IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 156

Magistrate's Appeal No 9242 of 2018/01

Between

Public Prosecutor

And

Tan Seo Whatt Albert

Magistrate's Appeal No 9242 of 2018/02

Between

Tan Seo Whatt Albert

And

Public Prosecutor

JUDGMENT

[Criminal Law] — [Statutory Offences] — [Securities and Futures Act] — [Offering securities without a prospectus]
[Criminal Procedure and Sentencing] — [Sentencing] — [Securities and Futures Act] — [Offering securities without a prospectus]

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v
Tan Seo Whatt Albert and another appeal

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Hoo Sheau Peng J
11 January; 22 March; 1 April 2019

28 June 2019 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 These are cross-appeals against the sentence imposed on Tan Seo Whatt Albert ("the Accused"), a manager of Gold Insignia LLP ("Gold Insignia"), after he pleaded guilty to 20 charges of *consenting* to Gold Insignia offering securities to various investors without the offers being made in or accompanied by a prospectus or profile statement. These are offences under s 331(3A) read with s 240(1) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (the "SFA"), and punishable under s 240(7) of the SFA. The Accused was sentenced to a total fine of $600,000. He has paid the fines imposed.

2 Arising from the scheme by Gold Insignia, four offenders, including the Accused, have been prosecuted for offences under these provisions. According to the Prosecution, this is the first time these provisions have been invoked

before the court. As a guide for sentencing in future cases, the Prosecution proposed certain factors to be considered in sentencing. The Prosecution argued that the custodial threshold had been crossed, and that a global imprisonment term of 12 to 16 weeks would be appropriate. Defence Counsel argued to the contrary, and contended that the fines imposed were manifestly excessive.

3 Having regard to the parties' written and oral submissions, this is my decision.

Facts

4 The facts are as stated in the Statement of Facts (the "SOF"), admitted to by the Accused and reproduced in entirety at [6] of the District Judge's grounds of decision in *Public Prosecutor v Tan Seo Whatt Albert* [2018] SGDC 247 (the "GD"). I summarise them here.

Offences of offering securities without prospectus committed by Gold Insignia

5 Gold Insignia was a limited liability partnership which offered debentures, being a form of securities, without a prospectus to the investing public. The debentures were structured as "memberships". In the course of its business, there were three versions of the memberships, with the following key terms:

(a) On purchase of a membership, an investor received a physical gold bar, worth about 70% of the membership fees. The gold bar remained the property of Gold Insignia, but the investor was to hold it on trust for Gold Insignia as collateral to secure his paid-up membership fees and the fixed pay-outs from Gold Insignia.

(b) The investor was to be given fixed pay-outs. The pay-out was fixed at 4.5% per quarter (18% per annum) under the first two versions of the membership, and 6% on a bi-annual basis (12% per annum) for the third version of the membership.

(c) Each investor could terminate his membership by giving one month's notice after a fixed non-terminable period. Upon termination, each investor was to return the gold bar to Gold Insignia, and the investor was entitled to a full refund of the original membership fee, or the prevailing market value of the membership, whichever was higher.

(d) If investors received a call-back notice from Gold Insignia, investors had two options – return the gold collateral to Gold Insignia and receive the prevailing market value of his membership, or sell the gold collateral to a third party.

6 In other words, of the funds obtained from the investors, around 70% of the funds were held by the investors in the form of gold bar collaterals. As for the remaining 30% of the funds, around $200,000 was invested by Gold Insignia's management committee, with the returns from the investments belonging to the partners of Gold Insignia. All the other monies were held by third party discretionary fund managers and brokerage firms for investment, without any input from Gold Insignia. The returns from these investments covered part of the operational costs of Gold Insignia, including the fixed pay-outs to the investors.

7 There were about 135 independent sales consultants who marketed and sold Gold Insignia's memberships. These sales consultants were paid a commission for every month a client, to whom they sold a membership, stayed

in the programme. The commission was 1.3% of the price of the membership per client per month.

8 Between June 2010 and November 2011, Gold Insignia sold a total of 853 memberships to 547 investors. The memberships were sold for prices between $5,000 to $1,000,000. During this period, $29,970,000 was raised by Gold Insignia from the sales of the memberships.

9 Each time Gold Insignia offered its membership to an investor without an accompanying prospectus or profile statement that complied with the requirements prescribed under s 240(4A) and s 243 of the SFA, it contravened s 240(1) SFA, punishable under s 240(7) of the SFA.

The role of the Accused

10 The business concept of Gold Insignia was conceived of by the Accused. Although he was not registered as a partner of Gold Insignia, he was the senior-most member of the management team of Gold Insignia, and had the final say in its management. In 2010, the Accused was a consultant and advisor to Gold Insignia, and was responsible for advising Gold Insignia on investing the moneys raised from the sales of the memberships. From February 2011 onwards, the Accused was the acting CEO of Gold Insignia. He was also the head of Gold Insignia's in-house trading team, after it was set up in January 2011. He was paid a monthly salary of $20,000 from October 2010 to August 2011, and a "Partial Consultant fees" of a total of $211,000 in 2011.

11 The Accused was also experienced in the financial industry, and was the sole proprietor of an entity known as Private Capital Fund Management ("PCFM") which was in the business of fund management. PCFM was an exempt fund manager lodged with the Monetary Authority of Singapore

("MAS") from 2005, and was permitted to conduct fund management for up to 30 sophisticated investors.

The roles of the other accused persons

12 Along with the Accused, three other persons were involved in the management of Gold Insignia, being Jacinta Ong Pei Yuen ("Jacinta"), Yeo Qianhui Serene ("Serene") and Wu Shiqiang, alias Ray ("Ray"). They were also charged for their roles in Gold Insignia's scheme.

13 Jacinta was one of two registered partners of Gold Insignia from 23 June 2010. After the Accused, Jacinta was the next-most senior figure in the Gold Insignia management team. Jacinta was deregistered as a partner sometime in July 2011 (backdated to January 2011). However, Jacinta remained on the management team of Gold Insignia, and was involved in its decision-making.

14 Serene was the second registered partner of Gold Insignia. In actual fact, she was a salaried employee, earning about $3,000 per month. She took instructions from the Accused, and was assigned administrative and operational tasks.

15 Ray joined Gold Insignia sometime in end-2010. He was the business marketing manager of Gold Insignia. From July 2011, Ray was also added to the management team of Gold Insignia. He was paid a salary of about $3,000 per month.

The proceeded charges

16 The charges against the Accused related to the offences committed by Gold Insignia with the *consent* of the Accused, as a manager of Gold Insignia

at the material time. They involved a total of 12 investors and $585,000 invested, as follows:

No.	DAC No.	Date	Investor	Amount invested
1	901081-2017	15/02/2011	Khoo Lee Yak	$50,000
2	901156-2017	7/10/2010	Ng Wai Guek	$20,000
3	901157-2017	28/03/2011		$20,000
4	901158-2017	30/12/2010	Chan Noi Eng	$100,000
5	901159-2017	13/04/2011		$100,000
6	901160-2017	15/07/2011	Lim Cheng Hon Yvette	$50,000
7	901161-2017	30/03/2011	Aw Choi Yin	$20,000
8	901162-2017	30/03/2011	Tan Lee See	$10,000
9	901163-2017	30/05/2011		$10,000
10	901164-2017	16/09/2010	Leck Yam Keng	$20,000
11	901167-2017	26/04/2011	Lee Bee Geok	$20,000
12	901168-2017	21/04/2011	Heng Sai Boh	$20,000

13	901169-2017	29/07/2011		$20,000
14	901170-2017	25/02/2011	Vasuhi D/O Ramasamypillai	$20,000
15	901171-2017	31/05/2011		$50,000
16	901172-2017	20/09/2010	Cher Jia Sheng	$5,000
17	901173-2017	30/10/2010		$10,000
18	901174-2017	23/02/2011		$10,000
19	901175-2017	20/09/2010	Lau Chiew Nah	$20,000
20	901176-2017	12/05/2011		$10,000

Charges taken into consideration

17 In addition to the 20 proceeded charges, there were 49 similar charges taken into consideration. These 49 charges involved offering Gold Insignia memberships to 25 different investors, but the sums involved are not stated in the charges or the SOF.

Additional facts raised in mitigation

18 For completeness, there were several facts which were raised in the Accused's mitigation plea as follows:

(a) Gold Insignia had made verbal enquiries with several authorities, namely the MAS, International Enterprise Singapore, the Accounting

and Corporate Regulatory Authority and the Singapore Police Force about the running of Gold Insignia's business.[1] Exhibits of follow-up emails of these enquiries showed that the authorities gave confirmations to the effect that limited liability partnerships could run membership programmes.[2]

(b) The Gold Insignia membership application form had included the applicable terms and conditions. One example is cl 7.1 which states that "members are subjected to a potential financial loss risk of 50% to 65% should Gold Insignia be unable to fulfil [its] obligations".[3]

(c) The Accused allegedly took steps to "mitigate the effects of" his offence, by sending out advisory letters to Gold Insignia members to keep them informed,[4] appealing to the Commercial Affairs Department to use confiscated funds to refund the membership fee to new members who had their gold bars seized,[5] and scheduling a "redemption exercise" for some members.[6]

The District Judge's decision

19 While the District Judge agreed that there were several aggravating factors at play in the present case, she held that the custodial threshold was not crossed (GD at [16]).

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1 Record of Proceedings ("ROP"), at p 427.

2 ROP, at p 468–470.

3 ROP, at p 443–445, 455–466.

4 ROP, at p 435–437.

5 ROP, at p 560.

6 ROP, at p 563.

20 On the level of harm, the District Judge held that the level of harm was high, as the investing public was exposed to serious financial risk due to the Gold Insignia investment being "highly speculative, extremely risky and unsustainable". Facts such as how promised returns were to be generated and the risks involved should have been disclosed in the prospectus. As a result, "[h]undreds of investors risked losing millions of dollars", and Gold Insignia "sold 853 memberships to 547 investors and raised almost $30 million" (GD at [20]).

21 On the Accused's culpability, the District Judge held that it was insufficient to surmount the custodial threshold (GD at [26]). The District Judge found that "the offence under s 240 SFA does not require proof of *mens rea*", but that the Accused's state of mind would be "highly relevant" to sentencing. The consideration which weighed on her mind (GD at [25(c)]) was that the offence "was not committed *knowingly*, even if the [Accused] may be described as *reckless* in doing so" [emphasis added]. In a similar vein, the District Judge had found that the Accused "may be said to be *negligent* or even… reckless" (GD at [25(b)]) [emphasis added]. Another description of the Accused's culpability was "*gross recklessness*" [emphasis added]; given his "experience in the industry", he should have known that a prospectus had to be issued with the membership offer (GD at [23]).

22 The District Judge "accept[ed] that the product sold by Gold Insignia involving the use of a gold bar, was a novel one", as "[s]uch a membership had never been offered in the industry before". Hence, weight was given to the fact that the present case was "not a situation whereby the [Accused] could instinctively identify the membership programme … as "securities" under the SFA" and yet fail to issue a prospectus alongside it (GD at [25(a)]). Recognition was also given (GD at [25(b)]) to the Accused having taken steps to seek

clarification from the authorities on whether all the rules and regulations had been satisfied in the offering of Gold Insignia's membership, a point he had raised in mitigation (see above at [18(a)]).

23 It was further held that the Accused's state of mind "must be distinguished from an offender who knowingly and deliberately offers securities without a prospectus" (GD at [26]). There was "no ill-intent" on the part of the Accused in offering the Gold Insignia membership programme without a prospectus, and he was "not motivated by any fraudulent or dishonest intention". The District Judge found that this was "clearly not a situation where the [Accused] had the intention to offer [securities] and had deliberately omitted [issuing] a prospectus so that he may conceal the high risk involved from the potential investors".

24 Regarding the applicable mitigating factors, the District Judge had regard to the following:

(a) the Accused pleaded guilty. While the charges were "neither seen as difficult for the Prosecution to prove nor one on which a substantial defence may be mounted", "some credit" was still given to the Accused's plea of guilt.

(b) the Accused extended full co-operation to the investigative authorities. The Accused cooperated during the six-year investigation period by surrendering documents, gold bars and monies, thus demonstrating "a measure of remorse and a degree of sincerity to rectify an unintended wrongdoing".

25 One more aspect which the District Judge addressed was whether the effects of the lack of prospectus were mitigated. In this regard, the lower court

considered that Gold Insignia did not "substantially me[e]t" the requirements of a prospectus through the information contained in the membership application forms, as the disclosed information still "[lacked] crucial details" (GD at [32]). The District Judge also considered that "the steps taken by Gold Insignia or the Accused to rectify the situation … to be at best, neutral" (GD at [33]).

26 Taking into account the harm and culpability, and giving weight to his plea of guilt, his cooperation in the investigations and his clean record, the District Judge imposed a fine of $30,000 (in default 3 weeks' imprisonment) on each of the 20 charges. The global fine was $600,000 (in default 60 weeks' imprisonment). The fine was to be paid in instalments of $100,000 over 6 months.

27 I should add that the District Judge also noted the sentences imposed on the three other accused persons, who pleaded guilty to similar charges, which differed in terms of the limb of s 331(3A) SFA proceeded on. In fact, Jacinta appeared before the District Judge at the same time as the Accused, and had pleaded guilty to charges under the "connivance" limb (GD at [42]). The charges against Serene were also under the "connivance" limb, while the charges against Ray were under the "neglect" limb. The following fines were imposed on them:

Name	**Number of charges**	**Fine imposed**
Ray	Proceeded: 3 TIC: 8	$10,000 (i/d 1 week) per charge Total: $30,000 (i/d 3 weeks)
Serene	Proceeded: 3 TIC: 66	$15,000 (i/d 3 weeks) per charge Total: $45,000 (i/d 9 weeks)
Jacinta	Proceeded: 3	$20,000 (i/d 4 weeks) per charge

	TIC: 66	Total: $60,000 (i/d 12 weeks)

The parties' cases on appeal

28 In brief, these are the parties' cases on appeal, which I flesh out in further detail as required below. The Prosecution's case was that the sentence was wrong in principle, and also that the District Judge had erred in weighing the various factors resulting in a sentence which was manifestly inadequate.[7] Given the lack of sentencing precedents, the Prosecution proposed several sentencing factors for consideration. Based on these factors, the Prosecution argued that the custodial threshold had been crossed, with 12 to 16 weeks being an appropriate global custodial term.

29 The Accused argued that the District Judge had erred in several factual findings pertaining to the nature of the Gold Insignia scheme, and that the District Judge had erred in weighing the various factors. As a result, the sentence meted out was manifestly excessive. The Accused submitted for the fines imposed to be "reduced appropriately".[8]

The role of the appellate court

30 It is well-established that an appellate court will be slow to disturb a sentence imposed except where it is satisfied that (a) the trial judge erred with respect to the proper factual basis for sentencing; (b) the trial judge failed to appreciate the materials placed before the court; (c) the sentence was wrong in principle; or (d) the sentence was manifestly excessive or manifestly inadequate: *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [12].

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7 Prosecution's Petition of Appeal, at para 5.

8 Accused's Written Submissions (31 December 2018), at para 29.

The applicable law

31 I begin with an analysis with the applicable law. I find it critical to clarify the elements of the offence in question, as there appears to be some confusion on the part of the District Judge, the Prosecution and the Defence whether there is a *mens rea* requirement, and what the requirement is.

32 The charges in question are under s 331(3A) read with s 240(1) punishable under s 240(7) of the SFA. Section 240(1) requires an offer of securities to be made in or accompanied by a prospectus:

> **Requirement for prospectus and profile statement, where relevant**
>
> **240.**—(1) No person shall make an offer of securities or securities-based derivatives contracts unless the offer —
>
> (a) is made in or accompanied by a prospectus in respect of the offer —
>
> (i) that is prepared in accordance with section 243;
>
> (ii) a copy of which, being one that has been signed in accordance with subsection (4A), is lodged with the Authority; and
>
> (iii) that is registered by the Authority; and
>
> (b) complies with such requirements as may be prescribed by the Authority.
>
> …

33 Section 239(1) SFA defines the term "securities" to include "debentures". Further, while the case of *Levy v Abercorris Slate and Slab Company* (1887) Ch D 260, at 264, was cited in the SOF for the definition of "debentures", s 239(3) SFA in fact contains a deeming provision to the same effect:

> (3) For the purposes of this Division —
>
> …
>
> (b) any document that is issued or intended or required to be issued by an entity *acknowledging or evidencing or constituting an acknowledgment of the indebtedness of the entity in respect of any money that is or may be deposited with or lent to the entity* in response to such an invitation shall be deemed to be a debenture.

34 Where the contravention of s 240(1) is committed by a limited liability partnership (which I shall refer to as the "primary offence"), s 331(3A) imposes criminal liability on the individual partner or manager of the offending limited liability partnership as follows:

> **Corporate offenders and unincorporated associations**
>
> **331.** …
>
> (3A) Where an offence under this Act committed by a limited liability partnership is proved to have been committed with the *consent or connivance of, or to be attributable to any neglect on the part of,* a partner or manager of the limited liability partnership, the partner or manager (as the case may be) as well as the partnership shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> [emphasis added]

35 It is clear from s 331(3A) that there are *three alternate limbs* under which liability of a partner or manager – which I refer to as "secondary liability" – is established, being consent, connivance or negligence. In this regard, I find helpful guidance in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 ("*Abdul Ghani*"), where the court discussed the meaning of these three limbs in the context of s 59(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA").

36 In *Abdul Ghani*, the accused, a non-executive director of the relevant company, was convicted of charges for the company's transfer of stolen moneys being attributable to his *neglect* as an officer of the company under s 47(1)(*b*) punishable under s 47(6)(*a*) read with s 59(1)(*b*) of the CDSA. However, the court's judgment contained *dicta* relevant to the present case:

> However, it must be emphasised that in relation to a secondary offender, s 59(1) of the CDSA contemplates **three distinct *mens rea*, *ie*, "consent", "connivance" as well as "neglect"**. While the difference in culpability between "neglect" and "consent or connivance" is obvious, there is also a fine difference in culpability between "consent" and "connivance" under English law – consent requires more explicit an agreement for the illegal conduct to take place. In *Huckerby v Elliot* [1970] 1 All ER 189, … Ashworth J noted that a fellow director of the company had pleaded guilty to a charge under the "consent" limb. In this connection, he expressed his approval for the following remarks which had featured in the magistrate's judgment from whose decision the appeal arose (at 194):
>
> > It would seem that where a director consents to the commission of an offence by his company, he is ***well aware of what is going on and agrees to it*** … Where he connives at the offence committed by the company he is ***equally well aware of what is going on*** but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it.
>
> In *Attorney-General's Reference (No 1 of 1995)* [1996] 1 WLR 970, … Lord Taylor of Gosforth CJ concluded that [to prove "consent",] a director ***must be shown to have known the material facts that constituted the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts*** (at 981). Subsequently, Lord Hope in [*R v Chargot Ltd (trading as Contract Services)* and others [2009] 1 WLR 1] … endorsed this test, adding that consent can be established by either inference or proof of an express agreement (at [34]).
>
> It is clear from the above that the English cases distinguish between "consent" and "connivance". However, since this matter does not arise for conclusive determination before me, I shall leave the position in Singapore open until a further court

> gets the opportunity to examine the precise difference between these two *mens rea* requirements.
>
> [emphasis added in bold italics]

37 I turn to consider *Attorney General's Reference (No. 1 of 1995)* [1996] 1 WLR 970 ("*Attorney General's Reference (No. 1 of 1995)*") in further detail, as it contains an exposition on the constituent requirement of "consent". In that case, against the context of two directors jointly charged for consenting to their company taking deposits in the course of the company's business without due licence from the Bank of England, the Attorney-General sought the opinion of the court on, *inter alia*, what *mens rea* was required to be proved to show "consent". In so doing, the Attorney-General framed its proposal for the requisite *mens rea* in the following terms (at 975):

> (i) It is necessary for the prosecution to prove: (1) that the company accepted a deposit in the course of carrying on a deposit-taking business and that the company was at that time in fact not authorised by the Bank of England to take deposits; (2) that the defendant was at that time a director of the company; (3) that the defendant knew that (a) the company accepted the deposit, and he consented to it doing so (b) in the course of carrying on a deposit-taking business (c) and the company had no authority from the Bank of England to take [deposits]. (ii) *It is sufficient for proof of knowle[d]ge of lack of authority that the defendant …, if asked the question, 'Has your company got the authority of the Bank of England,' to be able to say truthfully, 'No.' … The fact that the reason why the company had never applied for and thus never been granted such authority was that the director did not know the law impos[ed] the requirement does not in any way alter the matter of fact that his state of mind was that of knowing quite well that the company had no authority.*
>
> [emphasis added]

38 The court agreed with the Attorney-General, being "satisfied that the correct approach is that suggested on behalf of the Attorney-General", and held as follows (at 980):

> A director who *knows that acts which can only be performed by the company if it is licensed by the bank, are being performed when in fact no licence exists* and who consents to that performance is guilty of the offence charged. The fact that he does not know it is an offence to perform them without a licence, i.e., ignorance of the law, is no defence.
>
> [emphasis added]

In other words, the court accepted in no uncertain terms that ignorance of the need for a licence was irrelevant. Such a requirement for knowledge of a need for a licence is tantamount to undermining the principle of *ignorantia juris non excusat* (ignorance of the law excuses not).

39 In light of the above, I gratefully adopt the approach in *Abdul Ghani* in relation to the requirements of "consent" to the present offence, which does not require that the individual has knowledge of the legal requirements giving rise to the primary offence. Hence, where "consent" is relied on to establish secondary liability, the offender *must be shown to have known the material facts that constituted the offence by the limited liability partnership and to have agreed to its conduct of the business on the basis of those facts.* Further, in my judgment, it is only right *not* to require the offender to know of the legal requirement that the limited liability partnership failed to comply with.

40 In fact, it is for this reason that the Accused's guilty plea in the lower court can be considered validly taken in the first place. If the Accused's "consent" in fact requires him to know that the offering of Gold Insignia's memberships required a prospectus, then his plea would have been qualified by his maintaining in mitigation that he was "under a *bona fide* impression that the [memberships] did not require a prospectus".[9] Such an issue does not in fact

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9 ROP, at p 435, para 42.

arise; the Accused's defence counsel in the lower court made it clear that he had no intention to qualify the plea,[10] and more importantly, the Accused's claim to ignorance is irrelevant to the elements of the charge.

41 Putting the "consent" limb aside, I am inclined to agree that a person who connives must be found to have been equally aware of the material facts of the underlying offence. In this regard, I wish to highlight that while *Abdul Ghani* frames consent and connivance as separate kinds of mental states (as the court counted consent, connivance and neglect as "***three*** distinct *mens rea*" [emphasis added in bold italics]), it seems to me that the correct approach is to consider "consent or connivance" as *one* class of *mens rea* together, considering that they both appear to entail the same degree of knowledge. The interpretation of "consent" and "connivance" as being descriptors of similar *mental states* is also supported by the particular mode of expression in s 331(3A), grouping consent or connivance, on the one hand, and neglect, on the other. They seem to differ only in the form the agreement takes – explicit agreement in the former, and tacit agreement in the latter *ie,* the *actus reus* of the offence. Nonetheless, for present purposes, the issue of the precise distinction between "consent" and "connivance" is not a matter argued before me, and I shall not deal specifically with this.

42 Based on the foregoing, to prove the present offence against a partner or manager of a limited liability partnership and establish his secondary liability, the following elements must be established:

(a) The primary offence of offering securities without a prospectus is committed by a limited liability partnership.

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10 ROP, at p 283, ln 13.

(b) In the commission of the primary offence, there is *either* consent or connivance, *or* neglect on the part of the partner or manager. As stated immediately above at [41], I am of the view that there are two states of *mens rea* within the offence. Specifically, to prove "consent", the offender *must be shown to have known the material facts that constituted the offence by the limited liability partnership* and *agreed to its conduct of the business on the basis of those facts*. In the context of the present kind of secondary liability, adopting the language of *Attorney General's Reference (No. 1 of 1995)*, this is a partner or manager who has knowledge that the relevant security is being offered by the limited liability partnership without the required prospectus, and who consents to that conduct.

(c) The *acts or omissions* of the partner or manager in the commission of the primary offence, which demonstrate consent *or* connivance *or* neglect on his part. To reiterate what I said at [41] above, in terms of the *actus reus* of the offence, there appears to be three distinct limbs.

43 For completeness, under s 240(7), a contravention of s 240(1) is deemed an offence, and the prescribed punishment for the said offence is a fine not exceeding $150,000 or imprisonment for a term not exceeding two years or both.

The sentencing approach

General points

44 With the above in mind, I make four general points about sentencing for the offence.

45 First, it seems to me that "neglect" should be recognised as the state of *mens rea* involving lesser culpability relative to that of "consent or connivance". In *Abdul Ghani* at [103]–[105]*),* despite the different limbs in s 59 CDSA being subject to the same punishment provision in s 47(6) CDSA, the court recognised the different culpabilities involved in sentencing. Hence, the court determined that varying "notional upper limits" should apply to the various limbs, as a guide to determining the appropriate sentence. For offences prosecuted under the "consent or connivance" limbs, the court established that these would be subject to a maximum of ten years' imprisonment. In contrast, the court fixed the notional upper limit for "negligence" at approximately four years' imprisonment.

46 In line with *Abdul Ghani,* I am of the view that for a charge based on the "consent" limb under s 331(3A) read with s 240(1) of the SFA, the *full range of punishment*, up to the maximum of two years' imprisonment may be considered by a sentencing court. In this connection, I reject the Accused's submission that offences involving omissions, or indeed omissions to issue a prospectus, should generally be dealt with by fines.[11] To do so would be to disregard the full range of prescribed sentences for the present offence, and to ignore that "consent" entails more than a mere omission. I do not, however, propose to determine whether any notional upper limits should be applied to the "connivance" or "neglect" limbs, as the case before me is not based on either of these limbs. Although I see some merit in this approach, especially with regards the "neglect limb", the arguments were not canvassed before me on this.

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11 Accused's Written Submissions (15 February 2019), at paras 16.1 and 16.2.

47 Second, I should add that while the "consent" limb is certainly the most serious limb within s 331(3A), as it involves the more culpable of the two states of *mens rea* and the most culpable of the three forms of *actus reus*, I do not think that a custodial sentence is called for based on this factor alone. In other words, I would not impose an imprisonment term as the starting point. Ultimately, the inquiry will be a fact-sensitive one, in which factors such as those I shall set out below should be considered.

48 Third, it is trite that ignorance of the law is no excuse, whether to exculpate from criminal liability or to mitigate in sentencing (*Krishnan Chand v Public Prosecutor* [1995] 2 SLR 291, at [7]). It is therefore irrelevant to sentencing that an offender does not know that a prospectus is required. For clarity, I acknowledge that while "[i]gnorance of the law is no excuse, … that does not make every breach of the law a wilful one" (*Re Cashin Howard E* [1987] SLR(R) 643, at [13]). Wilful contraventions ought to receive greater censure where they reflect defiance and disregard of the law: *Sentencing Principles in Singapore*, Academy Publishing 2007, at 463–466. Hence, a partner or manager who *knows* that a prospectus is required, and yet *intentionally* or *deliberately* chooses not to issue one, would likely be viewed with greater disapproval. This, however, is distinct from the *mens rea* requirement of the offence. Here, I pause to observe that at times, the District Judge, as well as the parties, appear to have conflated the two issues, leading to a degree of confusion both in the GD, as well as in the written submissions before me.

49 Fourth, it is apt to highlight the mischief meant to be prevented by the prohibition within s 240(1) of the SFA, which is not seriously disputed by the parties. The provision sits within a disclosure-based regime, in which investors are meant to be presented with all the necessary information about a security so

as to make informed decisions about whether to invest in that security. In this disclosure-based regime, the prospectus is critical to investor protection. It prevents the fundamental information imbalance between the securities issuers and the investing public that would otherwise result, by placing the obligation on issuers to disclose all information that a reasonable investor needs to make an informed decision about whether to invest. The sentencing considerations I set out below, in particular the evaluation of the materiality of the information not disclosed, will therefore address this legislative purpose.

The sentencing factors

50 With the background in mind, I turn to consider the sentencing factors. The Prosecution proposed several factors to be taken into account.[12] In sum, this encompassed (a) the role of the offender within the limited liability partnership and which limb (consent, connivance or neglect) the offender is charged under; (b) the offender's mental state – whether the offence was committed knowingly (*ie*. it was a deliberate or reckless decision not to issue a prospectus) or negligently (*ie*. not knowing that a prospectus was required); (c) the nature and materiality of the information not disclosed; (d) the consequences of the offence; and (e) steps taken to mitigate the effects of the lack of a prospectus.

51 In support of these factors, the Prosecution submitted that another comparable offence, s 253(1) of the SFA, provides sentencing guidance along similar lines. Section 253(1) prohibits the publication of false or misleading statements in a prospectus accompanying an offer of securities. The legislative objective behind the offence was recognised in *Auston International Group Ltd v Public Prosecutor* [2008] 1 SLR(R) 882 ("*Auston*") – to enable the proper

12 Prosecution's Written Submissions at para 27.

functioning of a disclosure-based regime of securities regulation by ensuring that investors are able to make informed decisions about whether to enter into investments (at [11]–[13]). The Prosecution submitted that, apart from sharing a similar objective, the prescribed punishment for both offences is the same: a fine not exceeding $150,000 or imprisonment for a term not exceeding two years or both. In *Auston,* the factors considered by the court (at [14]–[18]) were (a) the degree of falsity of the information published; (b) steps taken to remedy the false information provided; and (c) the mental state of the offender. These are three factors identified above as being relevant to the present offences.

52 Indeed, the factors were not specifically challenged by the Accused. However, the Accused argued that s 253(1) offences were in fact of a more severe nature compared to s 240(1) offences, because "a prospectus containing a false and misleading statement is a lot worse than *no prospectus*" [emphasis in original]. As illustrated by *Auston,* the starting point for issuing a "false and misleading prospectus" is a fine. That being the case, the present offence "cannot possibly attract a custodial term".[13] I disagree with such a contention. It can be seen that the prescribed punishments for both offences, whether under s 240(1) or s 253(1) SFA, are the same. The legislative intent is therefore for both offences to, all things being equal, be viewed with equal severity.

53 In my view, the inquiry as to the appropriate sentence must be a fact-specific one that considers the various factors which I set out below. As guided by the factors in *Auston*, and taking on board the Prosecution's submissions, I consider the relevant sentencing considerations for the present offence to

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13 Accused's Written Submissions (10 January 2019), reply to para 22.

broadly fall into twin categories of culpability and harm. I now set out some non-exhaustive factors which constitute facets of these two main considerations.

54 Culpability, as a measure of an offender's blameworthiness, includes these factors:

(a) Role of the offender. This entails consideration of whether the offender is charged under the consent, connivance or neglect limb of the offence. In this provision, the three limbs are set out in an order that reflects a decreasing level of culpability. Further, under this factor, the offender's role in the entity, the nature and extent of the offending acts or omissions, should also be considered.

(b) The offender's mental state. This relates to whether the offence was committed with *either* consent or connivance of, *or* attributable to any neglect of the accused, and the extent of such consent, connivance or neglect. An offender charged with *either* consent or connivance is more culpable than one charged with neglect. Here, I depart from the Prosecution's analysis as set out at factor (b) in [50], and a more detailed discussion is at [62] below. Distinct from the *mens rea* requirement of the offence, this factor encompasses consideration of whether there has been a knowing, deliberate or wilful contravention of the legal requirement which would be an aggravating factor. Ignorance of the legal requirement, however, is but a neutral factor.

(c) Intention or motive of the offender, and benefits or gains made by the offender. This requires consideration of whether the offender intended to benefit from or is motivated by any financial or other gains, and whether he receives or reaps any benefits from the scheme.

(d) Steps taken to mitigate the effects of the offence. This accounts for any mitigation of the lack of a prospectus by making any disclosure concerning the securities offered.

55 The factors which constitute harm caused by the offending behaviour would include:

(a) Consequences of the conduct. This pertains to the actual and potential harm caused as a result of the offence(s), in other words, loss or risk occasioned as a result of the failure to issue the prospectus. It also involves a consideration of the scale of the operations, such as the number of investors to whom the securities were sold without a prospectus being issued and the total value of such securities sold. The sophistication of the operations is also pertinent.

(b) Materiality of the information not disclosed. Given the legislative object of the offence to address the information asymmetry of the offender and the investing public, it is important to consider the materiality – the relevance and importance – of the information which should have been disclosed to investors in the prospectus. The materiality of the information must be considered in the context of the nature of the securities offered. For instance, the riskier the investment, the more material the relevant information required to adequately inform investors' choices would be.

Starting points

56 Drawing upon the factors above, cases can be broadly classified according to the degree of harm and culpability. Should an offence involve low culpability and harm, a fine of $10,000 and upwards would be appropriate. This

is in line with the fine of $10,000 imposed in *Auston* on the primary offender. Where there is high culpability and high harm, a custodial sentence is warranted. In between the two extremes, the difficulty is to determine whether the custodial threshold is crossed. In my view, where the offence is one of low culpability and moderate harm, or moderate culpability and low harm, a fine of $30,000 and upwards would be suitable punishment. Where culpability and harm are moderate in degree, a short custodial sentence *may* be considered. That said, these broad positions may be moderated, depending on the other relevant factors (both aggravating and mitigating which fall outside the sentencing factors set out in [54]—[55] above). Given the paucity of cases dealing with the provisions, I will refrain from setting more detailed starting points.

My decision

57 Having set out the broad sentencing approach, I now apply it to the facts of the case to determine the appropriate sentence for the Accused, and in particular, whether the custodial threshold has been crossed. I first turn to consider the sentencing factors pertaining to the Accused's culpability.

Culpability

The Accused's mental state

58 On appeal, the Accused argued that the District Judge placed undue weight on the "recklessness" of the Accused, despite holding that the Accused was more negligent in his omission to issue a prospectus.[14] In fact, the Accused argues that the District Judge should not have even made a finding of either

14 Accused's Petition of Appeal, at para 2.9.

mental state, given that the offence is one of strict liability.[15] According to the Accused, as there was no *mala fides*, the imposition of any custodial sentence would be inappropriate.[16]

59 On the flipside, the Prosecution submitted firstly that the lower court had given insufficient weight to the Accused's gross recklessness in failing to "ensure that all legal requirements for offering securities were satisfied". Second, the lower court had erred in finding that the product sold by Gold Insignia was a novel one. Third, the lower court had given undue weight to the purported steps taken by the Accused to check with the relevant authorities if all the rules and regulations had been satisfied. Fourth, the lower court had given undue weight to its finding that the Accused was not proven to have acted fraudulently.[17]

60 In my judgment, in discussing the Accused's culpability, it must be remembered that the Accused pleaded guilty to a charge brought under the "consent" limb of s 331(3A), of consenting to Gold Insignia's offering of securities without a prospectus; that is, he knew the material facts that constituted the offence by the limited liability partnership and agreed to its conduct of the business on the basis of those facts.

61 This leads me to the confusion on the part of the District Judge. As I observed above, at [26] of the GD, the District Judge alluded to the fact that the offence "does not require proof of *mens rea*". This is not correct. The District Judge had also found that "the Accused may be said to be negligent or even …

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15 Accused's Written Submissions (31 December 2018), at para 28.

16 Accused's Written Submissions (31 December 2018), at para 11.

17 Prosecution's Petition of Appeal, at para 5.

reckless, there is no evidence … that the Accused had deliberately omitted offering the securities with a prospectus" (at [25(b)]). With respect, such findings are inconsistent with the *mens rea* of the charges to which the Accused had pleaded guilty to which required proof that the Accused must have "known of the material facts that constituted the offence by the [limited liability partnership]". The material facts that constituted the primary offence would include Gold Insignia's issuance of the debentures without a relevant prospectus. The Accused is not charged under the "neglect" limb of the offence. Therefore, insofar as the District Judge seems to discuss such states of minds in relation to the *mens rea* of the charges, she fell into error. Thereafter, the District Judge found that the Accused's state of mind would be relevant to sentencing, and at various points, she found him to be "negligent", "reckless" and even "grossly reckless". Insofar as these findings were made without being precise as to whether these related to *mens rea* or to whether the Accused had committed wilful contraventions of the law, they muddied the waters further.

62 For similar reasons, I disagree with the Prosecution that the offender's mental state concerns whether the offence was "committed knowingly (*ie*. it was a deliberate or reckless decision not to issue a prospectus) or negligently (*ie*. not knowing that a prospectus was required)": see [50], factor (b), and [54(b)] above. Again, it appears to me that the Prosecution's framing of the mental state as such is borne out of a misunderstanding as to the elements of the offence. Where the limb relied on is "consent", the offender must be shown to have *known* of the material facts of an issuance of securities without the relevant prospectus; *recklessness* does not suffice. As for negligence as to the material facts, this would suffice only for a charge under the third limb of "neglect", and there is no place for a discussion on negligence *in this sense* in the context of a charge based on "consent". The question of negligence *as to whether the*

prospectus was required is a separate and distinct one, which is *not* part of the *mens rea* element of the offence.

63 Equally, the Accused's arguments on appeal that custodial sentences are inappropriate due to the lack of *mala fides* involved in the present "strict liability" offences are misguided. There *is* a *mens rea* element to the present offences, and the Accused is charged for his consent to the material facts of the primary offence. Further, due recognition must be given to the statutory provision for possible custodial sentences being meted out in relation to them.

64 That being said, it appears that the parties' arguments, and the District Judge's findings, also relate to whether the Accused *knew* of the illegality of Gold Insignia's actions. The District Judge had found that the Gold Insignia membership offerings were "novel", such that "the [Accused] could [not] instinctively identify the membership programme … as "securities" under the SFA" (see [22] above). In other words, the Accused *did not know* that the Gold Insignia membership was captured within the prohibition of s 240(1) SFA. At most, he was *reckless* in failing to ensure that the legal requirement was met.

65 I reiterate that applying the *ignorantia juris non excusat* principle, ignorance is irrelevant to sentencing. While the Accused could not "instinctively identify" that the offering of memberships without a prospectus was in contravention of the SFA, this is at best a neutral factor; it has no mitigating value. All that can be said of the present case is that the Accused did not *wilfully* contravene the present provisions. On this, I do not disagree with the District Judge that there was insufficient basis to find otherwise. Given that the facts fall short of revealing a wilful contravention of the law, I leave this as a neutral factor.

66 As for the Accused's clarifications sought from the authorities, I likewise do not place much weight on them. In addition to merely going towards whether the Accused knew about the prospectus requirements or not, these enquiries in fact concerned the narrow question of whether any licensing was required in order to run a membership programme.[18] The question posed to the authorities was *not* about whether an accompanying prospectus was required in the offer of the debentures.[19] There was also no evidence to show that any information regarding the structure of the membership programme as a debenture was given to the authorities. These communications therefore have little relevance to the Accused's state of mind as to the requirement of a prospectus.

Intention or motive

67 It is undisputed that there is no evidence showing that the Accused had any broader fraudulent intent in offering the Gold Insignia memberships without a prospectus. In other words, he did not intend, by consenting to such conduct, to defraud potential investors. The District Judge found at [25(c)] and [26] of the GD that the Accused did not have any fraudulent, dishonest or ill intent.

68 On this finding, again, I do not disagree with the District Judge. There is insufficient basis to infer that the Accused has such intent. However, the District Judge went further to find that the "requisite state of mind necessary to tip the case across the custodial threshold was absent in this case" because of the lack of any fraudulent, dishonest or ill intent. On this, I agree with the Prosecution that the District Judge had erred. The Accused is not being charged

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18 ROP, at p 283, ln 24–28.

19 ROP, at p 283, ln 18–20.

with defrauding the investing public. While the lack of fraudulent intent amounts to a lack of such an aggravating factor, this is not *ipso facto* a mitigating factor, but is merely a neutral one. The purpose or object of the offence is not to target fraud, and I do not agree that such fraudulent intent is a necessary condition for a custodial sentence to be imposed in respect of this offence.

69 That being said, as the Prosecution pointed out, the Accused drew a monthly salary of $20,000 for 11 months, and received "partial consultant fees" of $81,000 and $130,000.[20] In response, the Accused argued that his receipt of such sums was not illegal,[21] and that it was effectively an irrelevant consideration. I am unable to agree with the Accused. The fact of the matter is that he had personally gained a benefit of $431,000 from the scheme. The financial motivation behind the scheme is relevant. In comparison, Ray and Serene were mere salaried employees drawing $3,000 per month, and Jacinta did not receive any salary from Gold Insignia. Weight must be given to this aggravating factor, and the District Judge did not do so.

The Accused's role in the scheme

70 The District Judge had found the Accused to be the "mastermind and architect" behind the scheme. However, on appeal, the Prosecution argued that insufficient weight had been placed on this fact. It was submitted that the Accused had in fact played a *different* role as compared to the other offenders. As a result, the Accused carried more responsibility for the features of the Gold Insignia scheme.

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20 Prosecution's Written Submissions, at para 61.

21 Accused's Written Submissions (10 January 2019), reply to para 61.

71 In my view, the role of the Accused is a crucial consideration; it reflects his responsibility for Gold Insignia's offending behaviour. Indeed, he had conceived of the entire business concept of Gold Insignia, was the senior-most member of the management team of Gold Insignia, had the final say in its management, and his remuneration reflects this. In this regard, I recognise that the Accused's responsibility for consenting to the lack of a prospectus is far greater than that of a more junior manager, as the Accused would have made the final decision on the matter, and be in a position to influence his subordinates as well.

72 More importantly, as the founder and senior-most manager of Gold Insignia, who conceived of the entire scheme, the Accused ought to have understood the risks of his business, and hence ought to have understood the materiality of the information which could have been disclosed in the prospectus. The features of the Gold Insignia business scheme were directly attributable to the Accused, and I agree with the Prosecution that insufficient weight has been given to the risk in the scheme's design and the Accused's role.

Mitigating steps

73 Although not a point canvassed before me on appeal, I discuss this point to arrive at a holistic view on the appropriate sentence, as it is one of the relevant factors under the framework I have set out above at [54(d)]. In this regard, the District Judge had held that the effects of the lack of a prospectus were not substantially mitigated against by the information contained in the membership application forms, and the steps taken by the Accused were "at best, neutral".

74 I am in the agreement with the District Judge on these points. First, I address the issue of the information disclosed in the membership application forms. It bears reiteration that the prospectus must be prepared in accordance

with s 243 SFA. Section 243(1)(*a*) requires that a prospectus contain "all the information that investors and their professional advisors would reasonably require to make an informed assessment" of numerous matters specified in s 243(3), which include, *inter alia*, the assets, liabilities, profits, losses, financial position and performance, and prospects of the issuer. In the present case, as the issuer of debentures is Gold Insignia, such information would thus have to be provided in relation to Gold Insignia, and not merely the terms and conditions of the membership offerings. Indeed, the terms and conditions were quite different in substance from the disclosure required of a prospectus, and are insufficient to be accorded mitigating weight.

75 Second, as for the Accused's alleged steps to mitigate the effects of his offence, I refer to my discussion at [81] below. As parties have not argued this issue specifically, I simply state that, having regard to all the facts, I see no reason to disagree with the District Judge's findings. The actions taken by the Accused after the fact constitute a neutral factor.

Harm

76 With regard to the harm caused by the Accused's offence, I first apply the sentencing considerations of the consequences of the conduct, in the form of actual and potential loss caused, as well as the scale of the present operations. I then consider the materiality of the information not disclosed.

Actual and potential loss caused to the investors

77 The District Judge did not make a specific finding as to whether any investors suffered actual loss as a result of the offences. Instead, the District Judge found that "[h]undreds of investors risked losing millions of dollars" (GD at [20]). On appeal, the Accused argued that there was no basis for this finding.

78 I first address the issue of actual loss. On the one hand, the Prosecution's position on appeal was that the amount of loss caused to the investors cannot be shown. On the other hand, the Accused argued that no loss was caused.[22] According to the Accused, the District Judge should have taken into consideration the fact that no investor complained of suffering any loss, that no loss was in fact suffered by any investor while the Accused was actively selling the product, and there was indeed no loss before the intervention of the authorities.[23] I also acknowledge the Accused's argument that any broader effect on the markets for gold or debentures was not shown to have resulted from the Accused's offence.[24]

79 In my view, in the absence of any further information on this point, the lack of proven loss – whether occasioned on the investors directly or otherwise – is simply a neutral factor at the sentencing stage. I further note that even if "no [losses were] suffered … whilst [the Accused] was still actively selling the product",[25] this is of little relevance. It was largely the fresh funds brought in through active sales of the memberships which kept the scheme going. However, numerous investors were exposed to a risk of losing a substantial sum of money, and thus I turn to the issue of potential loss.

80 Regarding the potential loss caused, the Accused contended that the District Judge had placed undue weight on the "level of harm" posed to the investing public.[26] There was no basis for finding that "hundreds of investors

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22 Accused's Written Submissions (31 December 2018), para 21.

23 Accused's Petition of Appeal, paras 2.4–2.5.

24 Accused's Written Submissions (31 December 2018), para 11.

25 Accused's Petition of Appeal, para 2.5.

26 Accused's Petition of Appeal para 2.1.

risked losing millions of dollars".[27] Insufficient weight was placed on the fact that each investor obtained a gold bar as security for their investment.[28] The Accused went further to argue that the District Judge had failed to appreciate that the potential harm to each investor was, in fact, "zero",[29] because the investors enjoyed a possibility of a full-value refund.[30]

81 In this regard, I note the substance of the various "advisory letters" sent to members to inform them of the situation as it developed (see [18(c)] above):

(a) Gold Insignia ceased making pay-outs to investors as early as 4 August 2011.[31] This meant that investors who joined the membership programme later were at higher risk of losing the unsecured 30% of their membership fee, having had less time to recoup that amount back through the periodic fixed pay-outs.

(b) From August 2011 onwards, Gold Insignia only offered the third variation of the membership to new investors, entailing a 6% bi-annual pay-out (12% per annum) as compared to the previously-offered 4.5% quarterly pay-out (18% per annum). In this regard, I note that this pointed towards the unsustainability of the first two versions of the memberships, with the third version having a lower pay-out.[32]

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27 Accused's Petition of Appeal para 2.1.

28 Accused's Petition of Appeal para 2.2.

29 Accused's Written Submissions (31 December 2018), at para 29.

30 Accused's Petition of Appeal, at para 2.11.

31 ROP, at p 563.

32 ROP, at p 278, ln 1–14.

(c) In November 2011, Gold Insignia members who wished to terminate their membership were informed that "the [Gold Insignia] management may not be able to deal with all requests and return all monies immediately".[33] Members were also offered two options – (a) to sign a letter of release, which absolved Gold Insignia and the member from all future obligations, and keep the gold; or (b) to participate in a "recall / redemption exercise", which would allow Gold Insignia "to deal directly with each customer to work out a suitable solution", but "may take some time".[34]

(d) By 17 November 2011, members were instructed to sign a letter of release, which would enable them to keep their gold bars.[35] If members did not sign the letter of release, they would effectively be unable to retain the gold bar.

82 As for the exact sums at risk of loss, the investors did not, as rightly pointed out by the Accused, stand to lose the entire sum of the membership fee. This is because each investor was returned a portion of their investment in the form of a gold bar worth 70% of their membership fee. However, out of the $29,970,000 paid to Gold Insignia in membership fees, I accept that 30% of that amount – about $8,991,000 – was exposed to risk. This was a substantial amount. The facts above at [81] go to show that there was a real risk of loss of such a sum, and not a mere speculative risk. Pay-outs had ceased to investors, liquidating their investments became more difficult, culminating in investors having to sign letters of release to retain the gold bar which represented 70% of

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33 ROP, at p 552, para 18.

34 ROP, at p 552–553.

35 ROP, at p 558, para 10.

their membership fee. Further, the last two points (stated at [81(c)]–[81(d)]) in particular reveal the Accused's error in implying that investors who had purchased their memberships were not exposed to *any* risk because they could obtain a full refund of their membership fee. The ability to do so was in fact hindered.

Scale of operations

83 At this juncture, it is apposite to note the large scale of Gold Insignia's operations. As alluded to above at [82], beyond the existence of the scheme, the *extent* of potential loss was substantial. About $8,991,000 of the invested sum from 547 investors was exposed to risk. For completeness, I note that the Accused's 20 proceeded charges relate to a total of 12 investors and $585,000 invested. 30% of this investment that was exposed to risk was thus $175,500, which is still a significant amount.

Materiality of undisclosed information and the unsustainability of the Gold Insignia scheme

84 Given the above facts, I now turn to the issue of the materiality of the information that should have been disclosed in the prospectus. As alluded to earlier when setting out the relevant sentencing considerations, this is a factor that cannot be assessed in a vacuum, but must instead be considered against the context of the risks of the scheme.

85 In the proceedings below, the Prosecution had submitted that the scheme operated by Gold Insignia was unsustainable, based on facts within the SOF. The District Judge had accepted the submissions, and therefore pegged the level of harm caused as "high", given that the investing public was exposed to serious

financial risk as a result of the Gold Insignia memberships being "highly speculative, extremely risky and unsustainable" (GD at [20]).

86 On appeal, the Accused has challenged this in the following two aspects:

(a) The District Judge should not have found that the scheme was "unsustainable" in the absence of any expert evidence or admission by the Accused. Undue weight was also given to this finding.

(b) The District Judge should not have found that the scheme was "highly speculative", as the memberships were not traded at wildly-varying prices, driven by the transactions of speculators.

87 While the degree of speculation involved was not directly addressed, the Prosecution submitted in response that the District Judge was entitled to find that the scheme was unsustainable, and that the issue was in any event conceded by the Accused.[36] The Prosecution also characterised the Gold Insignia membership offerings as a "money circulation scheme" where funds from new investors were used to pay off old investors, the offering of which (without a prospectus) was "extremely misleading".[37]

88 Addressing the factual challenges by the Accused, I first consider the facts relied on by the District Judge in making this finding, as referenced at [20] of the GD (footnote 10), which were as follows:

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36 Prosecution's Written Submissions, at para 36–43.

37 Prosecution's Written Submissions, at para 63.

(a) After 70% of the membership fee was used to purchase the gold bar for each investor to hold on trust, only 30% was left to meet its financial obligations,[38] which included:

(i) Payment of 4.5% per quarter (18% per annum) or 6% bi-annually (12% per annum), as the case may be, to the investors, on the entire amount invested by that investor;[39] and

(ii) Payment of 1.3% commission, on the full price of the membership, to each independent sales consultant, for every month that a member, to whom the consultant sold a membership, stayed in the scheme.[40]

(b) Gold Insignia generated monies by putting the 30% remainder less $200,000 with fund managers and brokerage firms.[41] On these investments, Gold Insignia had no input in how this money was invested.[42]

89 The Prosecution argued that, based on just these two liabilities set out above at [88(a)(i)] and [88(a)(ii)], after a year of operations, Gold Insignia had to pay the investor approximately 18% (or 12%) in pay-outs, and about 15.6% in commissions. These liabilities amounted to 33.6% (or 27.6%, as the case may be) of the membership fees of each investor, which exceeded or would be close to exceeding the 30% which Gold Insignia retained. In other words, to meet its

38 SOF, at para 10(a).

39 SOF, at para 10(b).

40 SOF, at para 29.

41 SOF, at para 14(b).

42 SOF, at para 14(b).

obligations, it had to generate 92% to 112% investment returns on the moneys it had retained. This does not even account for the operation costs of Gold Insignia, including the salaries of the Accused, Serene and Ray. Further, Gold Insignia did not engage in any innovative investment strategy in the investment of the membership fee. Instead, it sought to generate enough to meet its financial obligations through simply placing the funds with the fund managers and brokerage firms. Apart from this, Gold Insignia's only significant source of funding was the membership fees of new investors. The sustainability of this scheme therefore was, as the Prosecution argued, "not only impossible, but highly suspect in its conception".[43]

90 I accept that the facts show that the Gold Insignia scheme was fraught with a great degree of risk. It would have, in all probability, been unable to meet its financial obligations owed to its members and independent sales consultants, if, after a year, the members choose to terminate their membership and exercise their right to a refund of the original membership fee. Furthermore, I note that the Accused, in the proceedings below, did not specifically challenge the Prosecution's assertion of the scheme's unsustainability. I therefore accept that the District Judge was entitled to find that the scheme was unsustainable, whether based on the facts or the lack of dispute on the issue.

91 In addition, I note that before me, the Prosecution used the term "money circulation scheme", although the District Judge made no such finding. I do not think it necessary or suitable to characterise Gold Insignia's scheme as such, given the lack of clarity as to what the term means. In the same vein, while the District Judge's description of the scheme as "highly speculative" may simply

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[43] Prosecution's Written Submissions, at para 36–39.

be one way of expressing the high risk involved, as opposed to a finding that the membership prices were driven by speculation, I do not think use of these terms is necessary. It is sufficient for present purposes to recognise the risks associated with the scheme, based on facts set out in the SOF.

92 Viewed against this context that the scheme was an extremely risky one for investors, disclosure via the prospectus became all the more important. For instance, investors would have been informed, through the prospectus, of Gold Insignia's intended mode of generating profits. The failure to issue a prospectus had inhibited the ability of investors to acquire information about these risks, and to make informed investments.

The appropriate sentence

93 Having considered the parties' oral and written submissions, as well as the GD and relevant facts in totality, I am of the view that the custodial threshold *is* crossed. The culpability of the Accused falls in (*at least*) the moderate to high range. He had consented to Gold Insignia committing the offence under s 240(1) SFA, and his role in Gold Insignia was substantial. He had benefitted from the scheme. That said, I acknowledge that the Accused lacked any broader fraudulent intent underlying his offending behaviour, and that he was not in wilful contravention of the legal requirement. Turning to the harm, again, this was in (*at least*) the moderate to high range. The scale of the operations was large, and the non-disclosure was material due to the risks involved in the Gold Insignia scheme. Significant sums belonging to multiple investors were exposed to loss as a result. That said, there was no evidence of actual loss.

94 For almost every sentencing consideration, I assess the present case to contain aggravating elements. I further note that as compared to the other accused persons, the Accused is the only one who faced charges under the

"consent" limb, and bore the most responsibility for Gold Insignia's actions by virtue of his utmost seniority in the organisation and involvement in the devising of the scheme. In the circumstances, a custodial sentence is required for the deterrence of the Accused and other potential offenders.

95 In arriving at this outcome, with respect, I find that the District Judge has failed to appreciate some of the materials placed before the court, that the sentence was wrong in principle and that the sentence was manifestly inadequate.

96 Having concluded as such, I am left to consider the appropriate length of the custodial term for the 20 proceeded charges. I base my decision primarily on the sentencing factors set out above, given the lack of sentencing precedents. Having qualitatively analysed the factors above, and having determined that the present case falls within *at least* the moderate culpability-moderate harm category based on the factors above, I am of the view that an imprisonment term of six weeks' imprisonment per charge is appropriate. Giving full weight to the mitigating effect of the Accused's cooperation with the authorities, his plea of guilt and his clean record, I reduce this to arrive at an imprisonment term of four weeks' imprisonment per charge.

97 By s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), at least two of the imprisonment sentences imposed for the charges must be ordered to run consecutively. Considering the overall criminal behaviour, and having regard to the totality principle (as reiterated recently in *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799, at [71]–[81]), I am of the view that a global term of 12 weeks' imprisonment would be appropriate.

The Accused's bankruptcy

98 At this juncture, I note that the Accused is an adjudged bankrupt as of 20 November 2014. This was not made known to either the District Judge or the Prosecution before the sentence was imposed. The Accused eventually paid the fine imposed with the help of a benevolent third party.

99 In this regard, the Prosecution has cited the authority of *Public Prosecutor v Choong Kian Haw* [2002] 2 SLR(R) 997 ("*Choong Kian Haw*"), at [24]:

> I stated my view that fines were, in general, *not a suitable means of punishment since bankrupts would typically lack the means to pay for the fines themselves*. If they had the funds to pay the fines, these monies should clearly be channelled instead to the unpaid creditors. *If they lacked the funds and a third party paid for them, the punitive effect of the punishments is diminished.* These concerns apply with equal force to the sentencing of bankrupts in general. They are not limited to offences committed under s 141(1)(a) [of the Bankruptcy Act (Cap 20, 2000 Rev Ed]. [emphasis added]

100 Nevertheless, I note that the more recent case of *Tan Beng Chua v Public Prosecutor* [2014] 3 SLR 1274 states at [14]–[15]:

> With respect, *Choong Kian Haw* should not be taken to have laid down a rigid and inflexible rule.
>
> … it is pertinent to note that the underlying assumption in *Choong Kian Haw* is that bankrupts do not have access to funds other than (a) donations from benevolent third parties; and/or (b) funds that are available for creditors. However, with respect, this assumption may not always hold true. Some bankrupts may have other legitimate sources of funds that may be used to pay a fine. These include CPF moneys that a member is entitled to withdraw upon reaching 55 years of age … and the sale proceeds of a Housing and Development Board flat … Hence, the general proposition in *Choong Kian Haw* may have been misapplied somewhat to extend to every case irrespective of whether a bankrupt has legitimate sources of funds which are not available for distribution to creditors.

101 As I had concluded on the facts before me that the custodial threshold is crossed, it is strictly not necessary for me to further address this issue of whether it would be more appropriate to impose fines or imprisonment for an adjudged bankrupt such as the Accused.

102 However, I would add that given his bankruptcy status, fines would not be appropriate as punishment for the Accused. Given the seriousness of the offences, substantial fines were imposed on the Accused by the District Judge. The Accused admitted that he did not have his own funds to pay for the fines, and that at the end of the day, the money was furnished by a well-meaning friend to do so. He also claimed that he had to repay the friend. It is therefore clear that the Accused was not in the position to pay the fines, and any punitive effect was diminished. In terms of the arrangement reached to repay his friend, it would appear that any funds which the Accused comes into possession should really be used to pay his creditors. Accordingly, even if not for the other factors, I would have reached the view that fines would not be appropriate punishment for the Appellant.

Conclusion

103 For the reasons I have stated, I allow the Prosecution's appeal, and dismiss the Accused's appeal. For all the charges proceeded with, I impose four weeks' imprisonment per charge. I order the sentences of the first, second and fourth charges to run consecutively, with the remaining 17 sentences to run concurrently, resulting in a global custodial sentence of 12 weeks' imprisonment. The fine of $600,000 is to be refunded to the Accused.

Hoo Sheau Peng
Judge

Nicholas Khoo and Suhas Malhotra (Attorney-General's Chambers) for the Public Prosecutor;
Foo Cheow Ming (Foo Cheow Ming Chambers) for the Accused.