeremy Mark Pereira and Carmen Lee
(Withers KhattarWong LLP) for the first appellant;
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