IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 235

Magistrate's Appeal No 123 of 2015/01

Between

SOH GUAN CHEOW ANTHONY

… *Appellant*

And

PUBLIC PROSECUTOR

… *Respondent*

Magistrate's Appeal No 123 of 2015/02

Between

PUBLIC PROSECUTOR

… *Appellant*

And

SOH GUAN CHEOW ANTHONY

… *Respondent*

JUDGMENT

[Criminal Procedure and Sentencing] — [Appeal]
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20 October 2016 Judgment reserved.

See Kee Oon JC:

1 The accused, Soh Guan Cheow Anthony ("Soh"), faced 39 charges under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA") and the Companies Act (Cap 50, 2006 Rev Ed) ("CA"). Soh claimed trial to 11 charges under the SFA and was convicted of those charges. After his conviction, he pleaded guilty to 28 other charges under the CA. He was thereafter sentenced to a global imprisonment term of eight years and nine months, and a total fine of S$50,000 in default ten weeks' imprisonment. The grounds of decision of the District Judge on conviction and sentence are reported as *Public Prosecutor v Soh Guan Cheow Anthony* [2015] SGDC 190 ("GD").

2 Magistrate's Appeal No 123 of 2015/01 ("MA 123/2015/01") is Soh's appeal against his conviction on the said 11 charges and the sentences imposed on him for the same whereas Magistrate's Appeal No 123 of 2015/02 ("MA

123/2015/02") is the Prosecution's appeal against the individual sentences imposed in respect of the 1st to 7th, 37th and 38th charges, and the aggregate term of imprisonment imposed.

Background

3 As can be seen from the Statement of Agreed Facts tendered during the trial, the material background facts are largely undisputed. Soh is a medical doctor by training. In 2000, he left the medical profession to enter the financial services industry, joining UOB Venture Management Pte Ltd ("UOB Venture") as an Associate Director. He was subsequently appointed to head the investment team at UOB Venture Bio Investment Pte Ltd. He left UOB Venture in 2003 and went into the investment advisory and management business. The District Judge found that although Soh had never trained or practised as a banker, he was well-versed with corporate loans and financing.

4 The present proceedings arose from a failed Voluntary General Offer ("VGO") made by Soh's investment vehicle Asia Pacific Links Ltd ("APLL") for all the issued ordinary shares in Jade Technologies Holdings Ltd ("Jade") which it did not already own or control. Soh was, at the material time, a director and the sole shareholder of APLL. As at 18 July 2007, Soh controlled, through APLL, 52.47% of Jade's total issued share capital. His shareholding in Jade comprised 445,672,504 shares held by APLL. On 23 May 2007 and 8 June 2007, Soh was appointed a non-executive director and the Group President of Jade respectively.

Financing agreements

5 On 18 September 2007, APLL entered into a loan facility with a financial institution known as Singapura Finance Ltd ("Singapura Finance") to

obtain a loan for S$4m secured by 34,000,000 Jade shares. Under the terms of the loan facility, the value of Jade shares was capped at market value or S$0.24 per share, whichever was lower, and the security ratio for the loan was 50%. In other words, APLL would be required to top up the difference if the market value of the 34,000,000 Jade shares fell below S$8m.

6 On 12 October 2007, APLL raised more funds by entering into a securities lending agreement with Opes Prime Stockbroking Ltd ("Opes Prime"), a company registered in Melbourne, Australia. Under the agreement which was known as the Global Master Securities Lending Agreement ("GMSLA"), APLL agreed to deliver securities or other financial instruments to Opes Prime in return for a cash collateral. Either party could terminate the GMSLA by exchanging the cash collateral for the Jade shares or *vice versa*.

7 Pursuant to the GMSLA, APLL transferred a total of 145,050,000 Jade shares (15.78% of Jade's total issued share capital) in three separate tranches to Merrill Lynch Singapore Pte Ltd ("Merrill Lynch"), which held the shares as custodian for Opes Prime. The total cash collateral received by APLL in return for the Jade shares was S$28.63m. Under the GMSLA, APLL was required to maintain a loan to value ratio of 60%. This meant that a margin call would be triggered if the cash collateral provided by Opes Prime to APLL exceeded 60% of the value of the securities.

8 Jade was regarded as a penny stock and hence local financiers were unwilling to grant much credit on pledges secured by Jade shares. Significantly, the GMSLA differed from the share financing arrangement between APLL and Singapura Finance in that title to the Jade shares passed to Opes Prime upon delivery. Clause 2.3 of the GMSLA made it clear that notwithstanding the use of expressions such as "borrow" or "lend", title to the

securities "borrowed" or "lent" passed from one party to the other upon delivery of those securities. The party obtaining such title would be obliged to redeliver equivalent securities or equivalent collateral as the case may be. In *Overseas-Chinese Banking Corp Ltd v Asia Pacific Links Ltd and another (Abdul Rahman bin Maarip, third party)* [2011] 1 SLR 906, it was found as a fact by the High Court (and affirmed on appeal) that APLL no longer held title to the Jade shares that had been transferred under the GMSLA.

The purchase of 5,500,000 Jade shares between 15 August and 16 November 2007

9 Between 15 August 2007 and 16 November 2007, Soh purchased a total of 5,500,000 Jade shares from the open market on five occasions:

Date of purchase	**Number of shares purchased**	**Purchase price (average)**
15 August 2007	1,000,000	S$0.274 per share
4 October 2007	1,000,000	S$0.38 per share
8 October 2007	2,000,000	S$0.377 per share
12 November 2007	1,000,000	S$0.269 per share
16 November 2007	500,000	S$0.243 per share

10 The above purchases were made through a trading account held by Faitheagle Investments Ltd ("Faitheagle"), a company wholly owned by Soh. At the time of the purchases, Soh was a director of Jade and was thus required under ss 165(1)(*b*) and 166(1) of the CA to notify Jade and the SGX of any

change in his Jade shareholdings within two working days . However, Soh did not do so in respect of his purchases of Jade shares on each of those five occasions.

The decline in Jade's share price and the margin calls

11 Between November and December 2007, Jade's share price declined from S$0.34 on 1 November 2007 to S$0.275 on 31 December 2007. Due to the decline in Jade's share price, Soh received several margin calls from Opes Prime requiring him to top up the deficit in his account to maintain the loan to value ratio. The quantum of these margin calls ranged from S$3.71m to S$7.4m.

12 In January 2008, Jade experienced a further drastic decline in its share price from S$0.275 to S$0.09. The size of the margin calls in APLL's account with Opes Prime increased accordingly and APLL began to receive margin calls from Singapura Finance.

13 Subsequently, Opes Prime force-sold 4,600,000 of Jade shares to offset the shortfall in APLL's account. To prevent further disposals of Jade shares that had been delivered to Opes Prime, Soh delivered a further 155,000,000 Jade shares to Opes Prime on 25 January 2008 to rectify the margin deficit. By then, APLL had delivered to Opes Prime a total of 300,050,000 Jade shares under the GMSLA, of which 4,600,000 shares were force-sold. No disclosure of the forced sale of 4,600,000 Jade shares was made by Merrill Lynch, Opes Prime or APLL.

14 Separately, on 15 January 2008, Singapura Finance sent a letter to Soh requesting payment of S$355,684.93 to top up the deficit in his account. No payment was made. After a further fall in Jade's share price, Singapura

Finance sent a second letter to Soh on 22 January 2008 to request for payment of S$1,295,684.08. Soh then proposed to transfer 30,000,000 Jade shares to Singapura Finance as additional security and a minimum payment of between S$180,000 and S$250,000. This proposal was accepted by Singapura Finance.

Announcement regarding the purchase of 5,500,000 Jade shares on 21 January 2008

15 On 21 January 2008, Soh sent an email to Vera Lim, the company secretary of Jade. In his email, he stated that he had personally purchased a total of 5,500,000 Jade shares for a total consideration of S$1.11m on 21 January 2008. Soh also provided the following breakdown of the various purchase prices of the Jade shares he said he purchased on 21 January 2008:

Price	**Number of shares purchased**	**Value**
S$0.225	500,000	S$112,500
S$0.220	500,000	S$110,000
S$0.215	1,500,000	S$322,500
S$0.210	1,000,000	S$210,000
S$0.185	1,000,000	S$185,000
S$0.170	1,000,000	S$170,000

16 Vera Lim proceeded to file a notice regarding Soh's purchase of 5,500,000 Jade shares with the SGX on 21 January 2008 and the notice was

announced over the SGXNET. In reality, Soh did not purchase 5,500,000 Jade shares on 21 January 2008 but he did purchase 5,500,000 Jade shares through Faitheagle's trading account between August and November 2007 as set out above (at [9] and [10]) although these purchases had not been previously announced.

Subscription of E3 and Netelusion shares

17 In January 2008, Soh was due to make payment for the subscription of shares in two listed companies, E3 Holdings Ltd ("E3") and Netelusion Ltd ("Netelusion"). He had entered into two separate agreements with E3 and Netelusion on 20 September 2007 and 9 October 2007 respectively for the subscription of 280,000,000 E3 shares and 42,000,000 Netelusion shares. This was about the same time he had negotiated and obtained shares financing of S$4m from Singapura Finance and cash collateral of S$28.63m from Opes Prime.

18 The total cash consideration to be paid by Soh for the subscription of the E3 and Netelusion shares amounted to S$15.26m. Soh had earlier made a 10% down-payment and the remaining 90%, which amounted to S$8.82m for E3 and S$4.91m for Netelusion, was due on 9 January 2008 and 18 January 2008 respectively. Soh failed to make the payments by the stipulated dates and requested the payment dates to be extended to March 2008.

Soh's financial woes

19 By January 2008, Soh was in serious financial difficulty. He had failed to make payments for his subscription of E3 and Netelusion shares which amounted to S$15.26m. The significant decline in Jade's share price was also triggering margin calls from Singapura Finance and Opes Prime. In an email

to one Marian Morgan on 24 January 2008, Soh stated that the "[s]tock market was very bad and we have terrible margin calls that are driving us crazy". Soh also had difficulties making a US$100,000 payment in January 2008 to Marian Morgan as there were insufficient funds in his account as at 29 January 2008. In the same month, Soh also owed two other investors approximately S$8m as a result of losses in certain principal protected investments.

20 In February 2008, Soh had to cobble together A$500,000 to pay for an apartment he had purchased in Melbourne, Australia, in his daughter's name, with completion scheduled for February 2008. He had missed the due date for payment in February 2008, and had only made payment in March 2008 out of the proceeds derived from sales of Jade shares during the VGO period, a point I will return to later.

21 Separately, Soh also owed one Christopher Ho US$1.2m and S$500,000 as well as one Tony Liok US$500,000 for various capital guaranteed investments. This was evidenced by an email dated 8 April 2008 which stated that the amounts had been outstanding for more than two years.

Events leading to the VGO

The first meeting

22 On 30 January 2008, the price of Jade shares was S$0.09. On 31 January 2008, Soh had a meeting with Mike Tan Hai Seng ("Mike Tan") from OCBC Securities Pte Ltd ("the First Meeting"). At that meeting, Soh was introduced to Tsai Ai Liang ("Tsai") and Ang Suat Ching ("Ang") of OCBC Bank. Tsai was the Head of OCBC Corporate Finance and Ang was the Vice-President of OCBC Corporate Finance.

23 Soh informed the team from OCBC that he intended, through APLL, to make a VGO for the remaining shares in Jade not owned or controlled by him. He also informed them that based on Jade's annual report released in December 2007, APLL's direct and indirect interest in Jade shares amounted to 46.54%. This shareholding included the 5,500,000 Jade shares that he purportedly bought under his name on 21 January 2008.

24 To determine the offer price, Soh was asked by the team from OCBC whether APLL or he had purchased Jade shares in the three months immediately prior to 31 January 2008, and if so, the highest price paid for the shares. Soh informed them that he had purchased 5,500,000 Jade shares on 21 January 2008 and that the prices paid for these shares ranged from S$0.170 to S$0.225. As required by the takeover rules, the offer price for the VGO was fixed at the minimum of S$0.225 a share, since this was the highest price he had purportedly paid for Jade shares in the three months immediately prior to 31 January 2008.

25 Tsai and Ang gave evidence that Soh knew that S$116.6m would be required to finance full acceptances of the VGO based on an offer price of S$0.225. Both of them also testified that Soh was told that OCBC would require APLL to provide a letter from another bank to expressly confirm that APLL had the requisite funds to satisfy full acceptances under the VGO. This letter is commonly known as the Financial Resources Confirmation ("the FRC").

26 At the end of the First Meeting, Soh agreed to appoint OCBC as financial adviser to APLL, the offeror in the VGO. On 1 February 2008, OCBC and Allen & Gledhill LLP ("A&G") were formally appointed APLL's financial adviser and legal adviser respectively.

The second meeting

27 A second meeting was held on 4 February 2008 ("the Second Meeting"). The meeting was attended by Mike Tan, Ang and Tan Wei Ping ("Tan"), a manager at the corporate finance department of OCBC. Steven Lo ("Lo") of A&G and his assistant Wong Hui Ling ("Wong") also attended this meeting.

28 During the meeting, Soh gave an introduction of APLL. He explained that APLL was incorporated in the British Virgin Islands and was wholly owned by him. Soh confirmed that he and APLL jointly held a 46.54% stake in Jade as of 21 January 2008. Soh had also orally confirmed at the Second Meeting his purchase of 5,500,000 Jade shares on 21 January 2008 at prices between S$0.170 and S$0.225. Soh confirmed that this was his last purchase in the preceding three months.

29 During the Second Meeting, the subject of APLL's GMSLA with Opes Prime was raised. OCBC and A&G were informed by Soh that APLL had pledged 140,000,000 Jade shares as security to Opes Prime in return for cash collateral. However, neither the officers from OCBC nor the lawyers from A&G had seen the GMSLA at that time or given any advice to Soh regarding the effect the delivery of securities under the GMSLA had on the beneficial ownership of the Jade shares that were so delivered. By way of an email dated 5 February 2008, A&G requested Soh to provide them with, *inter alia*, a copy of the GMSLA. Copies of the GMSLA were only provided to OCBC and A&G on 28 March 2008, a day after Opes Prime's collapse on 27 March 2008.

The first verification meeting

30 On 14 February 2008, the first verification meeting was held at the office of A&G and was attended by Soh and Norman Phua ("Phua"), Soh's personal assistant, OCBC officers (namely, Tsai, Ang, and Tan) and lawyers from A&G (namely, Wong and Christopher Koh, a partner at A&G).

31 At this meeting, Soh confirmed that he and APLL collectively owned and controlled 451,172,504 Jade shares. This confirmation was patently false as the figure proffered by Soh included the 4,600,000 Jade shares which Soh knew Opes Prime had force-sold earlier. Further, Soh had also separately sold 1,000,000 Jade shares just two days earlier on 12 February 2008, as outlined below at [34], and the said 1,000,000 shares were likewise still included in the 451,172,504 shares that he claimed to own and control.

32 The OCBC officers testified that they had informed Wong that they had yet to receive the FRC and therefore could not confirm the part of the draft VGO announcement which set out OCBC's confirmation that sufficient financial resources were available to APLL for the VGO. Tan also gave evidence that Soh had himself stated that the FRC was still pending and he would provide OCBC with the same once it arrived.

33 The draft verification notes which were circulated by A&G on 24 March 2008 wrongly stated that OCBC had confirmed that APLL had sufficient resources for the VGO as at 14 February 2008. Nonetheless, given that Soh had already given OCBC the FRC on 18 February 2008, OCBC did not raise any issue with A&G. The District Judge accepted to be true the OCBC officers' account as to what transpired during the 14 February 2008 meeting.

Sale of 1,000,000 Jade shares by Soh on 12 February 2008

34 On 12 February 2008, while discussions concerning the VGO were still ongoing, Soh sold 1,000,000 Jade shares on the open market at the price of S$0.215 per share. The sale was made through a trading account held by Faitheagle. At the time of sale, Soh was a director of Jade and was thus required under ss 165(1)(*b*) and 166(1) of the CA to notify Jade and the SGX of any changes in his shareholdings of Jade within two days of the change. Soh did not do so. Significantly, Soh also did not inform OCBC or A&G of his sale of 1,000,000 Jade shares on 12 February 2008.

The furnishing of the FRC letter by Soh to OCBC

35 Soh was informed by OCBC's officers that OCBC required the FRC before confirming that APLL had sufficient financial resources to satisfy full acceptance of the VGO. Soh requested a template of the FRC, which OCBC provided him. The text of the template stated:

> **PROPOSED VOLUNTARTY [*sic*] CONDITIONAL CASH OFFER ("OFFER") FOR ALL SHARES ("OFFER SHARES") IN THE CAPITAL OF JADE TECHNOLOGIES HOLDINGS LIMITED NOT ALREADY OWNED OR AGREED TO BE ACQUIRED BY ASIA PACIFIC LINKS LIMITED ("COMPANY") AND ITS CONCERT PARTIES**
>
> We refer to the above.
>
> We have been instructed by the Company to earmark S$[•amount] from our [•type of facility] granted to the Company, to make payment for the Offer Shares tendered in acceptance of the Offer. In this regard, we confirm that the Company has sufficient financial resources to satisfy full acceptances of the Offer.
>
> Yours faithfully
>
> For and on behalf of
>
> [•NAME OF BANK]
>
> …

[emphasis in original]

36 On 18 February 2008, Soh sent an email to Ang, Wong, Phua and Tan containing a scanned copy of an FRC letter ("the FRC Letter") purportedly issued by Standard Chartered Bank Jakarta Branch ("SCBJ"). Dated 18 February 2008, the FRC letter stated that SCBJ was instructed by APLL to earmark US$100 million from a current account maintained with SCBJ ("the SCBJ account") to make payment for the shares tendered in acceptance of the VGO. In the FRC Letter, it was stated that APLL had sufficient financial resources to satisfy full acceptances of the VGO. The FRC letter was purportedly signed by one Ng Khok Pheng, purportedly a manager of SCBJ and one Lim Bun Tjaij, purportedly trade service officer of SCBJ.

37 In the same email of 18 February 2008, Soh stated that the original copy of the FRC Letter would be mailed to OCBC's office and a banker's guarantee for the amount of US$100 million would be sent to OCBC via the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") network within a week. The SWIFT network allows financial institutions worldwide to send and receive information about financial transactions in a secure, standardised and reliable environment.

38 Tan informed Phua that the attachment in Soh's email was blocked by OCBC's email server and OCBC was unable to open the attachment containing the scanned copy of the letter. Phua informed Soh accordingly and a color copy of the scanned FRC Letter from SCBJ was printed. Soh wrote the words "certified true copy" together with his signature and designation on the FRC Letter and handed the letter to Phua for delivery to Tan.

39 Later that same day, relying on the scanned copy of the FRC Letter, OCBC released an announcement to the SGX on behalf of APLL about the

voluntary conditional cash offer by APLL to acquire all issued ordinary shares in Jade at the offer price of S$0.225 per share (the "Offer Announcement"). The Offer Announcement stated, *inter alia*, that:

(a) APLL and its concert parties (including Soh) collectively and beneficially owned 451,172,504 shares representing 46.54% of the issued capital of Jade;

(b) OCBC confirmed that APLL had sufficient financial resources to satisfy full acceptances of the Offer;

(c) APLL intended, through the Offer, to develop and grow the businesses of Jade and its subsidiaries and pursue opportunities for revenue synergies, particularly in the energy sector;

(d) the directors of APLL had taken all reasonable care to ensure that the facts stated and all opinions expressed in the Offer Announcement were accurate;

(e) aside from the purchase of 5,500,000 Jade shares on 21 January 2008 for the price of S$0.225 per share, APLL and its directors had not dealt in Jade shares for the preceding three months;

(f) the Offer price was S$0.225 per share; and

(g) the Offer was conditional on acceptances bringing APLL holdings past the 50% mark.

40 On the first trading day after the Offer Announcement, on 19 February 2008, the share price of Jade closed at S$0.220 which was slightly above the

closing price on 12 February 2008 of S$0.205. Thereafter, Jade shares traded at between S$0.220 and S$0.235 for the duration of the VGO.

Sale of 4,500,000 Jade shares in Faitheagle's account between 21 and 25 February 2008

41 On 21, 22 and 25 February 2008, whilst the VGO was subsisting, Soh procured the sale of 4,500,000 Jade shares through a trading account maintained under the name of Faitheagle.

Date	**Number of Jade shares sold**	**Selling price**
21 February 2008	1,000,000	S$0.220 per share
22 February 2008	2,000,000	S$0.220 per share
25 February 2008	1,500,000	S$0.220 per share

Soh did not notify Jade or SGX regarding the abovementioned sale of the 4,500,000 Jade shares.

Transfer of 50,000,000 Jade shares from APLL's account to Faitheagle's account

42 On 7 March 2008, whilst the VGO was ongoing, Soh transferred 50,000,000 Jade shares from APLL's account to Faitheagle's account. Both APLL and Faitheagle were investment companies solely owned by Soh as a sole shareholder. Soh did not notify Jade or SGX of the transfer.

The FRC Letter and the SWIFT

43 On 10 March 2008, after a verification meeting with Soh, OCBC released the Offer Document that was the formal offer to Jade shareholders. According to the Offer Document, the VGO would have closed on 7 April 2008.

44 On or about 19 March 2008, OCBC was informed that APLL had procured a banker's guarantee, purportedly issued by SCBJ, to pay for acceptances of the VGO ("the Banker's Guarantee"). OCBC was also informed that a funds confirmation would be sent to it via SWIFT for this purpose (the "First SWIFT"), and thereafter a banker's guarantee for US$50m, and a second banker's guarantee for a further US$50m would be issued.

45 On 27 March 2008, Tan was informed that the First SWIFT could not be located. The SWIFT department of OCBC also found irregularities in the format of the copy of the First SWIFT provided to OCBC. Tan then contacted Soh and informed him that OCBC would be contacting SCBJ directly. Soh informed him to proceed. Subsequently, OCBC's investigations revealed that SCBJ did not issue the FRC Letter, the Banker's Guarantee or the First SWIFT to OCBC.

46 On 28 March 2008, at a meeting with OCBC and A&G, Soh informed the parties that Opes Prime had been placed under receivership and that this would affect his shareholding in Jade as a result of the GMSLA. It was then that Soh asked OCBC if the offer made by APLL, now faced with the collapse of Opes Prime, might be withdrawn on the basis of Opes Prime's receivership.

47 On 29 March 2008, A&G discharged itself as legal adviser to APLL in relation to the VGO. On 1 April 2008, Soh, through Rodyk & Davidson LLP

("Rodyk & Davidson"), the new solicitors acting for APLL, provided OCBC with a circular dated 1 April 2008 from Deloitte Touche Tohmatsu (the receivers and managers of Opes Prime) ("the Deloitte Circular"). The Deloitte Circular explained that the title to the shares "lent" to Opes Prime was in fact fully transferred to Opes Prime. This meant that Soh had a controlling interest of far less than 46.54% of Jade's shareholding.

48 On 1 April 2008, through Rodyk & Davidson, APLL sent a letter signed by Soh to the Board of Directors of Jade informing Jade of the Deloitte Circular and stating that "[t]he Offeror is seeking further advice on its rights. A review of the terms of the SLA is consistent with the position as set out in the Circular. If this position is correct, the Offeror's shareholdings as stated in the Offer Document needs to be corrected".

49 On 1 April 2008, Rodyk & Davidson sent an e-mail to OCBC attaching a copy of a purported confirmation from SCBJ that the SWIFT remittance of US$100m would be effected that day ("the Second SWIFT"). By the close of business on 1 April 2008, OCBC still had not received the Second SWIFT.

50 On 2 April 2008, according to a Rodyk & Davidson e-mail, APLL was directed by the Securities Industry Council ("SIC") to send another letter to the Board of Directors of Jade stating that because of the transfer of shares to Opes Prime, APLL was to confirm whether it had sufficient financial resources to satisfy full acceptances of the VGO.

51 OCBC as well as Rodyk & Davidson subsequently discharged themselves as advisers to APLL in connection with the VGO on 2 April 2008 and 3 April 2008 respectively. Although OCBC had resigned as APLL's

financial adviser, Soh still contacted the OCBC team on 3 April 2008 to inform OCBC that the SIC had requested that he provide OCBC with a confirmation of his financial capacity to complete the VGO by noon on 4 April 2008 via a SWIFT confirmation, failing which the SIC would require APLL to withdraw the VGO.

52 Soh also informed OCBC that he had given instructions for the cancellation of the Second SWIFT and had given instructions for SCBJ to send another SWIFT confirmation to OCBC ("the Third SWIFT"). By the expiry of SIC's deadline, OCBC's SWIFT Operations Department was still unable to locate the Third SWIFT. At the suggestion of the SIC, Tan made another inquiry with SCBJ to confirm whether SCBJ had issued any SWIFT messages to OCBC in connection with the VGO during the relevant period of time. The bank officer whom Tan spoke to confirmed that SCBJ had not issued any SWIFT messages to OCBC in connection with the VGO.

Letter furnished by Soh to the SIC regarding financial resources for the VGO

53 In response to the SIC's requirement for proof of his financial resources to complete the VGO, Soh wrote a letter dated 3 April 2008 informing the SIC that he had given instructions to SCBJ on 1 April 2008 to transmit via SWIFT a banker's guarantee of US$100 million to OCBC. In addition, he stated that he would be instructing SCBJ on the same day to transmit an additional banker's guarantee for an amount of up to US$100 million to a bank in Singapore. It was an agreed fact that no such instructions were given to SCBJ.

54 The VGO was subsequently withdrawn on 4 April 2008 with the consent of the SIC, after APLL failed to provide the SIC with sufficient proof that it had the financial resources to complete the VGO.

Sale of 45,700,000 Jade shares in Faitheagle's account between 10 and 31 March 2008

55 Between 10 and 31 March 2008, while the VGO was still extant, Soh procured the sale of a total of 45,700,000 Jade shares from the account of Faitheagle on four days:

Date of sales	**Number of Jade shares sold**	**Selling price (average)**
10 March 2008	15,000,000	S$0.222 per share
11 March 2008	11,000,000	S$0.223 per share
17 March 2008	4,700,000	S$0.220 per share
31 March 2008	15,000,000	S$0.220 per share

56 Soh did not notify Jade or SGX regarding the sale of the 45,700,000 Jade shares. The proceeds from the sale of the 45,700,000 Jade shares amounted to approximately S$10m. S$5.9m was by used Soh to pay for the subscription of shares in Netelusion and E3 Holdings, which had been due for payment since January 2008. Soh used S$1.5m to repay his loans while the remaining S$2.6m had been seized by the Commercial Affairs Department ("CAD"). The District Judge also found that Soh had converted a sum of S$519,400, being proceeds from his undisclosed February 2008 sales of Jade

shares, into Australian currency and had wired the same to Australia to meet a late payment for an apartment purchase in Melbourne.

The charges

57 Soh faced 39 charges which arose out of the facts stated above.

(a) The 1st to 7th charges were in respect of insider trading offences under s 218(2)(*b*) of the SFA. These alleged that Soh, as a director and thus a connected person of Jade, had traded in Jade shares between 21 February 2008 and 31 March 2008 when he was in possession of inside information (that is, information that APLL did not have sufficient financial resources to implement its VGO).

(b) The 8th charge was in respect of a false report allegedly furnished by Soh to the SGX, an offence under s 330(1) of the SFA. The charge averred that Soh had on 21 January 2008 authorised the furnishing of a false report to the SGX stating that he had purchased 5,500,000 Jade shares.

(c) The 9th to 22nd charges, in respect of Soh's failure to notify Jade about share purchases or sales, involved offences under s 165(1)(*b*) of the CA. These alleged that Soh, as a director of Jade, had failed to notify Jade about share purchases/sales in which he had an interest on various occasions between 15 August 2007 and 31 March 2008.

(d) The 23rd to 36th charges, in respect of Soh's failure to notify the SGX about share purchases or sales, involved offences under s 166(1) of the CA. These involved allegations that Soh, as a director of Jade, had failed to notify SGX about share purchases/sales in which he

had an interest on various occasions between 15 August 2007 and 31 March 2008.

(e) The 37th charge was in respect of Soh having allegedly made a takeover offer without having reasonable grounds for believing that he or APLL had sufficient financial resources to implement that takeover. This concerned a charge under s 140(2) of the SFA which averred that Soh had caused APLL to announce the VGO on 18 February 2008 without reasonable grounds for believing that it would be able to satisfy the acceptances.

(f) The 38th charge was in respect of Soh's creation of a false or misleading appearance as to Jade's share price. It involved an offence under s 197(1)(*b*) of the SFA. The charge averred that Soh had caused APLL to announce the VGO on 18 February 2008 with the primary intention of raising/maintaining the share price of Jade.

(g) The 39th charge was in respect of a false report allegedly furnished by Soh to deceive the SIC, an offence under s 330(2) of the SFA. The charge averred that Soh had authorised the furnishing of a false report to the SIC stating that APLL had given instructions to SCBJ to transmit banker's guarantees for a total of US$200m.

58 Soh claimed trial to the 11 SFA charges, namely, the 1st to 8th charges and the 37th to 39th charges. The remaining 28 charges (*ie*, the 9th to 36th charges under the CA) were stood down for Soh to decide on his course of action after the outcome of his trial to the 11 SFA charges was known.

The decision below

Submission of no case to answer

59 At the close of the Prosecution's case, the Defence submitted that it had no case to answer in respect of nine charges, namely, the 1st to 7th charges as well as the 37th and 38th charges. The District Judge rejected the Defence's submission and held that there was a case for the Defence to answer in respect of the aforesaid charges. Accordingly, the District Judge called for Soh's defence in respect of all the 11 proceeded charges (including the 8th and 39th charges for which the Defence did not make a submission of no case to answer).

The Defence's application to admit two statements

60 After the District Judge ruled that there was a case for the Defence to answer, the Defence requested for one day's adjournment to trace one Abdul Rahman Bin Maarip ("Rahman") and one Isnin Bin Rahim ("Isnin") as defence witnesses, and subsequently made an application to the District Judge to admit, under s 32(1)(*j*)(ii) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), two statements made by Rahman and one statement made by Isnin. All three statements had been recorded by the Securities Commission of Malaysia ("the MSC Statements") and obtained by the CAD of Singapore. The statements were produced at the trial during the cross-examination of the Investigating Officer, Tan Fong Chin, on 29 October 2013.

61 Having considered the parties' submissions on the admissibility of the MSC Statements, the District Judge agreed with the Defence that the three statements were admissible under s 32(1)(*j*)(ii) of the EA as exceptions to the hearsay rule. In his view, Soh had discharged his burden of showing that both

Rahman and Isnin were outside Singapore and that it was not practicable to secure their respective attendance, and that being competent but not compellable to give evidence on Soh's behalf, each of them had refused to do so.

Main trial

The Prosecution's case

62 Soh was facing tremendous financial pressure in January 2008. Against this backdrop, Soh falsely announced that he had purchased 5,500,000 Jade shares on 21 January 2008 when in fact no purchases were made on that day. He then decided to launch the VGO with the intention of raising the share price of Jade and thereafter maintaining it at or around the offer price. This (*ie*, the raising and maintaining of Jade's share price) would stave off margin calls. Soh knew that the VGO would require some S$116m in the event of full acceptances but his net worth was only in the region of between S$3m to S$5m. Prior to 18 February 2008, Soh did not broach the subject of financing for the VGO with any financial institution. Therefore, Soh and APLL had no reasonable grounds to believe that APLL would be able to perform its obligations under the VGO if the VGO were accepted.

63 Apart from maintaining Jade's share price at an artificial level, the VGO enabled Soh to procure the sale of more than S$10m worth of Jade shares to the unsuspecting public at an inflated price. These sales were made during the VGO period notwithstanding that Soh possessed price-sensitive information, that is, he knew that APLL did not have sufficient financial resources to implement the VGO in full. Further, Soh did not make disclosure of the sales.

The Defence's case

64 Soh's defence was that he was principally relying on the funds in the SCBJ account which was maintained by First Capital Growth Investment Limited ("FCGIL"). As at 31 January 2008 he had told OCBC, and OCBC was well aware, that he was relying on that account to issue the FRC and banker's guarantee (whether directly to OCBC or indirectly *via* UBS) and OCBC was agreeable to this arrangement. Further and alternatively, Soh claimed that OCBC did not as financial adviser to the VGO, inform him that apart from the FRC, he was required to produce cash to complete the VGO.

65 Separately, Soh also claimed that OCBC should not have made the Offer Announcement on 18 February 2008 and that OCBC had breached its duty of care to APLL in failing to verify the FRC, and that the Offer Announcement was not caused by him but by OCBC. Soh also submitted that in order for the Prosecution to succeed, it must prove his fraudulent intention in launching the VGO.

The District Judge's findings

(1) 37th charge

66 The only disputed element was whether Soh had reasonable grounds for believing that APLL would be able to perform its obligations if the VGO were accepted. The District Judge found that as at 18 February 2008, Soh had no reasonable grounds for believing that he/APLL had S$116m to fund the VGO.

67 First, APLL only had S$3,728.67 in its OCBC Bank account on 18 February 2008. Secondly, APLL's sole shareholder, Soh, was in dire financial straits at that point. Thirdly, contrary to Soh's claims, there was no agreement

between Soh and OCBC for the latter to fund the VGO. Lastly, OCBC did not know that Soh/APLL did not have S$116m in cash to fund the VGO. Significantly, the District Judge rejected the Defence's submission that OCBC/A&G were to be blamed for not having properly advised him and APLL; Soh and APLL had an independent obligation under the Singapore Code on Take-overs and Mergers ("the Take-over Code") to ensure that they had sufficient funds to satisfy the takeover offer.

68 In view of the above, the District Judge held that a reasonable man in Soh's shoes would have had no reasonable grounds for believing that Soh/APLL had the resources to fund the VGO if accepted. The District Judge went further to say that the evidence showed that Soh *knew* that he/APLL did not have such resources. Soh was therefore convicted of the 37th charge.

(2) 38th charge

69 The disputed element was whether APLL had announced the VGO with the primary intention to raise or maintain Jade's share price. In this regard, the District Judge found that Soh's intention was to artificially distort the demand and supply forces in respect of Jade shares. First, the VGO was not a genuine one as Soh/APLL had no reasonable grounds for believing that APLL would be able to perform its obligations if the VGO were accepted. Secondly, Soh was clearly not a genuine investor since (a) he was offering to buy Jade shares and furtively offloading them at the same time; and (b) his offer was not based on sound commercial reasons. Significantly, the District Judge accepted that the announcement of the VGO had the effect of raising Jade's share prices. In the premises, the District Judge found that the 38th charge had been established and convicted Soh of it.

(3) 1st to 7th charges

70 The District Judge found that Soh knew that (a) the contents of the FRC letter were untrue; (b) OCBC had not agreed to grant any loan for the VGO; (c) he did not have the S$116m required for the VGO; (d) the FRC letter had not been issued by SCBJ; and (e) the Jade shares lent to Opes Prime might be seized or sold by creditors of Opes Prime. The District Judge also found that the aforesaid information would effect a significant change in prices of Jade shares. Applying the presumption in s 218(4) of the SFA, Soh was presumed to have known the materiality of the information. He himself had also said that there would be disastrous consequences on Jade's share price.

(4) 8th charge

71 The crux of the 8th charge was that Soh had authorised the furnishing of a false report to SGX on 21 January 2008 stating that he had purchased 5,500,000 Jade shares on the same day. The District Judge accepted that there were two false aspects to the announcement, namely: (a) the date; and (b) the identity of the purchaser. Accordingly, Soh was convicted of the 8th charge.

(5) 39th charge

72 The 39th charge alleged that Soh had authorised the furnishing of a false report to the SIC to the effect that APLL had given instructions to SCBJ to transmit two banker's guarantees. It was undisputed that no such instructions were given. Therefore, he had authorised the furnishing of the false report to the SIC and was convicted accordingly.

The discovery application

73 During the hearing of the appeal, Soh's counsel argued that the Prosecution had breached its criminal discovery obligation and made an application for the Prosecution to produce documents for inspection. Before delving into an analysis of the arguments, it will be useful to first briefly set out the procedural history of Soh's criminal discovery applications. A similar application was taken out in the District Court and an application to state questions of law was subsequently brought before the High Court. Both applications were dismissed. The District Court's decision on the discovery application is reported as *Public Prosecutor v Soh Guan Cheow Anthony* [2014] SGDC 107 ("*Anthony Soh (Discovery)*") whereas the High Court's decision is reported as *Soh Guan Cheow Anthony v Public Prosecutor* [2015] 1 SLR 470 ("*Anthony Soh (Reference Application)*").

Events leading up to the application before the District Court

74 On 4 November 2013, the Prosecution closed its case and offered to the Defence a total of 29 witnesses from whom statements had been recorded by the CAD but had not been called by the Prosecution as part of its case on the 11 charges to which Soh claimed trial. Shortly after the close of the Prosecution's case, the Defence wrote to the Attorney-General's Chambers ("AGC") on 6 November 2013 to request discovery of all unused material obtained or seized by the CAD/Prosecution, from prosecution witnesses who testified and witnesses who were not called by the Prosecution but had been interviewed by the CAD.

75 On 15 November 2013, the AGC turned down the Defence's request on the basis that it was not in possession of unused material falling within the *Kadar* discovery regime. On 18 November 2013, the Defence wrote to the

AGC stating, *inter alia*, that their request "is for all documents in the possession of the prosecution/CAD" and asserted that "unless the defence has been furnished with copies of all documents in [the Prosecution's]/the CAD's possession, [they] will not be in a position to determine their relevance or materiality to the defence case".

76 On 20 November 2013, the AGC wrote to the Defence seeking clarification on the legal basis for its request. The Defence replied stating, *inter alia*, that "[i]t is therefore apparent that the prosecution has taken the position that there is no "legal basis" for [their] requests, a position [they] cannot accept in light of the decided cases on the law". The Defence did not elaborate on which "decided cases on the law" they were referring to.

77 On 25 November 2013, the AGC replied that it was unable to accede to the Defence's request and on 27 November 2013, the Defence wrote to the District Judge seeking directions on the discovery of *all* unused documents in the Prosecution's possession.

The application before the District Court

78 On 25 February 2014, prior to the hearing of the trial for Soh to make his defence, Soh made a formal application to the District Judge for the disclosure of and production by the Prosecution of:

(a) All documents in the possession of the Prosecution which had been obtained or seized by the CAD/Prosecution from the 29 witnesses who had been interviewed but not called to testify.

(b) All documents in the possession of the CAD/Prosecution which had been seized or furnished by witnesses who testified for the

> Prosecution and which had not been referred to or tendered by the Prosecution as part of its case.

79 The District Judge began by observing that the Defence was essentially seeking discovery of all "unused material" except for statements made by witnesses to the CAD in the course of police investigations. The application was founded on the Prosecution's *Kadar* obligation of disclosure which stemmed from the decision of the Court of Appeal in *Muhammad Bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar No 1*").

80 The District Judge considered the relevant case law and took the view that the Prosecution's *Kadar* obligation did not cover all unused material; it only included material that tends to undermine the Prosecution's case or strengthen the Defence's case. In his view, nothing in *Kadar No 1* stood for the proposition that "disclosure should generally be made to the Defence, which will then decide what to do with the material". In this regard, the District Judge was cognisant that the Court of Appeal had stated expressly that the Defence is not entitled to all unused material.

81 Further, the District Judge noted that the Defence had not drawn the Prosecution's attention to any specific document or category of documents that it sought to have produced. While the Defence claimed that it required discovery of all the documents in order to decide whether to call any of the 29 witnesses as part of the Defence's case, the District Judge agreed with the Prosecution that the assessment could be made by interviewing the 29 witnesses or issuing subpoenas for them to testify in court and thereafter taking instructions from the accused. As for the documents seized from the witnesses who had testified for the Prosecution, the Defence could have cross-

examined those witnesses on those documents while they were still giving evidence on the witness stand.

82 The District Judge also found that the Defence had not displaced the presumption that the Prosecution had complied with its disclosure obligation. In other words, the Defence had not shown reasonable grounds to believe that the Prosecution had in their possession material which should be disclosed. The District Judge addressed two specific arguments made by the Defence in this regard. First, the District Judge rejected the Defence's argument that the Prosecution's disclosure of the MSC Statements showed that there were other documents that should be disclosed under *Kadar*, commenting that the Notes of Evidence would show that the Prosecution had voluntarily supplied the statements to the Defence and merely objected to their admissibility on the basis of the hearsay rule.

83 Second, the District Judge also rejected the Defence's argument that the Prosecution was also obliged to disclose evidence related to the civil penalty action brought by the Monetary Authority of Singapore ("MAS") against one Ng Yu Jin and Phua under s 201(*b*) of the SFA. Instead, the District Judge agreed with the Prosecution that since the Attorney-General was acting in his capacity as legal counsel to the MAS insofar as the civil penalty action was concerned (and not as the Public Prosecutor), there was no legal basis to conflate the two roles. Any documents provided by the MAS to the AGC would be privileged pursuant to s 128A(1) and (5) of the EA. Further, the Prosecution had placed on record that the prosecutors having conduct of the trial had not seen any of the evidence in relation to the civil penalty action. In any case, the District Judge said that if the Defence was of the view that the evidence in the civil penalty action could exculpate the accused, the Defence

could and should subpoena them as witnesses and seek production of any relevant documents from any of them if necessary.

84 To conclude his analysis, the District Judge suggested that if the Defence was of the view that there was specific material or categories of material within the Prosecution's possession that may be *prima facie* relevant and credible, it should identify such material and bring them to the Prosecution's attention. He took the view that the Defence would be in a position to establish the existence of such material if it were to cross-examine the Prosecution's witnesses, interview the witnesses offered to it by the Prosecution and/or subpoena them to testify in court on these documents and thereafter take the accused's instructions on the existence of such material or categories of material.

The application to state questions of law

85 After the discovery application was dismissed by the District Judge, Soh applied under s 395(2)(*b*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") for the District Judge to refer to the High Court certain questions of law on criminal discovery. The District Judge allowed the reference application. The questions ("the Questions") framed by the District Judge were as follows:

> (a) Whether the Kadar disclosure regime requires the Prosecution to provide the Defence with a list of all unused material in its possession which have been seized or taken from witnesses offered to the Defence by the Prosecution (but without their disclosure or production) so as to enable the Defence to identify any such material which may be *prima facie* relevant and credible, and bring them to the Prosecution's attention for its consideration and assessment, after

which only then would such material be disclosed to the Defence or placed before the Court for a ruling?

(b) Whether the Kadar disclosure regime requires the Defence having to first ascertain by interviewing the witnesses offered by the Prosecution to the Defence and taking instructions from the accused person, the unused documents or categories of documents that may be *prima facie* credible or relevant to the defence before making a written request to the Prosecution for the said documents?

(c) Whether in the light of the fact that the Defence has no power to compel the attendance of witnesses for the purpose of ascertaining whether they have credible and/or relevant documents in their possession, the *Kadar* disclosure regime requires the Defence to first issue subpoenas against the witnesses to testify and then question them to ascertain whether they have provided relevant documents to the CAD/Prosecution in the course of police investigations, before the Defence is entitled to make an application for the documents?

(d) In the context of the Court of Appeal's observations on unilateral decision making in *Kadar No 1* and in the context of the Defence not having been provided with a list of the material in the Prosecution/CAD's possession, whether the *Kadar* disclosure regime requires the Defence to have to first identify unused material or documents which may be *prima facie* relevant and credible, and bring them to the Prosecution's attention for its consideration and assessment, after which only then would such material be disclosed to the Defence or placed before the court for a ruling?

(e) In the context of the Court of Appeal's observations on unilateral decision making in *Kadar No 1*, whether the Prosecution can unilaterally decide on whether and when there is a dispute, uncertainty or doubt as to whether any unused material in its possession is *prima facie* relevant and credible such that the Prosecution ought to refer it to the court for the court to assess and make the determination?

(f) In the context of the Court of Appeal's observations on unilateral decision making in *Kadar No 1*, whether the Prosecution is entitled to conduct its own internal assessment/evaluation of the unused material in its possession and state that it has no material which "tends to undermine the Prosecution's case or strengthen the Defence case", without the court or the Defence ever having first had sight of the unused material or being provided with a list of documents in the CAD/Prosecution's possession?

86 Before the High Court, the arguments revolved around a preliminary issue, that is, whether the District Judge had jurisdiction to refer the questions of law under s 395(2)(*b*) of the CPC because a final order had not yet been granted. Noting the reasoning of the High Court on a similar issue in *Azman bin Jamaludin v Public Prosecutor* [2012] 1 SLR 615, Chao Hick Tin JA dismissed the application on the preliminary point of jurisdiction and directed for the trial in the court below to continue. Significantly, Chao JA clarified that nothing in his decision had any bearing on the merits of the case. Further, in fairness to the District Judge, Chao JA noted that at the hearing before the District Judge, the Prosecution did not object to the reference application on the preliminary point of jurisdiction and the District Judge did not have the opportunity to consider the issues that were eventually canvassed before the High Court (*Anthony Soh (Reference Application)* at [47]).

The present application

87 In the present appeal, Soh seeks to renew his application for discovery in accordance with the principles laid down by the Court of Appeal in *Kadar No 1*. His submission is essentially that the Prosecution had breached its criminal discovery obligation laid down in *Kadar No 1*, thus displacing the presumption of compliance. According to counsel for Soh, there are documents that may lead to a train of inquiry and his client would have been prejudiced by the non-disclosure of these documents.

88 Counsel emphasised that the Prosecution had breached its criminal discovery obligation by failing to disclose the MSC Statements to the Defence. To properly address this argument, it will be useful to understand what transpired at the trial. During the cross-examination of the Investigating Officer (Tan Fong Chin), it emerged that the CAD had enlisted the help of the MSC to record statements from Rahman and Isnin. The Prosecution took the position that the MSC Statements were hearsay since the individuals who provided the statements were not going to testify and that the statements were not admissible at that stage. After the court stood down to permit counsel to look into the issue of the court's power to order production of documents, the Prosecution voluntarily supplied the Defence with three statements, two from Rahman and one from Isnin.[1] According to counsel, the Prosecution's failure to produce these statements earlier was a breach of its discovery obligation which displaces the presumption that the Prosecution has complied with its discovery obligation.

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1 ROP Volume 2, p 753.

89 The Prosecution points out that it is not entirely clear what Soh is seeking in this appeal as regards the issue of unused materials. Soh's Petition of Appeal suggests that, as a ground of appeal, he takes issue with the District Judge's alleged failure to order disclosure of all the unused materials in the Prosecution's possession or to review those documents which, according to Soh, resulted in a miscarriage of justice. At the same time, Soh states in his Petition of Appeal that he is renewing his application for unused documents. However, the precise scope of the application is unclear. A renewal of his application before the trial court means that Soh is seeking disclosure of ***all*** unused materials in the possession of the Prosecution, but this is inconsistent with his Petition of Appeal which states that "[Soh] renews his application for unused documents that the Prosecution is required under the Kadar regime to disclose and produced [*sic*] to [Soh]".

90 The Prosecution also emphasises that the six purported questions of law which formed the subject matter of the earlier criminal reference to the High Court and which are reproduced in Soh's Petition of Appeal are not before this court since Soh has not filed a fresh criminal reference to refer these questions to the High Court. Therefore, the focus of this court should only be on the disclosure application. I turn now to the applicable legal principles.

Applicable legal principles

91 In *Kadar No 1*, two brothers were charged with the murder of the victim, an elderly woman who was stabbed to death in her apartment. During the trial, it was incidentally revealed by police officers that three statements had been recorded from the husband of the victim, wherein he stated that he was quite sure that there was only one person who had entered the apartment

that day. These statements, which had not been made available to the Defence, would have been fatal to the Prosecution's case theory that both brothers were at the apartment. It was in this context that the Court of Appeal, after conducting a compendious analysis of the existing authorities in Singapore and other common law jurisdictions, held that beyond an ethical duty, there is a common law duty for the Prosecution to disclose to the Defence a limited amount of unused material ("the *Kadar* obligation").

92 While the Court of Appeal left the precise scope of the *Kadar* obligation open for further development, it was careful to limit the duty of disclosure to: (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

93 A few aspects of the Court of Appeal's decision in *Kadar No 1* merit elaboration. *Firstly*, the Prosecution is obligated to disclose only exculpatory material that would likely be admissible in evidence or would provide a real chance of leading to such "likely-admissible" material. *Secondly*, the phrase "material … that might reasonably be regarded as credible and relevant" refers to material that is objectively *prima facie* credible and relevant. Evidently, the *Kadar* obligation to disclose unused material is a limited one, and the required extent of disclosure has to be calibrated with the ultimate purpose of disclosure in mind, that is, to ensure a fair trial and prevent miscarriages of justice. *Thirdly*, in respect of timelines, the Court of Appeal aligned the *Kadar* obligation with the existing criminal case disclosure procedures in the CPC and where these statutory procedures do not apply, disclosure pursuant to the

Kadar obligation must take place at the latest before the trial begins. While not all non-disclosures will be attributable to fault on the part of the Prosecution, the Court of Appeal made it clear that a failure to discharge the *Kadar* obligation timeously could possibly result in a conviction being overturned if such an irregularity can be considered to be a material irregularity that occasions a failure of justice or renders the conviction unsafe (*Kadar No 1* at [120]).

94 Following *Kadar No 1*, the Prosecution applied to the Court of Appeal to clarify the scope of the *Kadar* obligation. In *Muhammad bin Kadar and another v Public Prosecutor and another matter* [2011] 4 SLR 791 ("*Kadar No 2*"), the Court of Appeal clarified that the *Kadar* obligation does not require the Prosecution to search for additional material outside its knowledge. The Court of Appeal made two further observations beyond the scope of the matters set out in the Prosecution's application. The Court of Appeal first observed that the judgment in *Kadar No 1* could not affect the operation of any ground for non-disclosure recognised by any law as it did not have the power to depart from statute law (*Kadar No 2* at [18]). The Court of Appeal also observed that if a prosecutor knows of material and knows of a case where it should be disclosed, he is under an institutional and personal duty to arrange for the disclosure of that material even if he is not directly assigned to conduct that case (*Kadar No 2* at [19]).

95 The scope of the *Kadar* obligation was further elucidated by Chan Seng Onn J in *Lee Siew Boon Winston v Public Prosecutor* [2015] 4 SLR 1184 ("*Winston Lee (HC)*"). Chan J stressed that the credibility and relevance of the exculpatory evidence should not be subject to an opaque, purely internal and subjective exercise of discretion; the court is the ultimate arbiter of the credibility and relevance of exculpatory evidence (*Winston Lee (HC)* at [162]).

Chan J held that there is, however, a presumption that the Prosecution had complied with the *Kadar* obligation and this presumption would only be displaced if the court had reasonable grounds to believe that the Prosecution had failed to comply with the *Kadar* obligation (at [184]). Where the presumption has been displaced, the court would look to the Prosecution to show that it had complied with its obligation. Chan J observed in the course of his judgment that in cases where the Prosecution had doubts on whether material should be disclosed, it should of its own volition disclose the material without seeking a ruling from the court which should be seen as a measure of last resort (at [181]).

96 Subsequently, the accused in *Winston Lee (HC)* brought a criminal motion for leave to refer questions of law to the Court of Appeal pursuant to s 397(1) of the CPC. One of the questions concerned the threshold test for the Prosecution to demonstrate compliance with its *Kadar* obligation. In *Lee Siew Boon Winston v Public Prosecutor* [2015] SGCA 67 ("*Winston Lee (CA)*"), the Court of Appeal endorsed Chan J's formulation of the test in the following terms: "[i]f the court is satisfied that there exist reasonable grounds to believe that the Prosecution has in its possession material which should be disclosed, then the presumption is displaced and the Prosecution has to show or prove to the court that it has not in fact breached its *Kadar* obligation". The Court of Appeal also approved of Chan J's statement that "[t]he presumption will only be displaced if the court has sufficient reason to doubt that the Prosecution has complied with its *Kadar* obligation".

97 At this juncture, it will be useful to take stock of what has been discussed above. First, the Prosecution is duty-bound to disclose to the Defence a *limited* amount of unused material that is exculpatory in nature, *viz*, material that tends to undermine the Prosecution's case or strengthen the

Defence's case. Secondly, only material that is *prima facie* credible and relevant has to be disclosed. Where the Prosecution has doubts whether to disclose, disclosure to the Defence should be the usual course. A ruling from the court may be obtained as a measure of last resort in contested applications where the Defence seeks disclosure but the Prosecution *bona fide* believes that disclosure is not required. Thirdly, there is a presumption that the Prosecution has complied with its duty of disclosure ("presumption of compliance") that would only be displaced if there were reasonable grounds to believe that the Prosecution had failed to comply with its duty.

98 It must necessarily follow from the presumption of compliance that the Prosecution is entitled to conduct its own internal assessment and evaluation of the unused material in its possession without first providing the court or the Defence with the unused materials or a list of the unused materials. This is so unless the Defence has shown that there are reasonable grounds to believe that the Prosecution had failed to comply with its duty of disclosure. I would note in this regard that it would not be helpful for the Defence to make a blanket assertion that the Prosecution has failed to comply with its duty of disclosure without reference to specific categories of undisclosed documents which they believe to be exculpatory. Lastly, the principles governing the Prosecution's duty of disclosure are to be applied with the foundational principles of justice and fairness in mind.

99 In respect of the Defence's suggestion that it is entitled to a list of all unused materials in the Prosecution's possession, I would observe provisionally that this suggestion is ultimately difficult to reconcile with the Court of Appeal's view that the *Kadar* obligation is a limited one. Further, such an obligation if imposed would evince a clear and perhaps unwarranted distrust of the Prosecution's ability or willingness to comply with its

disclosure obligation which is plainly inconsistent with the presumption of compliance. I note also that the Defence is not hamstrung in the criminal discovery process even without the benefit of a list of all unused materials in the Prosecution's possession. Interviewing witnesses (or subpoenaing them to court) as well as taking detailed instructions from the accused person are some of the possible means by which the Defence could establish the existence of undisclosed, exculpatory materials so as to displace the presumption of compliance. While there is no strict requirement that the Defence must explore or even exhaust all these avenues before applying for the disclosure of specific documents, the Defence must ultimately be prepared to satisfy the court that there are reasonable grounds to believe that the Prosecution had failed to comply with its duty of disclosure.

Application

100 Turning now to the disclosure application proper, counsel argues that (a) the MSC statements fell within the *Kadar* obligation and the Prosecution had therefore fallen short of its duty by failing to disclose these statements before the trial; and (b) this breach displaces the presumption that the Prosecution had complied with the *Kadar* obligation and shifts the burden on the Prosecution to satisfy the court that it had done so. The categories of material sought are extremely broad and they include statements and materials obtained from witnesses such as (a) Steven Ow; (b) William Chan; (c) Valerie Ong; (d) Wong; and (e) Phua. Counsel also contended that there must at least be a regime under which a list of unused material is supplied, or alternatively a regime under which these documents are provided for the court to determine if they are credible or relevant since the Defence is unable to specify the documents that are in the Prosecution's possession. Before engaging the

merits of these arguments, I note that they are all arguments that have been canvassed before and addressed by the court below.

101 I agree with the Defence that the MSC statements fell within the *Kadar* obligation. The District Judge accepted that the MSC statements were relevant to the defence given that they would to a large extent corroborate the accused's account, in particular of his reliance on Rahman's representations on the SCBJ account, the issuance of the FRC Letter and his honest belief of the existence of that account. While the District Judge ultimately found that the MSC statements were unreliable and not credible at the end of the trial, much of his assessment involved testing the credibility of those statements against the other materials that had been placed before the court. Prior to the conclusion of the trial and without the benefit of the full trial process, it is difficult to say with certitude that the MSC statements did not meet the threshold of *prima facie* credibility.

102 It bears recalling that the Prosecution's initial position was that the MSC Statements were hearsay and therefore inadmissible. However, after the District Judge found that the statements were relevant to the defence, the Prosecution appeared to accept the District Judge's finding but maintained that the MSC Statements did not fall within its *Kadar* obligation because they were not credible. However, the Prosecution did not provide any reasons for taking this view of the MSC Statements and it is insufficient to fall back on the contention that they were hearsay statements. After all, there are hearsay exceptions that might apply, and in the event the District Judge ruled that the MSC Statements could be admitted under s 32(1)(*j*)(ii) of the EA as exceptions to the hearsay rule.

103 I am mindful that the *Kadar* obligation is a limited one; only exculpatory evidence that is *prima facie* relevant and credible should be disclosed to the Defence. A judicious and delicate balance needs to be struck between an overly liberal and overly restrictive approach towards criminal discovery. On one hand, the Court of Appeal has made it clear that disclosure is limited to material that is *prima facie* (as opposed to *possibly*) credible and relevant (*Kadar No 1* at [116]). On the other hand, the Court of Appeal also observed that "credibility may be *difficult* to determine in advance, and the critical question of whether exculpatory evidence is true ultimately resides within the domain of the court and not within that of the Prosecution" [emphasis in original] (*Kadar No 1* at [115]). In the context of criminal law where the life and liberty of an individual is at stake, it is important to place all the apparently-credible, relevant or admissible material before the court which could then accord appropriate weight to the material. Ultimately, whether the material in question falls within the Prosecution's *Kadar* obligation depends on all the circumstances of the case.

104 Notwithstanding my observations above, even if the Prosecution had breached its *Kadar* obligation by failing to disclose the MSC statements before trial, the MSC statements were eventually furnished upon the Defence's request and the Defence did have sufficient time to consider them. It also appears from the Defence's arguments that it is in effect arguing that because of this breach, the floodgates have been forced open and it is now entitled to the disclosure of other unused materials in the Prosecution's possession. In my view, and with respect, this argument is ambitious but patently without merit. The mere fact of this breach alone does not invite the inexorable inference that there are reasonable grounds for believing that the Prosecution had fallen short of its *Kadar* obligation in respect of *other* materials. It does not furnish grounds to demand the Prosecution to produce

for the court's inspection statements and materials obtained from other witnesses. Moreover, counsel has not explained how these materials could be exculpatory in nature and has not furnished any other basis to contend that the Prosecution had breached its *Kadar* obligations in respect of other materials.

105 Before leaving the issue on criminal discovery, I should add that there is no merit in counsel's suggestion that the Defence is disadvantaged in the criminal discovery exercise as it does not know what documents are in the Prosecution's possession. *Firstly*, as the District Judge had rightly pointed out, the ball was in the Defence's court. The Prosecution had not sought to deny the Defence access to any potential witnesses; all the 29 witnesses who were not called were offered to the Defence. In respect of witnesses who had not been called, it was always open to the Defence to interview these witnesses or to call them to testify so as to establish the existence of exculpatory documents; and in respect of witnesses who had been called, the Defence was entitled, in its cross-examination of these witnesses, to establish the existence of exculpatory documents. The failure to do so would mean that there is no independent evidence supporting much of what the accused sought to establish in his defence. *Secondly*, the Prosecution's *Kadar* obligation does not extend so far as to require a list of all unused materials to be provided to the Defence.

106 In an adversarial system of criminal justice, it is not the Prosecution's duty to assist the Defence in making out a case nor is it appropriate to allow the Defence to trawl through lists of unused material in the speculative hope of finding a defence, while placing the burden on the court to decide on the relevance or credibility of those materials. The Prosecution's overriding duty is to act fairly in the public interest and to assist the court. Surely this does not mean it must be placed in the invidious position of having to assist the Defence to this extent as well. The Defence's suggestion has no basis in law

and is plainly against the weight of the authorities that have been examined above. The point was made abundantly clear in *Kadar No 1* that there are reasonable limits to the amount of unused material that has to be disclosed by the Prosecution. For these reasons, I fully agree with the District Judge's view that the discovery application is nothing but a fishing or trawling expedition which, if permitted, would render nugatory the laws on criminal discovery.

Appeal against conviction

107 In MA 123/2015/01, Soh appeals against his conviction in respect of the 11 charges to which he claimed trial. The appeal is premised largely on his submission that the District Judge had erred in his findings of fact or on aspects of mixed law and fact. The key points raised by the Defence revolve around the following contentions:

(a) Soh reasonably believed that APLL (or he) did have sufficient financial resources or means of funding to implement the VGO;

(b) The VGO was made in good faith and was a legitimate commercial transaction; and

(c) APLL's professional advisers (OCBC and A&G) had failed in their duties to advise him/APLL.

108 These are the central issues that are germane to the 37th and 38th charges. These charges were the focus of counsel's submissions on appeal and I will begin with the 37th charge as the findings in this respect would have an impact on the 1st to 7th charges (for insider trading) and the 38th charge (for creating a false and misleading appearance in the price of securities).

37th charge

109 The main plank of Soh's case in respect of the 37th charge is that he had reasonable grounds to believe that OCBC Bank was intending to extend a loan secured by banker's guarantee(s) issued from the SCBJ account. He also attributes the failure of the VGO to the advisers' individual and collective failures to advise him/APLL prior to the Offer Announcement on two aspects of the VGO: (a) that he/APLL had to furnish cash of S$116m; and (b) whether APLL retained beneficial ownership of the 300,050,000 shares pledged by him/APLL to Opes Prime under the GMSLA.

110 Soh's argument fails on a number of levels. First, the evidence shows that he had no reasonable grounds to believe that the funds which were allegedly in the SCBJ account could be used as collateral upon which banker's guarantees could be issued. Secondly, even if it could be said that he did reasonably believe that the funds in the SCBJ account could be used as collateral, he did not have reasonable grounds to believe that OCBC was intending to extend a loan on the basis of the banker's guarantee(s) drawn from the SCBJ account. Further, the alleged breaches of duty by the professional advisers are, to my mind, red herrings and completely irrelevant to these proceedings. I turn now to explain the reasons for my views.

Whether Soh had knowingly misled OCBC with the FRC Letter

111 In the trial below, it was established that the FRC Letter had not been issued by SCBJ. It was also established that neither FCGIL nor APLL maintained an account with SCBJ at any point in time and that Lim Bun Tjaij, one of the purported signatories to the FRC Letter, retired from SCBJ well before the letter was issued. As for Ng Khok Pheng, it was also established that he had never signed the FRC Letter. All this pointed irresistibly to the

inference that a forged letter had been provided. The District Judge found that Soh was complicit in the forgery and had been untruthful in his claim that he was not involved in the drafting of the FRC Letter. In particular, the District Judge found that Soh had inserted information into the draft FRC attachment that only Soh could have provided and that Soh had also renamed the file. I do not see any reasons to interfere with the District Judge's findings in this regard as they are amply supported by the evidence.

112 In any case, even if Soh had no hand in the drafting of the FRC Letter, he must have known that the contents of the letter were untrue. His own evidence was that the funds in the SCBJ account could not be remitted or withdrawn.[2] In contrast, the FRC Letter clearly stated that the funds were earmarked "to make payment for the Offer Shares tendered in acceptance of the Offer".[3] Notwithstanding that, Soh proceeded to certify as true copy the FRC Letter and caused it to be delivered to OCBC, knowing that OCBC was waiting for the letter to complete the draft VGO announcement (see above at [32]). Clearly, he had done so with the intention of misleading OCBC.

Whether Soh had reasonable grounds to believe that the funds allegedly in the SCBJ account could be used as collateral

113 Soh submits that he had reasonably relied on the representations made by Rahman to him regarding the funds allegedly in the SCBJ account. Much emphasis was placed on the contents of the MSC statements which, on their face at least, appear to provide some corroboration of Soh's account of events, and in this regard, he submits that the District Judge had erred in failing to accord any weight to the MSC Statements.

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2 ROP Volume 3, p 377.

3 ROP Volume 6, p 666.

114 I do not think that there is any merit in Soh's submissions that he had reasonable grounds to believe that the funds allegedly in the FCGIL (SCBJ) account could be used as collateral for the VGO. No weight should be placed on Rahman's and Isnin's uncorroborated assertions as to the existence of the SCBJ account, and the funds in the same. Even if Rahman had indeed made the representations as asserted by Soh, I do not think that it was reasonable for Soh to have relied on those representations given the number of red flags that strongly indicate serious irregularities with the account.

(1) Whether any weight should be accorded to the MSC Statements

115 I am of the view that little weight (if any) should be accorded to the MSC Statements. Rahman's statements, in particular, were internally and externally inconsistent, and therefore highly unreliable. It will suffice for me to give two examples. First, Rahman claimed in his statement recorded on 28 August 2008 that he was the sole signatory to the SCBJ account.[4] This assertion directly contradicted what he told the MSC just a day earlier (*ie*, that there were three signatories to the SCBJ account).[5] It was also inconsistent with the undisputed FCGIL board resolution dated 25 July 2006, signed by Rahman himself, which stated that there would be three signatories to the account (namely, Rahman, Isnin and Soh).[6] Secondly, Rahman's assertions in relation to the existence of the SCBJ account and the funds therein appear to be unsubstantiated. More importantly, given that one Tauchid Trihandoyo, an officer from SCBJ, had given affirmative evidence that the account in question never existed,[7] it would be extremely unsafe to accord any weight to

4 ROP Volume 14, p 189.

5 ROP Volume 14, p 164.

6 ROP Volume 12, p 292.

7 ROP Volume 10, p 499.

Rahman's statements. If the SCBJ account genuinely did exist, it would stand to reason that SCBJ's officer(s) would be able to verify this without hesitation.

116 Next, I note that Rahman's and Isnin's versions of the story were not consistent with Soh's. In the court below, Soh sought to persuade the court that while the US$500m could not be withdrawn, the remaining US$125m could be withdrawn with the consent of all three directors of FCGIL. This is clearly at odds with Rahman's statement that the maximum amount deposited in the SCBJ account was US$625m and that "the amount is not to be shared".[8] In the court below, the defence submissions stated that Isnin had confirmed that Rahman was holding the fund in trust purportedly for the former Prime Minister of Malaysia, and in his oral testimony, Soh had made a similar claim that Isnin told him the name of the owner.[9] However, as pointed out by the District Judge, Isnin's statement contradicted Soh's claims because Isnin's account was that he did not know the identity of the owner of the fund.[10]

117 I am also conscious of the fact that the MSC Statements contain out-of-court statements that cannot be tested under cross-examination. While they had been admitted under the exception to the hearsay rule under s 32(1)(*j*)(ii) of the EA, the court retains a discretion under s 32(5) of the EA to assign such weight as it deems fit to the statements in question. In the present case, apart from the issues of reliability that have been highlighted above, I should also emphasise that there is a further reason to doubt the veracity of Rahman's statements. By his own admission, Rahman was the one who had procured the FRC on behalf of Soh.[11] Since the FRC letter turned out to be a forgery,

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8 ROP Volume 14, p 173.

9 ROP Volume 3, p 253.

10 ROP Volume 14, p 203.

Rahman was effectively Soh's accomplice and had every reason to misrepresent the facts. It is wholly fanciful to suggest that Soh was in fact a victim of Rahman's fraudulent misrepresentation.

118 In view of the above considerations, I find that the MSC Statements are of highly doubtful probative value. I agree with the District Judge's decision to accord little weight to the contents of the same.

(2) Whether there were red flags that put Soh on notice as to the serious irregularities with the SCBJ account

119 In the court below, Soh's evidence was that he "had no reason to suspect" and therefore, did not bother to verify the existence of the funds within the SCBJ account.[12] The District Judge had set out detailed reasons at [74]–[93] of his GD for his view that there were red flags that ought to have placed Soh on notice of the serious irregularities with the SCBJ account. I endorse his view in full and I would highlight a few such red flags which, in my view, demonstrate compellingly that Soh could not have reasonably believed that the funds allegedly in the SCBJ account could be used as collateral upon which funding could be obtained for the VGO.

120 As early as March 2007, Soh was told by one Armin Bosshard in an email sent on 6 March 2007 that the authorities had told him that the SCBJ account had no cash funds.[13] The email stated:

> Dear Dr. Soh

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11 ROP Volume 14, p 185.

12 ROP Volume 3, p 404.

13 ROP Vol 11, p 471.

> I have tried to contact you this evening on your Cell Phone and I spoke to your answer machine.
>
> We have a Question to you and maybe you are disapointed [*sic*] on this but we have to ask you this question.
>
> On the Account in London there is no money because it is a Mirror-Account. THIS Situation is CLEAR.
>
> BUT
>
> Are on the Account in Jakarta also Cash Funds?
>
> I tell you why we ask you this.
>
> *The Authorities came back to us and told us, that also on this account are no cash Funds. …*
>
> [emphasis added in italics]

121 Subsequently, in October 2007, one of Soh's business counterparties had, in response to a purported SWIFT message sent by SCBJ in September 2007, stated in an email that the SWIFT message was a fraudulent one. It will be useful to set out the email in full:[14]

> **Dear Anthony,**
>
> I am sending your copy SWIFT MT760 with remark after expertise by specialist of LLB (It was made with security for us).
>
> You must know:
>
> 1. This copy is fraudulent;
> 2. The person who has made this swift absolutely does not know format SWIFT MT760;
> 3. Person absolutely does not know the rules of system swift "FIN Service Swift";
> 4. Format of SWIFT MT760 has Seven Field and Six Field of format are obligatory use! (Your copy swift has only one Field 27, which is corresponding to format MT760);
> 5. If Format swift before its preparing by banking officer will have any discrepancy or mistakes, then the swift system with program of "FIN Services Swift" will not

[14] ROP Vol 12, p 514.

> accept this copy; (this similar when you are sending email, but address of email is wrong);
>
> 6. Time of transmission swift usually within from 30 sec. to 3 min. max., it when the line is open i.e. when banks are working. When bank is closed the swift system will deliver message about non delivering.
>
> All this mentioned information is fully correct!!!
>
> Therefore, you must decide these problems with your command and with your bank, because it is criminal offence!
>
> …
>
> [emphasis in original in bold]

122 During cross-examination, Soh attempted to downplay the significance of the above email and claimed that it did not cross his mind that the SWIFT message was fraudulent notwithstanding his admission that if all that had been alleged were true, it was a serious problem.[15] He also explained that Rahman had cancelled the SWIFT in question as he did not like the deal.[16] His explanation evades the point. I do not see how a fraudulent SWIFT transfer with mistakes in its formatting could be plausibly and so conveniently explained away as one that had been cancelled after it had been sent.

123 Further, I find it especially telling that Soh had stated in an email to Marian Morgan on 24 January 2008 that "[t]he funds in SCB though real had long been used by the authorities to hypothecate no wonders our swifts were never allowed thru the regulators, so we have given up on that".[17] When he was cross-examined on this email, he claimed that he was "puzzled what exactly it means"; his only explanation was that he had given that response since he was unwilling to make the transfer to Marian Morgan.[18]

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15 ROP Volume 4, p 385.

16 ROP Volume 4, p 386.

17 ROP Volume 11, p 672.

124 In the light of the above red flags, it is extremely difficult to accept that Soh had believed in good faith that the funds in the purported SCBJ account could be used as collateral to fund the VGO. In any event, such a belief could not have been founded on any reasonable grounds. In this regard, I will briefly address Soh's contentions that the District Judge had wrongly refused to place weight on (a) the grant of a UOB Privilege Banking account to Rahman, (b) various confirmations that the US$500m in the SCBJ account had been cleared by the US Federal Reserve, as well as (c) an email from one William Chan which stated that "I have confirmed that the funds are there".

125 There is no merit in these contentions. Soh relies on a series of correspondence to show that there was previous confirmation in writing that the US$500m in FCGIL's SCBJ account had been cleared by the US Federal Reserve. In that series of correspondence, mention was made of various transactions. For instance, in an email dated 29 September 2008, Soh had stated, *inter alia*, that "[o]n 5 Mar 08, William Chan … checked and confirmed that the US$500M BG was sent and received by UBS Zurich".[19] However, like the email from William Chan,[20] there is nothing in the aforesaid series of correspondence that links the subject matter of those discussions with FCGIL's SCBJ account. Further, as pointed out by the District Judge, Soh's evidence on Rahman's UOB account was hearsay and was unsupported by any documentary evidence. Therefore, these cannot constitute reasonable grounds for Soh's purported belief that the alleged US$500m in FCGIL's SCBJ account could be utilised as collateral upon which a loan could be secured to

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18 ROP Volume 4, p 410.

19 ROP Volume 14, p 281.

20 ROP Volume 14, p 255.

finance the VGO. All the evidence therefore points plainly to the irresistible inference that the SCBJ account did not exist.

126 It is also disingenuous for Soh to suggest that an adverse inference should be drawn against the Prosecution for failing to call William Chan as a witness. It is pertinent to recall that William Chan was offered to Soh as a witness. If Soh were truly confident that William Chan would have given evidence in his favour, he should have called William Chan as a defence witness, but he chose not to do so and has not provided any credible explanation for his failure to do so.

Whether Soh had reasonable grounds to believe that OCBC was intending to extend a loan secured by banker's guarantee(s) issued from the SCBJ account

127 I have found earlier that Soh had no reasonable grounds to believe that the funds in the (non-existent) SCBJ account could be used as collateral to fund the VGO. Even if I am wrong on that point, I am persuaded that Soh would not have had reasonable grounds to believe that he would have sufficient resources to execute the takeover bid since he knew from the outset that OCBC would not be financing the VGO. Chief among the reasons for my view is the fact that the FRC Letter expressly stated that funds had been earmarked to make payment for the VGO. To recapitulate, the FRC Letter stated as follows:[21]

> PROPOSED VOLUNTARTY [*sic*] CONDITIONAL CASH OFFER ("OFFER") FOR ALL SHARES ("OFFER SHARES") IN THE CAPITAL OF JADE TECHNOLOGIES HOLDINGS LIMITED NOT ALREADY OWNED OR AGREED TO BE ACQUIRED BY ASIA PACIFIC LINKS LIMITED ("COMPANY") AND ITS CONCERT PARTIES
>
> We refer to the above.

[21] ROP Volume 11, p 153.

> *We have been instructed by the Company to earmark US$100,000,000.00 (One Hundred Millions United States Dollars) from our current account granted to the Company, to make payment for the Offer Shares tendered in acceptance of the Offer.* In this regard, we confirm that the Company has sufficient financial resources to satisfy full acceptances of the Offer. …
>
> [original emphasis omitted; emphasis added in italics]

The terms of the FRC Letter as set out above made it crystal-clear that the intention was for the funds purportedly available in FCGIL's SCBJ account to be utilised to satisfy acceptances. It directly contradicts the alleged agreement or understanding between Soh and OCBC that the VGO would be financed by a loan from OCBC which was to be secured by a banker's guarantee issued from the SCBJ account. Further, I note that there would clearly have been no need for the FRC from a third party bank had there been any agreement or understanding that OCBC would finance the VGO.

128 Further, Soh himself had conceded under cross-examination that contrary to what he had said in his conditioned statement, there was no *agreement* reached between OCBC and himself on 31 January 2008 that the funding mechanism would be by way of a bank guarantee issued out of FCGIL's account with SCBJ. According to him:[22]

> There was no agreement signed on the 31st between OCBC and myself. There was an understanding between OCBC team and me on the 31st that this would be the way that I would fund the general offer. So there was no agreement, so I think it doesn't give you a problem. There was no agreement, I agree, but there was an understanding between OCBC and myself that a banker guarantee would be issued, and that would be the funding mechanism.

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22 ROP Volume 3, p737.

129 The District Judge found that there could also not have been any *understanding* between OCBC and Soh that the former would finance the VGO. I agree with the District Judge's findings in this regard and I do not think it is necessary to repeat all of his findings save to highlight a few.

130 First, I agree with the District Judge's point that if the "understanding" was for OCBC to actually fund the VGO by extending a loan to Soh (on the security of a bank guarantee), it begs the question why there is no evidence of any discussion of the terms of the purported loan (such as the interest rate payable, the duration of the loan, events of default, and so on). The offeror's financial capacity to execute the bid is one of the most (if not the most) crucial aspects of a takeover offer and it is completely inconceivable and illogical for the parties to have left the details in respect of the purported loan to be confirmed at a later date. Therefore, as I see it, the absence of any evidence of discussion or negotiation in respect of the terms of the purported loan points irresistibly to the conclusion that there had been no understanding between Soh and OCBC that the latter would be financing the VGO.

131 Secondly, Soh's concession that the banker's guarantee was *additional comfort* effectively sounded the death knell for his contention that there was an understanding that OCBC would be extending a loan secured by the banker's guarantee. Early on in the proceedings, he had taken the position that he had told OCBC that he would fund the VGO through a banker's guarantee issued by FCGIL. However, when it was pointed out that he had said in an email dated 27 February 2008 that "a Banker's Guarantee or Swift was never part of the requirement as [he] understood right from the beginning",[23] he eventually accepted that "the BG was treated as additional comfort, was –

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[23] ROP Volume 7, p 11.

there was no argument on this one. When they told me that it was additional comfort, I am not arguing with that".[24]

132 Thirdly, there is no evidence that reflects any intention for OCBC to extend a loan that was going to be secured by the banker's guarantee from SCBJ. On the contrary, the available evidence shows that OCBC did not intend to extend any loan for the purposes of the VGO. In Soh's submissions for the proceedings before the SIC ("SIC Submissions"), he alleged that he had met with Jocelyn Hoi from OCBC's Enterprise Banking team to discuss funding prior to the announcement of the VGO:[25]

> 67 On or about the end of January 2008 when he was contemplating whether to make the VGO, Dr Soh had met with Jocelyn Hoi from OCBC's Enterprise Banking team to discuss funding for the purposes of the contemplated VGO. The proposal discussed was that OCBC would provide the credit line to APL for the monies for the acceptances on the contemplated VGO but in turn, OCBC would require a banker's guarantee as security. OCBC indicated that they may also require a banker's guarantee as additional security for the grant of credit line. Dr Soh intended that any banker's guarantee would be issued from FCGIL's account with SCBJ.

In the court below, Soh told the District Judge that he had not been challenged on the above submission and that he did not include the above evidence in his conditioned statement as he was unable to prove the meeting and what transpired during the meeting. However, the relevant transcripts showed that Soh's submission (in [67] of his SIC Submissions) had in fact been challenged and he had conceded that he had never met Jocelyn Hoi from OCBC Enterprise Banking to discuss the contemplated VGO.[26]

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24 ROP Volume 4, p 50.

25 ROP Volume 12, p 530.

26 ROP Volume 12, p 562.

133 Soh also argues that there is clear unequivocal documentary evidence that he had sought financing for the VGO from OCBC Enterprise Banking. He relies primarily on an email sent from Jocelyn Hoi to Tan on 4 March 2008, asking if there was any business proposal that OCBC intended to grant Soh upon the receipt of the guarantee.[27] Tan replied on 6 March 2008 stating that "[w]e do not foresee [OCBC] granting any loans or guarantee for the takeover of Jade Technologies at the moment but we will keep you informed if there are any business opportunities".[28] I am not convinced that the aforesaid correspondence shows that Soh had sought out financing from OCBC Enterprise Banking. There is no suggestion that Jocelyn Hoi made the enquiry pursuant to an attempt by Soh to seek funding for the VGO. In any case, even if Soh had indeed approached Jocelyn Hoi for that purpose, I am unable to accept that such an attempt to secure financing would constitute reasonable grounds for believing that OCBC would provide the necessary funding for APLL to perform its obligations under the VGO.

134 Taking his case at its highest, Soh's suggestion that he was labouring under the (mis)impression that OCBC would fund the VGO does not assist his case at all. Again, I cannot see how his impression alone, which was not supported by any objective facts, could constitute reasonable grounds for believing that he/APLL had sufficient resources to execute the takeover bid. Put another way, the fact that he proceeded to cause the announcement of the VGO with only a vague impression that OCBC would fund the VGO (as opposed to having actually secured a concrete financing arrangement) strongly suggests that he had no reasonable grounds to believe that he/APLL could perform their obligations under the VGO.

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27 ROP Volume 13 p 307.

28 ROP Volume 13, p 309.

135 In my judgment, the evidence before the court leads inexorably to the conclusion that Soh had *known* at all material times that OCBC would not be financing the VGO. Before leaving this issue, I should point out that Soh's credibility has been severely damaged by his blatant lies to the court and repeated shifts in position. He changed his evidence time and again just on the issue of financing from OCBC. First, he claimed in his conditioned statement that there was an *agreement* reached between him and OCBC on 31 January 2008 that OCBC would finance the VGO. When he was cornered during cross-examination, he changed tack and claimed that there was an *understanding* that OCBC would finance the VGO. When he later found himself compelled to agree with the Prosecution that the banker's guarantee was merely additional comfort, he switched tack yet again and claimed that he had discussed the issue of funding with OCBC Enterprise Banking. This, as mentioned above, was again another blatant lie.

Whether the breaches of duty by APLL's advisers are relevant

136 Another main plank of Soh's case in this appeal is that his *mens rea* was negated by the breaches of duty by APLL's professional advisers, namely, OCBC and A&G. According to him, he would not have proceeded with the VGO had he been correctly advised on the following aspects of the VGO, namely: (a) that he needed cash of S$116m; and (b) that the beneficial ownership of the shares transferred under the GMSLA had passed to Opes Prime. In my view, Soh's arguments in this regard are plainly unsustainable on several grounds.

137 First, I agree with the District Judge that the alleged breaches of duties by APLL's professional advisers are red herrings. Section 140(2) of the SFA, which criminalises the making of a take-over offer in the absence of

reasonable or probable grounds for believing that the offeror will be able to perform his obligations if the take-over offer is accepted or approved, clearly and squarely places the obligation on the shoulders of the offeror (and its officers) to ensure that it has sufficient resources to execute the bid. This is consistent with General Principle 6 of the Take-over Code which makes it clear that it is incumbent on *both* the offeror and his financial advisers to ensure that the offeror can and will be able to implement the offer in full. General Principle 6 reads:

> An offeror should announce an offer only after the most careful consideration. Before taking any action which may lead to an obligation to make a general offer, *a person and his financial advisers should be satisfied that he can and will continue to be able to implement the offer in full.*
>
> [emphasis added in italics]

138 Secondly, Soh's submission that OCBC did not directly ask him if he had S$116m in cash to fund the VGO is a selective portrayal of what transpired between the parties. From the onset, Soh was informed that he was required to provide OCBC with the FRC to confirm that he had funds to finance the VGO. In other words, it was made clear (albeit indirectly) that Soh needed the resources to execute the bid, and Soh had provided that confirmation through the FRC Letter. The significance of the FRC Letter is clear: it was confirmation that the funds in the SCBJ account had been earmarked to make payment for Jade shares under the VGO. It was thus unnecessary for OCBC to ask Soh directly if he had S$116m in cash.

139 For all of the above reasons, I am satisfied that Soh had no reasonable grounds to believe that he had sufficient resources to execute the takeover bid. I would go further to conclude, as the District Judge did, having regard to the evidence before the court, that Soh had *known* at all material times that both he and APLL did not have the resources to perform their obligations under the

VGO. Despite this, he went on to conceal material information and mislead OCBC with false representations about the availability of such resources.

140 Soh seems to also suggest that the breaches of duty had broken the chain of causation such that he cannot be said to have caused the announcement of the VGO. Indeed, I note that the professional advisers in the present case have been found to have fallen short of their respective duties. The Grounds of Decision of the Hearing Committee appointed by the Securities Industry Council in the Matter of Jade Technologies Holdings Limited (14 October 2008) ("the SIC Hearing Committee Report") notes (at Ch 5 para 3.9) that OCBC ought to have acted responsibly and exercised greater care to take further steps to independently verify Soh's assurances. The SIC Hearing Committee Report also concluded that A&G ought to have advised Soh on the implications of the pledge of APLL shares to Opes Prime under the GMSLA (at Ch 6 para 3.10). However, the fact that OCBC and A&G were found to have been remiss does not mean that Soh is absolved from any possible criminal responsibility or that any *mens rea* in respect of the charges has been negated.

141 It is trite that causation consists of causation *in fact* and causation *in law*. The former is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [52]. The latter is concerned with identifying the event that should be treated as the cause for the purpose of attributing legal responsibility: *Sunny Metal* at [54].

142 The concept of causation in law was more recently discussed in *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 ("*Nickson Guay*"). In that case, the appellant was charged with causing the death of an infant by a negligent act under s 304A(*b*) of the Penal Code (Cap 224, 2008 Rev Ed)("Penal Code"). He had failed to keep a proper lookout while making a right turn at a traffic-light controlled junction. On appeal, the appellant made much of the fact that the deceased infant was being breastfed at the material time and had not been secured in an approved child restraint. It was argued that the infant would not have passed on if he had been properly restrained, and that this was a factor that the appellant had no control over. Sundaresh Menon CJ held at [38] that in order for an accused to escape criminal liability, it is not sufficient for the accused to point to the fact that there are other contributing causes. All the Prosecution has to show is that the accused is a substantial cause of the injury even if there were other contributing causes. Although *Nickson Guay* was concerned with a *negligent* act, I do not see any principled reason why the same considerations should not extend to a situation involving an intentional act.

143 I am satisfied that Soh was the substantial cause of the announcement of the VGO. Right from the beginning, Soh's actions had been calculated to mislead. He had been informed by OCBC's officers that OCBC required the FRC before confirming that APLL had sufficient resources to satisfy full acceptances of the VGO in the announcement (see [35] above), and proceeded to furnish OCBC with the FRC Letter which was subsequently found to be forged. He had falsely declared his shareholdings in Jade at the meeting with his professional advisers on 14 February 2008 by including the 4,600,000 Jade shares which had already been force-sold by Opes Prime (see [31] above). Admittedly, the professional advisers could possibly have discovered Soh's fraudulent scheme had they discharged their duties more prudently and

properly. However, the fact that they had not done so does not absolve Soh from legal responsibility for the outcome that he had intended to cause. Seen in this light, it is disingenuous, to say the least, for Soh to argue in effect that his professional advisers should have prevented him from committing his wrongs.

38th charge

144 The only disputed element is whether Soh, in causing the VGO to be announced, did so with the primary intention to raise or maintain Jade's share price. In this regard, Soh contends that he had *bona fide* launched the VGO for legitimate commercial reasons. According to him, he genuinely believed that Jade shares were undervalued and to justify his belief, he had relied on a draft independent report by the Russian National Geological Institute ("the draft Giproshaft[29] Report") he had received in December 2007 which gave a favourable estimate of coal reserves in a project by a subsidiary of Jade.

145 In my view, all the aforesaid "commercial reasons" do not stand up to scrutiny. First, Soh's purported belief in the value of Jade shares and his desire to secure majority control of Jade flies in the face of his own conduct during the VGO. He was furtively offloading a large chunk (50,200,000) of his shares from 21 February to 31 March 2008, at the same time that he was offering to buy up shares belonging to other shareholders, and had profited handsomely from such sales. In my view, his secret sales of large quantities of Jade shares is an extremely cogent indicator that his ultimate aim was to secretly profit from an anticipated inflation in the share price after the VGO was announced, as opposed to genuinely seeking to secure majority control of Jade.

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[29] The entity is "Giproshaht" but the term "Giproshaft" was used in the Notes of Evidence and the GD.

146 Secondly, Soh's purported reliance on the draft Giproshaft Report was thoroughly considered and rejected by the District Judge. As pointed out by the District Judge, Soh's evidence that the draft Giproshaft Report had reinforced his belief that Jade shares were undervalued was seriously flawed. The draft Giproshaft Report that was tendered to the court bore no conclusion and did not provide any estimate of coal reserves.[30] Soh's explanation in court was that the draft report had come with a conclusion typed at the second page, and that he had torn off the page containing the conclusion because it was price-sensitive information. As pointed out by the District Judge, Soh's evidence that he had torn off the conclusion was incredible since a perusal of the draft Giproshaft Report showed that: (a) the page numbered as the second page did not contain any conclusions and was intact as part of the exhibit; and (b) the document was a complete document given that the pages run sequentially from pages one to ten where it ends off leaving a huge blank space at the bottom.

147 Thirdly, I accept that Soh had entered into the "conditional future contract" with one Rajesh Harichandra Budhrani ("Budhrani") to ensure that the latter did not tender his Jade shares pursuant to the VGO. Under the conditional future contract, Soh offered to buy 20m Jade shares from Budhrani at a price of S$0.38, which was well above the VGO offer price of S$0.225. Significantly, Budhrani was the largest non-corporate individual shareholder in Jade and if he had tendered his shares under the VGO, it would have immediately turned the VGO unconditional. The promised arrangement provided an enormous financial incentive not to tender his shares under the VGO. Soh's explanation that he had only agreed to the arrangement because Budhrani had pleaded with him was contradicted by the evidence given by

[30] ROP Volume 14, pp 441–450.

Budhrani himself. Budhrani denied that he had pleaded with Soh to purchase his shares, and testified instead that Soh had offered to buy 20m Jade shares from him at S$0.38 sometime in February 2008 and they had signed an agreement on 24 March 2008 for the same. I agree that the District Judge was entitled to accept Budhrani's evidence in this regard. This is also consistent with the earlier finding that Soh knew he had insufficient resources to implement the VGO.

148 I will next address Soh's contention that the District Judge erred in failing to consider that it would be illogical for him to artificially inflate the share price of Jade, liquidate a small proportion of his shareholdings and only to have the vast majority of his 46.58% shareholdings in Jade become nearly worthless as a result of the withdrawal of the VGO. I agree with the Prosecution that it was not inevitable that the VGO would turn unconditional. If the irregularities in the transaction had not been discovered and the VGO had not turned unconditional, it would not have been necessary for Soh to withdraw the VGO and in that situation, he might have walked away from the deal a much richer man without obliterating Jade's share prices. Further, it is clear that by the end of January 2008, Soh's shareholding in Jade had been significantly reduced and the impact on his remaining shareholding, if any, would not have been as substantial as counsel suggested it to be.

149 In my view, the evidence points overwhelmingly towards the conclusion that Soh launched the VGO with the specific intention of raising and/or maintaining Jade share prices for his own financial gain. The evidence shows that Soh was in serious financial difficulties at the material time. While Soh has sought to downplay the severity of his financial woes, I do not find his explanations to be convincing. Moreover, it is undisputed that he had applied a large part of the proceeds of his secret sales of Jade shares towards meeting his

financial obligations and this, in my view, is a further indication of his true motivations behind the making of the VGO. While he was recorded as having suggested the postponement of the VGO for a year, I am not inclined to read too much into this suggestion. In any case, any inference that could possibly be drawn in favour of Soh would be displaced by the weight of the evidence that has been discussed above.

1st to 7th charges

150 Soh's submissions on the 1st to 7th charges are similar to the arguments on the 37th and 38th charges. His key contention is that he did not know that APLL had insufficient financial resources to implement the VGO. As I have found earlier at [135] that he had such knowledge, the appeal against the conviction for the 1st to 7th charges will be dismissed on this basis. Nonetheless, I would add my observation that Soh's misconduct in respect of the 7th charge was particularly egregious. Prior to Soh's sale of 15,000,000 Jade shares on 31 March 2008 (which forms the subject matter of the 7th charge), he was told that the FRC Letter as well as the copy of the First SWIFT had not been issued by SCBJ[31] and by then, Soh had already formed the intention of withdrawing the VGO on the basis of the collapse of Opes Prime. His conduct in this respect only serves to fortify my view that he had intended to profit handsomely from the artificial inflation and/or maintenance of Jade's share price.

8th charge

151 It appears that Soh has not made any submissions in respect of his conviction on the 8th charge, the crux of which is that he had authorised the

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[31] ROP Volume 9, p 717.

furnishing of a false report to SGX on 21 January 2008 stating that he had purchased 5,500,000 Jade shares on the same day. I agree with the District Judge that this announcement was false in two respects: (a) the date of purchase and (b) the identity of the purchaser. First, Soh had not purchased the said shares on 21 January 2008. Although he initially claimed that he had instructed the purchase of 5,000,000 Jade shares on 21 January 2008, he accepted ultimately that he did not do so. Secondly, the 5,500,000 Jade shares that had been purchased earlier were purchased in Faitheagle's name, not Soh's. Therefore, I find the 8th charge to be established beyond reasonable doubt and I dismiss the appeal in this respect.

39th charge

152 The crux of the 39th charge is that up to 3 April 2008, Soh had been aware that the banker's guarantee had not been issued by SCBJ, yet he had authorised the furnishing of a report to the SIC stating that APLL had given instructions for the transmission of two banker's guarantees for a total of US$200m to satisfy the VGO when there were in fact no such instructions given. The said letter stated:

> Dear Sirs
>
> **JADE TECHNOLOGIES HOLDING LTD**
>
> I refer to your telephone instructions to Rodyk & Davidson LLP on or about 2 April 2008.
>
> I wish to make the following response for the Council's consideration:-
>
> 1. Financial resources to fulfil the Offer
>
> I have instructed my banker, Standard Chartered Bank (Jakarta) on 1 April 2008 to transmit via SWIFT to OCBC Bank in Singapore, a banker's instrument for US$100 million. Copy attached. I will be instructing my banker today, 3 April 2008, to transmit an additional banker's guarantee for an amount of up to

> US$100 million to a bank in Singapore. I shall be furnishing SIC with proof of such transmission.
>
> The total banker's instruments amounting to up to US$200 million (equivalent to S$220 million based on today's exchange rate) should be sufficient to fulfill acceptances under the Offer on the assumption referred to in my letter dated 2 April 2008 to the Company.
>
> 2. Proposal
>
> Although circumstances beyond my control have occurred, my intentions in relation to the Company under the Offer Document dated 8 March 2008 remain unchanged. I sincerely hope to be able to continue with the current Offer, which closes on Monday, 7 April 2008. If the Offer becomes unconditional at 5.00 pm on Monday, I have probable grounds to believe that I would be able to satisfy acceptances within the usual 10 days after the close of the Offer, based on the arrangements I have made as explained above. …

153 Soh submits that the District Judge had erred in finding that it was an agreed fact that no instructions were given to SCBJ to transmit an additional banker's guarantee for an amount of US$100m to a bank in Singapore. He submits that he had, in accordance with the arrangement between him and Rahman, requested for two banker's guarantees from Rahman. In my view, it does not lie in Soh's mouth to take this position in this appeal since it was expressly agreed at [72] of the Statement of Agreed Facts that "[i]n fact, no such instructions were given to SCBJ". Further, his alleged instructions to Rahman to procure the banker's guarantees do not cure the falsehoods in the report made to the SIC given that no instructions were eventually conveyed to SCBJ.

154 It is also deeply disturbing that in respect of this charge, Soh has again sought to shift the blame onto his professional adviser. He argues in this regard that the letter was drafted by one Valerie Ong from Rodyk & Davidson based on facts verified by her. Soh has also described the letter as containing

legal jargon. However, it bears noting that the crucial part of the letter (*ie*, the purported confirmation that he had instructed SCBJ to issue two banker's guarantees) was a mere statement of fact that he would have understood without difficulty. Further, it is crucial to note that Rodyk & Davidson began to act for APLL only on 31 March 2008, and had done so for barely three days before discharging themselves on 3 April 2008. They could not possibly have had full cognisance of the entire complex patchwork of background facts. Most tellingly, Valerie Ong had specifically disclaimed any responsibility and independent knowledge for the letter in an email sent to Daniel Teo of the SIC on 3 April 2008. She stated in that email:

> Although we have discharged [*sic*] as lawyers of Asia Pacific Links Ltd in connection with the Offer, Dr Soh has asked us to do him the favour of sending this to SIC, for which we bear no responsibility or liability, nor do we have any independent knowledge of. Please see attached. If you have any queries, please contact him directly without reference to us, thanks.

155 The email speaks for itself. Similar qualifications can be found in Valerie Ong's earlier email to Soh which was sent at 6.46 pm on 2 April 2008 . Rodyk & Davidson disavowed any "independent knowledge" of the contents of the letter they had sent on behalf of Soh as a "favour". Clearly, none of the facts had been verified by Valerie Ong, contrary to what Soh maintains. In view of the above, I see no reason to disturb Soh's conviction in respect of the 39th charge and I dismiss the appeal in this respect.

Conclusion on conviction

156 Soh's evidence had been thoroughly tested and found wanting, and the District Judge had rightly discerned the shifts in his evidence and numerous material inconsistencies.[32] He found that Soh had purported to rely on

[32] GD at [111].

documents such as the forged FRC Letter, bogus SWIFT transmissions from a non-existent SCBJ account and the draft Giproshaft Report in order to advance a sham defence. He concluded that Soh did not merely have no reasonable grounds to believe that he or APLL had sufficient financial resources to carry out the VGO; Soh in fact *knew* that he or APLL did not have such resources. I concur with these conclusions.

157 Soh had actively sought to mislead OCBC with the FRC Letter and his other claims which purported to confirm the availability of resources for the VGO. He concealed the true extent to which his/APLL's controlling interest in Jade had been diluted by the time the VGO was launched. He nevertheless sought to take his professional advisers to task for their failure to properly advise him. He asserts that OCBC ought to have exercised greater care and diligence before proceeding to accept his false assurances and make the VGO announcement. The District Judge opined that this argument was a red herring; to my mind it is an obvious and desperate attempt to avoid the consequences by shifting the blame for his own criminal conduct.

158 The appeal against conviction essentially seeks to overturn the District Judge's findings of fact. I agree with the District Judge's assessment of Soh's credibility; he was fully justified in finding that Soh's evidence was "incredible, unreliable and filled with blatant lies in material aspects".[33] I am not persuaded that the District Judge's findings were plainly wrong or against the weight of the evidence adduced at trial.

159 For the foregoing reasons, I find no reason to differ from the District Judge's conclusion that all 11 charges had been established beyond reasonable

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[33] GD at [143].

doubt. Soh's appeal against conviction is accordingly dismissed. I turn next to address the appeals against sentence.

Appeals against sentence

160 Following his trial and conviction in respect of 11 charges under the SFA and his plea of guilt in respect of the remaining 28 charges under the CA, Soh was sentenced on 14 August 2015. The sentences imposed, the sentences sought by the Prosecution, and the prescribed maximum sentences for each charge are set out below:

Charge	**Gain/Loss caused**	**Sentence Imposed**	**Sentence sought by PP**	**Prescribed maximum sentence**
1st Charge – s 218(2)(b) SFA	Gain of S$155,000	6 months	1 year	Fine not exceeding S$250,000 or imprisonment for a term not exceeding 7 years or both
2nd Charge – s 218(2)(b) SFA	Gain of S$310,000	6 months	1.5 years	Ditto
3rd Charge – s 218(2)(b) SFA	Gain of S$232,500	6 months	1.5 years	Ditto
4th Charge – s 218(2)(b) SFA	Gain of S$2.355m	2.5 years	3.5 years	Ditto
5th Charge – s 218(2)(b) SFA	Gain of S$1.7424m	1.5 years	3 years	Ditto
6th Charge – s	Gain of	1 year	2. 5 years	Ditto

218(2)(b) SFA	S$728,500			
7th Charge – s 218(2)(b) SFA	Gain of S$2.325m	2.5 years	3.5 years	Ditto
8th Charge – s 330(1)(a) SFA	-	6 months	6 months	Fine not exceeding S$50,000 or imprisonment for a term not exceeding 2 years
9th to 13th Charges – s 165(1)(b) CA	-	S$5,000 fine i/d 1 week's imprisonment per charge	S$5,000 fine per charge	Fine not exceeding S$15,000 or imprisonment for a term not exceeding 3 years
14th to 22nd Charges – s 165(1)(b) CA	-	3 months per charge	3 month per charge	Ditto
23rd to 27th Charge – s 166(1) CA	-	S$5,000 fine i/d 1 week's imprisonment per charge	S$5,000 fine per charge	Ditto
28th to 36th Charge – s 166(1) CA	-	3 months per charge	3 months per charge	Ditto
37th Charge – s 140(2) SFA	Caused loss of S$67.4m	4 years	5-6 years	Fine not exceeding S$250,000 or imprisonment for a term not exceeding 7 years or both

38th Charge – s 197(1)(b) SFA	Gain of S$11.3m	2.5 years	3-4 years	Ditto
39th Charge – s 330(2) SFA	-	3 months	3 months	Fine not exceeding S$50,000 or imprisonment for a term not exceeding 2 years or both

161 The District Judge ordered the sentences imposed for six charges, namely the 5th, 18th, and 36th to 39th charges, to run consecutively, resulting in an aggregate sentence of eight years and nine months' imprisonment and fines totalling S$50,000. Both the Prosecution and the Defence are appealing against the sentences imposed by the District Judge.

The decision on sentence

162 As a starting point, it will be useful to highlight a few key aspects of the District Judge's decision on sentence that are relevant for the purposes of the appeals against sentence.

Whether the custodial threshold had been crossed

163 The District Judge, at the outset of his decision on sentence, squarely rejected the Defence's submission that the custodial threshold had not been crossed. In reaching this conclusion, the District Judge took into account the following factors which he considered to be salient in sentencing for securities offences: (a) the enormous economic significance of the securities market; (b) the potential for securities offences to undermine confidence in the integrity of a securities market, and disrupt fairness, orderliness, transparency and efficiency in the market; (c) the disclosure-based regime which makes it

important to ensure that market players comply with requirements relating to the quality and quantity of information disclosed; (d) the impact on victims of the securities offences; (e) the need for general deterrence given the vast opportunity for illicit financial gain; and (f) the difficulty in detecting, investigating and prosecuting securities offences.

The aggravating and mitigating factors

164 Save for his view that Soh's intention or dishonesty should not be considered an aggravating factor, the District Judge accepted the Prosecution's submission that the following were aggravating factors: (a) the offences were carried out with considerable deliberation and premeditation; (b) the havoc and calamitous harm caused by Soh's wrongdoing; (c) the enormous gains and avoidances of loss to Soh; (d) the gravity of Soh's misconduct which included the distribution of purported banking documents which he knew to be false, and making use of the services of professional advisers to facilitate his criminal activity; and (e) his fabrication of his defence and spinning an entire fairy tale during the trial.

165 The District Judge found little mitigating value in the various factors that were highlighted in mitigation, including: (a) his service to the community as a medical doctor from 1982 to 1992; (b) his service in the Singapore Armed Forces as reservist medical doctor; (c) his excelling in the IT business after medical practice; (d) contributions to biomedical ventures; (e) contributions to Jade; (f) his financial losses as a result of the failed VGO; (g) his remorse and lack of antecedents; and (h) his filial piety.

Sentence for the 37th charge

166 In respect of the 37th charge, the District Judge accepted that a custodial sentence was warranted, but disagreed with the Prosecution's view on the interplay between ss 140(1) and 140(2) of the SFA. The District Judge emphasised that the Prosecution had in the exercise of its prosecutorial discretion elected to charge Soh under s 140(2) of the SFA for having "no reasonable or probable grounds" to believe that APLL had sufficient resources to satisfy the VGO, and not s 140(1) of the SFA which requires the Prosecution to prove intention and dishonesty. On this basis, the District Judge did not think that sentencing precedents involving cheating offences under s 417 of the Penal Code would be useful comparators for the s 140(2) offence under the SFA since the former required dishonesty (as opposed to having no reasonable grounds to believe). He considered offences under ss 199 to 204 of the SFA to be more analogous to the s 140(2) offence since they similarly seek to prevent market manipulation and have similar *mens rea* requirements of failing to have "reasonable grounds to believe".

167 The District Judge took the view that a term of four years' imprisonment would be appropriate for the 37th charge given that: (a) the failed takeover offer caused S$67.4m in loss of shareholders' value to Jade shareholders, and an estimated S$50.8m of losses to Soh himself; (b) Soh's offer to purchase Jade shares at a premium (compared to the market value) was not genuine and essentially operated as a deception on public investors and constituted a dishonest inducement to purchase from the market and pay for shares of Jade; and (c) Soh's offer induced shareholders to hold on to their shares in order that they may sell those shares to APLL.

Sentence for the 38th charge

168 The District Judge considered two years and six months' imprisonment to be appropriate for the 38th charge. In reaching his decision, the District Judge considered the following:

(a) The decision of *R v Chauhan and Holroyd* (1997) All England Official Transcripts (20 January 2000), which establishes that the sentencing benchmark would range from 18 months to four years for an early plea of guilt.

(b) Soh had been charged with and convicted of the more serious limb of s 197(1) of the SFA which required that he intended to create a misleading appearance on the market. In this regard, it had been established that Soh's actions artificially distorted the forces of supply and demand in respect of Jade shares and had caused immense market impact.

(c) Soh, who was the Group President and a director of Jade at the material time owed fiduciary duties to act in the interests of Jade but had engineered the sham VGO and left Jade in tatters after the sham was exposed.

Sentence for the 1st to 7th charges (insider trading)

169 The District Judge accepted the Prosecution's submission that Soh's S$7.8m gain from his insider trades could not be offset from his self-induced losses. It is also worth mentioning that while the District Judge accepted that insider trading is a species of fraud akin to cheating, he rejected the analogy that the Prosecution sought to draw between insider trading offences and cheating offences under s 420 of the Penal Code. In his view, cheating

offences under s 420 of the Penal Code were more aggravated than insider trading offences under s 218 of the SFA. For the aforesaid reasons, the District Judge imposed sentences as follows: (a) an imprisonment term of six months for each of the 1st to 3rd charges where the wrongful gain was respectively S$155,000, S$310,000 and S$232,500; (b) an imprisonment term of one year for the 6th charge where the wrongful gain was S$728,500; (c) an imprisonment term of one year and six months for the 5th charge where the wrongful gain was S$1.7424m; and (d) an imprisonment term of two years and six months for the 4th and 7th charges where the wrongful gain was S$2.355m and S$2.325m respectively.

Sentence for the 9th to 36th charges (non-disclosure)

170 The District Judge sentenced Soh to three months' imprisonment in respect of each of the 18 non-disclosure offences that were committed on or after 12 February 2008 (*ie*, the subject matter of the 14th to 22nd charges, as well as the 28th to 36th charges). The non-disclosures allowed him to hide the fact that he was offloading shares and also to keep up the impression that the VGO was genuine. As for the remaining ten non-disclosure offences that Soh committed prior to 12 February 2008 (*ie*, the subject matter of the 9th to 13th charges as well as the 23rd to 27th charges), the District Judge imposed a sentence of S$5,000 per charge. While Soh had repeatedly failed to disclose his dealings in Jade shares over a period of seven months and the information was relevant to the investing public, the District Judge accepted that there was no admission or evidence that he had committed theses offences intentionally.

Overall sentence

171 Ultimately, the District Judge took the view that the overall criminality of Soh's conduct could not be encompassed in two consecutive sentences and

ordered him to serve at least one sentence for each of the six different categories of offences under the SFA and the CA. The District Judge, however, took the view that the sentence of ten to 13 years' imprisonment sought by the Prosecution appeared to be manifestly excessive having regard to the English decision of *R v Tom Alexander William Hayes* [2015] EWCA Crim 1944 ("*R v Tom Hayes*") wherein a former trader with the UBS Group who was found guilty of manipulating the London InterBank Offered Rate ("LIBOR") was sentenced to 14 years' imprisonment. Based on the transcript in that case, the offender had been convicted of eight counts of conspiracy to defraud and the widespread implications and gravity of the manipulation of the LIBOR was a key consideration for the imposition of 14 years' imprisonment. The District Judge considered that the magnitude of the offences in *R v Tom Hayes* exceeded that of the offences committed by Soh given the size and importance of the LIBOR benchmark which was used to value more than US$350 trillion of loans and securities, and the US$9bn paid in fines by the offenders concerned.

Soh's appeal against sentence

172 Soh appeals against the aggregate imprisonment sentence on the basis that the District Judge had breached the one-transaction rule by ordering the imprisonment sentences for the 5th, 37th and 38th charges to run consecutively. According to Soh, the crux of the 1st to 7th charges, the 37th charge, as well as the 38th charge is effectively the same — he had essentially been accused of falsely causing the VGO to be announced to artificially raise and maintain the share price of Jade while liquidating his existing shareholdings for financial gain. Therefore, he submits that the consecutive imprisonment sentences in respect of the 5th, 37th and 38th charges would doubly punish him for committing the same offence.

The Prosecution's cross-appeal against sentence

173 The Prosecution, on the other hand, submits as follows:

(a) The District Judge erred in failing to treat as an aggravating factor Soh's dishonest intent in respect of the 1st to 7th, 37th and 38th charges.

(b) The District Judge erred in failing to consider sentences for closely analogous offences in respect of the 1st to 7th and 37th charges.

(c) The District Judge erred in law in effectively holding that a charge under s 140(2) of the SFA cannot attract an equally severe sentence compared to a charge under s 140(1) of the SFA.

(d) The District Judge erred in failing to place adequate weight on Soh's culpability as well as the need for general deterrence.

(e) The District Judge erred in his appreciation of the facts in *R v Tom Hayes* and in relying on the result in that case to conclude that a global sentence of 10 to 13 years' imprisonment was manifestly excessive.

Issues in respect of sentence

174 Taking into account the key contentions raised by Soh and the Prosecution, the following issues arise for determination in the appeals against sentence:

(a) Whether the District Judge erred in failing to consider Soh's dishonest intent as an aggravating factor;

(b) Whether the District Judge should have considered sentencing precedents for cheating offences in calibrating the sentences for the 1st to 7th and 37th charges, and more generally, whether the sentences imposed for the 1st to 7th and 37th charges are manifestly inadequate;

(c) Whether the District Judge erred in drawing a distinction between the gravity of ss 140(1) and 140(2) of the SFA;

(d) Whether the District Judge breached the one-transaction rule by ordering the imprisonment terms for the 5th, 37th and 38th charges to run consecutively; and

(e) Whether the District Judge erred in his appreciation of the case of *R v Tom Hayes*.

My Decision

Whether the District Judge erred in failing to treat Soh's dishonest intent as an aggravating factor

175 In the GD at [151], the District Judge explained why he declined to consider dishonesty as an aggravating factor for the 1st to 7th and 37th and 38th charges:

> … it was wrong to consider aggravating factors that were merely factors which satisfied the ingredients of the offence of insider trading and for all the present offences which [Soh] had been charged with where intention or dishonesty is not even a crucial element of these offences, such intention or dishonesty should not be considered as a factor to impose a heavier and more severe sentence on [Soh] as contended by the Prosecution. …

176 Dishonesty can often be inferred from the motives and conduct of an offender who is convicted of insider trading offences, such as those which formed the subject-matter of the 1st to 7th charges. However, with respect, the

District Judge had erred in his reasoning. There is no requirement in law to *prove* dishonesty as an ingredient of the s 218(2)(b) SFA charges for insider trading. In my view, dishonesty can be regarded as an aggravating factor precisely in those circumstances where it is *not* an element of the offence. This is particularly apposite for the 37th charge which involved a s 140(2) SFA offence. The holding in *Madhavan Peter v Public Prosecutor and other appeals* [2012] 4 SLR 613 at [169(a)] does not go beyond saying that it is wrong to "double count" in the sense of overlaying an element of the offence as a further aggravating factor when it was already accounted for in the nature of the offence as one of the ingredients which must be proved.

177 It is also apposite to note that there are various shades of dishonesty that could be taken into account. As highlighted by the Prosecution, factors that may affect the colour of an offender's dishonesty include: (a) the size of the gain to be obtained; (b) whether the dishonest gain was intended to benefit oneself only, as opposed to benefitting others; and (c) the identity and characteristics of the victims at whom the dishonest conducted is targeted.

178 In the present case, the District Judge had ample basis to find that dishonesty pervaded almost every aspect of Soh's offending, from planning the VGO, co-opting the assistance of OCBC and A&G, causing the VGO to be announced and surreptitiously selling 50,200,000 shares to the investing public for his own wrongful gain. Such dishonesty should ordinarily be considered an aggravating factor. Having said that, I note that the Prosecution, at the same time, urges this court to accept sentencing precedents which involve cheating offences (which require proof of dishonesty as an element of the offence) and adopt a similar sentencing range. I hesitate to endorse this approach unreservedly, since the element of dishonesty does not feature as an ingredient of the SFA offences. While Soh's dishonesty can validly be taken

into account as an aggravating factor, the weight to be accorded would still depend on the overall assessment of the seriousness of the offences in their context, measured broadly in terms of the twin considerations of harm and culpability.

Whether the District Judge erred in treating s 140(1) SFA offences as more serious than s 140(2) SFA offences

179 The Prosecution submits that a violation of s 140(2) of the SFA is not invariably less serious than a violation of s 140(1) of the SFA. For ease of reference, the provision is set out below:

> **Offences relating to take-over offers**
>
> 140.—(1) A person *who has no intention to make an offer* in the nature of a take-over offer shall not give notice or publicly announce that he intends to make a take-over offer.
>
> (2) A person shall not make a take-over offer or give notice or publicly announce that he intends to make a take-over offer if *he has no reasonable or probable grounds for believing that he will be able to perform his obligations* if the take-over offer is accepted or approved, as the case may be.
>
> (3) Where a person contravenes subsection (1) or (2), the person and, where the person is a corporation, every officer of the corporation who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $250,000 or to imprisonment for a term not exceeding 7 years or to both.
>
> [emphasis added in italics]

180 As pointed out by the District Judge, ss 140(1) and 140(2) of the SFA provide for different degrees of *mens rea*. One who *knows* that he will not be able to perform his obligations if the takeover offer is accepted will fall under s 140(1) because he clearly has no intention to make a takeover offer whereas another who failed to exercise due care to ensure the sufficiency of his resources to perform his obligations would fall under s 140(2). The former would clearly be far more culpable than the latter. However, where the

evidence before the court establishes a clear lack of intention to make the takeover offer (*ie*, an offence under s 140(1) of the SFA), such intention would, in my view, still be relevant for the purpose of sentencing notwithstanding that the offender in question has been charged under s 140(2).

181 This situation is, in my view, analogous to that of s 304A of the Penal Code in its pre-2008 form on the offence of causing death by a rash or negligent act. The same maximum punishment was prescribed for both forms of conduct, irrespective of whether death was caused by rashness or negligence. The provision was amended in 2008 with the result that separate punishment provisions now apply. In *Public Prosecutor v Hue An Li* [2014] 4 SLR 661, the High Court held that "rashness" and "negligence" demarcated separate offences with different starting points for sentencing. However, notwithstanding the different punishment provisions that apply to the rashness and negligence limbs of s 304A offences, the High Court accepted that the actual penal consequences that follow upon the commission of a s 304A offence would ultimately depend on the presence of mitigating or aggravating factors, and not merely the categorisation of an offender's conduct as rash or negligent. Hence, notwithstanding that there are now separate punishment provisions, there can still be potential overlapping sentencing outcomes where custodial sentences for "lower-end" rashness may shade into "higher-end" negligence.

182 A further analogy may be drawn with offences involving (non-capital) drug trafficking or drug importation. In a case where the Prosecution decides to proceed on a charge that makes reference to a reduced quantity of drugs, the accused cannot be convicted in respect of the actual quantity of drugs recovered even if it has been proved or admitted. However, when it comes to imposing a custodial sentence within the prescribed range, regard must be had

to the actual amount of drugs involved, and a higher sentence could be imposed if the court considers it appropriate to do so (see for example *Public Prosecutor v Suventher Shanmugam* [2016] SGHC 178 at [18]).

183 Returning to the present case, the *mens rea* requirements for ss 140(1) and 140(2) of the SFA are plainly different and the outcome of the proceedings at the liability stage could possibly differ depending on the evidence proffered. However, I do not think that there is a need for a notional distinction to be observed in terms of sentencing especially since there may be possible points where culpability converges. This would amount to a self-imposed fetter on the court's sentencing discretion when the same punishment provision applies to both limbs. In my view, there is no compelling reason for this approach. Instead, a more flexible and nuanced approach should be preferred at the sentencing stage and the court should not shut its eyes to the obvious aggravating circumstances in which the accused has committed the offences. Therefore, notwithstanding the fact that the Prosecution has preferred a charge under s 140(2) of the SFA, I find it relevant, for the purpose of sentencing, to take into account the fact that Soh had abused the takeover mechanism by launching a sham VGO without the intention of seeing it through, and had intended to profit handsomely from doing so.

Whether the District Judge should have considered sentencing precedents for cheating offences in respect of the 1st to 7th and 37th charges

184 There is some support for the view that when insider trading is done *deliberately*, it is a species of fraud and could amount to cheating. In *Ng Poh Meng Allan v Public Prosecutor* [1991] 1 SLR(R) 293, M Karthigesu J (as he then was) pithily observed that:

> 6 … [Insider trading] is particularly pernicious because it affects the integrity of the securities market, it gives the

> person who has that information an unfair advantage over others, it amounts to cheating the other person to the transaction and it is an abuse of corporate confidentiality.

185 This is consistent with the views of the English and Australian courts. In *R v Mcquoid* [2009] 4 All ER at [9], the English Court of Appeal took the opportunity to emphasise that insider trading does not merely contravene regulatory mechanisms, and to send a clear message that insider trading is a species of fraud and cheating when it is done deliberately. A similar view was espoused by McCallum J sitting in the New South Wales Court of Criminal Appeal in *R v Nicholas Glynatsis* (2013) 230 A Crim R 99 (at [79]):

> … The acquisition or disposal of financial products by people having the unfair advantage of inside information is criminalised because it has the capacity to unravel the public trust which is critical to the viability of the market. It is, as previously observed by this Court, a form of cheating. …

186 The District Judge considered sentencing precedents involving cheating offences to be inapplicable on the basis that cheating offences involve *mens rea* of a higher order, *ie*, intention and dishonesty. It must, however, be borne in mind that there could be varying degrees of culpability and a wide variety of circumstances which may give rise to insider trading offences. Thus, whether or not cheating offences are appropriate comparators for insider trading offences would depend on the precise circumstances of each individual case. The same reasoning would apply in respect of the s 140(2) SFA offence. Cheating offences would be suitable comparators where the evidence shows that the offender had dishonestly launched a takeover offer without the intention to see it through. Conversely, where intention or dishonesty has not been proved, it would not be appropriate for the court to calibrate the sentence for an offence under s 140(2) of the SFA by reference to those imposed for cheating offences.

187 As explained at [149] and [150], I agree with the Prosecution that Soh had committed the insider trading offences deliberately for his own financial gain and had launched the takeover offer without any intention of seeing it through. It would thus be appropriate to have regard to sentencing precedents for cheating offences in calibrating the sentences that should be imposed on him. I note in this regard that the table of precedents tendered by the Prosecution reflects imprisonment terms of between six months and four years that have been imposed in respect of cheating offences under s 420 of the Penal Code. In this light, I turn to consider whether the sentences imposed for the 1st to 7th charges as well as the 37th charge are manifestly inadequate.

188 There appears to be no sentencing precedent that deals with offences under s 140 of the SFA. I note also that there is no local sentencing precedent that involves insider trading on a scale that is similar to that in the present case. A brief survey of the precedents show that the insider trading cases that have come before the courts in Singapore have hitherto involved misconduct that falls on the lower end of the culpability spectrum, and the sentences imposed on those offenders are correspondingly on the lower end of the punishment range (that is, a fine not exceeding S$250,000 or imprisonment for a term not exceeding seven years or both).

(a) In *Public Prosecutor v Chen Jiulin* (unreported, District Arrest Case No 23240 of 2005) ("*Chen Jiulin*"), the offender was the Chief Executive Officer and Managing Director of China Aviation Oil ("CAO") and a vice-president of CAO's parent company. He procured CAO's parent company to sell its 15% stake in CAO while he was in possession of information that CAO was facing market losses of at least US$180m. The proceeds were not used to benefit the offender directly. 96% of the proceeds went to meet margin calls that CAO was

facing, and the remainder was used as CAO's working capital. He was sentenced to four months' imprisonment for one count of insider trading.

(b) In *Public Prosecutor v Desai Praful Jayantilal* (unreported, District Arrest Case No 15208 of 2009 & others), the offender was a director of his company and had received information that was likely to increase the price of the company's shares. Thereafter, he bought no less than 500,000 shares in the company over the space of a month. For his first insider trading charge, he made a profit of S$1,035 and received a fine of S$40,000. For his second insider trading charge, he made a profit of S$14,970 and received a fine of S$60,000.

(c) In *Public Prosecutor v Franco Giuseppe* [2011] SGDC 184, the offender, who was the Chief Financial Officer of Permasteelisa Pacific Holdings Ltd ("PPH") at the material time, gave instructions for the purchase of PPH shares when he was in possession of information that PPH was acquiring another company. The District Judge found that his culpability was at the lower end of the spectrum of criminality since: (a) he had only been trading as instructed by his superiors; (b) the trades did not have a significant market impact; (c) the information in question was not particularly price-sensitive; (d) he did not trade on his own behalf or make any profit; and (e) there was no evidence of loss or diminishing of public confidence as a result of the trades. He was thus sentenced to a fine of S$40,000 per charge.

189 In various other insider trading case precedents, fines were deemed adequate. I am compelled to conclude that Soh's conduct, unlike those of the offenders in the precedents, falls on the higher end of the culpability spectrum.

The launch of the sham VGO and the insider trades were deliberately executed and coldly calculated for personal profit. Soh exploited to full measure the information asymmetry between him and unsuspecting public investors by offloading a total of 45,700,000 Jade shares at artificially-inflated prices while the VGO was extant. This was done with the knowledge that APLL did not have sufficient resources to implement the VGO, and that a withdrawal of the VGO would have devastating consequences on Jade's share prices.

190 Of particular note is his sale of 15,000,000 Jade shares on 31 March 2008 which forms the subject matter of the 7th charge. By then, Soh had been informed that the FRC Letter as well as the copy of the First SWIFT had not been issued by SCBJ and he had separately formed the intention of withdrawing the VGO on the basis of the collapse of Opes Prime. In this case, there is no doubt that Soh had been greatly enriched at the expense of investors who had purchased Jade shares during that period. He was found to have made a profit of S$7.8m from the insider trades, and to have used this sum to meet his personal financial obligations.

191 It is uncontroversial that sentencing courts should determine precisely where the offender's conduct falls within the spectrum of punishment devised by Parliament, and in doing so, a consideration of the maximum penalty prescribed for an offence is fundamental to a determination of the appropriate sentence to be imposed: *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [84]. I am satisfied that the gravity and scale of Soh's misconduct in respect of the 1st to 7th charges and the 37th charge call for sentences on the higher end of the spectrum of punishment. I also consider a strong measure of general and specific deterrence to be necessary in the present case. Soh's actions must be met with strong disapprobation. They have caused immeasurable harm to the investing public and are undoubtedly

inimical to Singapore's interest in the maintenance of an orderly, efficient and transparent securities market.

Whether the District Judge failed to place sufficient weight on the gravity of the appellant's conduct as well as the need for general deterrence

192 The Prosecution argues that the District Judge had failed to give sufficient weight to the public interest in preventing such flagrant misconduct and to the need for general deterrence. The Defence, on the other hand, argues that the District Judge had breached the one-transaction principle by ordering the imprisonment sentences for the 5th, 37th and 38th charges to run consecutively. The Defence does not contend that the order for the other three imprisonment terms (*ie*, for the 18th, 36th and 39th charges) to run consecutively is inappropriate.

193 I begin with the decision of the High Court in *Public Prosecutor v Ng Sae Kiat and other appeals* [2015] 5 SLR 167 ("*Ng Sae Kiat*"). In that case, the appeals revolved around offences under s 201(*b*) of the SFA which penalises a wide range of fraudulent or deceptive conduct directly or indirectly linked with the purchase or sale of securities. The High Court held that the following factors are relevant to sentencing for such offences (at [58]): (a) the extent of the loss/damage caused to victim(s); (b) sophistication of the fraud; (c) the frequency and duration of the offender's unauthorised use of the relevant account; (d) extent of distortion, if any, to the operation of the financial market; (e) the identity of the defrauded party (*ie*, whether the defrauded party was a public investor or a securities firm); (f) relationship between the offender and the defrauded party; and (g) the offender's breach of any duty of fidelity that he might have owed the defrauded party. While Soh has not been charged under s 201(*b*), the sentencing factors outlined by the

court in *Ng Sae Kiat* are nonetheless germane for our purposes since s 201(*b*) is a catch-all provision that penalises a wide range of fraudulent conduct.

194 It is clear from an application of the sentencing factors set out in *Ng Sae Kiat* that Soh's conduct falls on the high end of the spectrum of culpability, thus warranting substantially high sentences. To engineer the sham VGO, he had blatantly supplied his professional advisers with false banking documents. In addition, the sham VGO had calamitous effects on the securities market. The withdrawal of the VGO caused Jade's shares to plunge from its last traded price of S$0.220 to S$0.065 in just one day. As noted by the District Judge, Soh had left Jade in tatters after the sham was exposed notwithstanding his duty, as a director and Group President, to act in the interests of the company. Moreover, by surreptitiously offloading his shares during the period of the sham VGO, Soh had enriched himself at the expense of public investors. His actions were motivated solely by self-interest.

195 I am unable to agree with Soh's submission that the District Judge had breached the one-transaction principle by ordering the sentences for the 5th, 37th and 38th charges to run consecutively. As explained by Sundaresh Menon CJ in *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 ("*Shouffee*"), the one-transaction rule serves as a filter to sieve out those sentences that ought not as a general rule to be ordered to run consecutively (at [27]). The rationale for the rule stems from the principle that consecutive sentences are not appropriate if the various offences involved a single invasion of the same legally protected interest (at [30], citing D A Thomas, *Principles of Sentencing* (Heinemann, 2nd Ed, 1979) at p 53). In the final analysis, the application of the one-transaction rule has to be undertaken as a matter of common sense (at [39]).

196 I agree with the Prosecution that the District Judge was entitled to order the sentences for the 5th, 37th and 38th charges to run consecutively since they pertain to distinct interests. The insider trading prohibition under s 218 of the SFA is intended to ensure a level playing field since such offences have the potential of undermining market confidence and could discourage investors from entering the market to invest because of other market actors who may have an unfair advantage over them (see *Sentencing Practice in the Subordinate Courts* (LexisNexis, 3rd Ed, 2013) ("*Sentencing Practice in the Subordinate Courts*") at p 1303). In contrast, s 140 of the SFA protects against abuses of the takeover mechanism which could possibly affect the credibility of future takeover offers. Section 197 of the SFA, on the other hand, protects the forces of supply and demand in the securities market from artificial distortions. It is meant to catch persons who interfere with the workings of the market for personal profit (*Sentencing Practice in the Subordinate Courts* p 1278).

197 In any event, the one-transaction rule is not an inflexible rule and its application yields only a provisional exclusion (*Shouffee* at [81(b)]). Even if the ss 218, 140 and 197 SFA offences could be regarded as part of the same transaction, I am of the view that the imposition of at least three consecutive sentences is necessary to adequately reflect Soh's culpability given the aggravating features of the offending conduct highlighted above at [194]. The strong public interest in deterring market misconduct has been emphasised time and again (see, for example, *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 1082 at [1]). The number of consecutive sentences must be sufficient to express the court's abhorrence of market misconduct of such magnitude and gravity, while having regard to the principles of proportionality and totality.

Whether the District Judge erred in his appreciation of the facts in R v Tom Hayes and in concluding that a global sentence of ten to 13 years was manifestly excessive

198 The Prosecution's argument is two-fold: (a) the District Judge erred in using the quantum of punishment in *R v Tom Hayes* to determine the upper limit of aggregate sentence; and (b) the District Judge erred in appreciating the facts of *R v Tom Hayes*. In respect of the first point, I do not think that the comments of V K Rajah J (as he then was) in *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 ("*Law Aik Meng*") completely shut the door on the use of foreign case precedents in devising sentencing benchmarks. His view was that (at [16]):

> … *sentencing courts must be extremely circumspect when devising sentencing benchmarks based on another jurisdiction's public policy or interest*. Indeed, given the differences in culture, community values, public policy and sentencing attitudes in different jurisdictions, undue and unthinking deference by local courts to the sentencing benchmarks pronounced by foreign courts could well result in sentences inconsistent with and ill-suited to the administration of criminal justice in Singapore.
>
> [emphasis added]

It stands to reason that where the sentencing factors and the policy interests underpinning the relevant offence do not materially differ, case precedents from foreign jurisdictions could provide some assistance. Moreover, *Law Aik Meng* should be read in its context. In that case, the offenders skimmed data from ATM cards in order to manufacture cloned ATM cards with which fraudulent withdrawals could be made. The accused pleaded guilty to offences under the Computer Misuse Act (Cap 50A, 1998 Rev Ed) as well as the Penal Code. There were relevant precedents in Singapore (pertaining to credit card fraud) which were appropriate comparators and in those circumstances, the court's reluctance to rely on foreign case precedents is understandable.

199 Returning to the present case, I do not think that the District Judge had erred in using as a guide the global sentence that was imposed on the offender in *R v Tom Hayes*. First, there is clearly a dearth of local precedents involving securities offences of this scale and magnitude. Secondly, there seems to be no appreciable difference between the interests of the UK and Singapore in ensuring an orderly, fair and transparent securities market, as well as the courts' attitude towards sentencing in such cases. In any event, the Prosecution has not pointed out any significant contextual differences in their submissions.

200 In respect of the second point made by the Prosecution, I note that Hayes was sentenced to 14 years' imprisonment at first instance. His sentence was later reduced to 11 years on appeal on the basis of, *inter alia*, his age, his non-managerial position in the banks and his mild Asperger's condition. I note in particular that the English courts took the following into consideration in sentencing Hayes: (a) the vital significance of the financial markets in the UK; (b) the high culpability of Hayes who had developed the manipulation of Yen LIBOR and the practice of using other traders to manipulate the market and doing favours for each other; (c) Hayes' leading role in the manipulation of the Yen LIBOR (he pressured others more junior to engage in manipulation and made corrupt payments to brokers for their assistance); (d) Hayes' trading amounted to 40% of the Yen derivative trading in the market; (e) his offences were carefully thought through and involved sophistication; and (f) the harm caused was at a high level and the amounts were very substantial as the attempts to influence LIBOR had been huge in number.

201 In view of the aggravating features of Hayes' offences, I agree with the District Judge's assessment that Hayes is more culpable and his wrongdoings more egregious as compared to Soh. However, since the mitigating factors that had resulted in the eventual reduction of Hayes' sentence are not present in the

case at hand, it would be more appropriate to calibrate Soh's aggregate sentence by reference to the 14-year sentence that had been imposed on Hayes at first instance. Viewed from this perspective, the District Judge had adopted an unduly lenient starting point for reference and while the sentences he imposed were substantial, he had erred in concluding that the Prosecution's proposed sentence of ten to 13 years' imprisonment in the aggregate was manifestly excessive.

202 I should add however that the court's reference to the 14-year sentence in *R v Tom Hayes* by no means represents a form of "anchoring" but it helps in affording a broad sense of how a sentencing court in another common law jurisdiction that serves as a major financial centre has approached such matters. The views of that court are of course not binding and should not be blindly adopted as a convenient short-cut or substitute for independent evaluation and judgment. I am of the view that both in terms of context and currency, *R v Tom Hayes* is a relevant reference for sentencing purposes and I am not persuaded that there are good grounds to disregard it.

Conclusion on sentence

203 For the reasons that are set out above, I am of the view that there is no merit in Soh's appeal against sentence. Considering matters in the round, including the disparity in the scale and gravity of wrongdoing between Soh and Hayes, the individual and aggregate imprisonment sentences imposed by the District Judge do not fully and adequately reflect the overall criminality and gravity of Soh's misconduct. In turn, I am persuaded that the sentences in respect of the relevant charges and the aggregate sentence are manifestly inadequate having regard to the gravity of his offending conduct. Accordingly,

I allow the Prosecution's appeal against the sentence imposed by the District Judge and dismiss Soh's appeal against the same.

204 I agree with the Prosecution's submissions and conclude that the sentences for the following offences ought to be enhanced:

(a) for the first three insider trading offences (*ie*, the 1st to 3rd charges involving sums of S$310,000 or below), the sentence of six months' imprisonment per charge will be enhanced to nine months' imprisonment;

(b) for the 4th and 7th insider trading offences, (*ie*, involving sums above S$2m), the sentence of 2.5 years' imprisonment per charge will be enhanced to 3.5 years' imprisonment;

(c) for the 5th insider trading offence (*ie*, involving the sum of S$1.7424m), the sentence of 1.5 years' imprisonment will be enhanced to 2.5 years' imprisonment;

(d) for the 6th insider trading offence (*ie*, involving the sum of S$728,500), the sentence of one year's imprisonment will be enhanced to 1.5 years' imprisonment;

(e) for the 37th charge (*ie*, involving s 140(2)of the SFA and a loss of S$67.4m in shareholder value), the sentence of four years' imprisonment will be enhanced to five years' imprisonment; and

(f) for the 38th charge (*ie*, involving s 197 of the SFA and a gain of S$11.3m to Soh), the sentence of 2.5 years' imprisonment will be enhanced to 3.5 years' imprisonment.

205 I have indicated above (at [195]–[197]) that the District Judge's order for consecutive sentences for the 5th, 37th and 38th charges does not fall foul of the one-transaction rule. I turn now to address the totality principle and in particular whether it is appropriate to maintain the District Judge's order for six imprisonment terms to run consecutively, bearing in mind the implications of the enhanced sentences for each of the above offences.

206 Given the significant enhancements I have ordered to the sentences for the 5th, 37th and 38th charges, an order for these three imprisonment terms to run consecutively will result in an aggregate sentence of 11 years' imprisonment. This is a considerable uplift from the aggregate custodial sentence of eight years and nine months' imprisonment as ordered by the District Judge and is adequate to mark the overall gravity of the offending conduct. In the premises, I see no necessity to adhere to the District Judge's order for consecutive sentencing for six of the imprisonment terms. I therefore order that only the imprisonment terms for the 5th, 37th and 38th charges are to run consecutively. The fines imposed totalling S$50,000 are to remain and I understand that they have been paid.

See Kee Oon
Judicial Commissioner

Michael Khoo SC, Josephine Low and Joel Yeow Guan Wei (Michael Khoo & Partners) for the appellant in MA 123/2015/01 and respondent in MA123/2015/02;
Teo Guan Siew, Nicholas Tan and Ng Jean Ting (Attorney-General's Chambers) for the respondent in MA 123/2015/01 and appellant in MA123/2015/02.
