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

[2024] SGHC(A) 23

Appellate Division / Civil Appeal No 50 of 2023

Between

Chan Pik Sun

… *Appellant*

And

(1) Wan Hoe Keet (Wen Haojie)
(2) Ho Sally
(3) Ho Hao Tian Sebastian
(4) Strategic Wealth Consultancy Pte Ltd

… *Respondents*

Appellate Division / Civil Appeal No 124 of 2023

Between

Chan Pik Sun

… *Appellant*

And

(1) Wan Hoe Keet (Wen Haojie)
(2) Ho Sally
(3) Ho Hao Tian Sebastian
(4) Strategic Wealth Consultancy Pte Ltd

… *Respondents*

In the matter of Suit No 806 of 2018

Between

Chan Pik Sun

… *Plaintiff*

And

(1) Wan Hoe Keet (Wen Haojie)
(2) Ho Sally
(3) Ho Hao Tian Sebastian
(4) Strategic Wealth Consultancy Pte Ltd

… *Defendants*

JUDGMENT

[Tort — Conspiracy — Unlawful means conspiracy]
[Tort — Conspiracy — Lawful means conspiracy]
[Tort — Misrepresentation — Fraud and deceit]
[Tort — Misrepresentation — Negligent misrepresentation]
[Tort — Misrepresentation — Innocent misrepresentation]

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Chan Pik Sun
v
Wan Hoe Keet (Wen Haojie) and others and another appeal

[2024] SGHC(A) 23

Appellate Division of the High Court — Civil Appeals Nos 50 of 2023 and 124 of 2023
Steven Chong JCA, Woo Bih Li JAD, Debbie Ong Siew Ling JAD
14 March 2024

7 August 2024 Judgment reserved.

Steven Chong JCA (delivering the judgment of the majority comprising Debbie Ong Siew Ling JAD and himself):

Introduction

1 It is oft said, "when it is too good to be true, it probably is". Like many other victims, the appellant invested millions in a scheme presciently named "SureWin4U" (hereinafter referred to as "SureWin4U" or the "Scheme"). The Scheme promised lucrative returns in exchange for the purchase of what were represented as investment packages.

2 Unsurprisingly, SureWin4U turned out to be a Ponzi scheme. Such schemes are usually premised on the representation that there are legitimate business activities generating profits for the scheme when there is in fact none. The supposed "profits" would in truth be derived solely or largely from the money put in by new investors, which would then be distributed to existing

investors. Therefore, for existing investors to continue profiting from the scheme, they would have to constantly recruit new downline investors. SureWin4U's purported *sole* business model was that investors' moneys would go towards funding professional gamblers generating profits for the Scheme by playing baccarat at casinos using sure-win methods devised by the Scheme. It is now clear that this business model was non-existent.

3 While the premise of such fraudulent schemes may seem incredulous, nonetheless, it is not uncommon for fraudsters to succeed in selling these schemes to investors who probably should have known better typically with the benefit of hindsight. This case is a quintessential example. Should the law exculpate such fraudsters because they were dealing with the gullible and possibly greedy? In our view, this question is clearly answered in the negative, for indeed, "[a] knave does not escape liability because he is dealing with a fool" (see *Gould v Vaggelas* (1985) 157 CLR 215 at 252).

4 After examining the evidence and the parties' submissions, for the reasons set out below, we allow the appeal to the extent that we find the first and second respondents liable for fraudulent misrepresentation in respect of the entire sum claimed by the appellant but dismiss the appeal with respect to the third and fourth respondents. Where relevant, we will make reference to the dissenting judgment of Woo Bih Li JAD (the "Minority Judgment").

5 It is relevant to note that while there were two notices of appeal filed, there is in substance only one appeal against the trial judge's (the "Judge") entire decision on the merits of the claims and costs, and we shall refer to the appeal in the singular for the purposes of this judgment. There were two notices of appeal because AD/CA 50/2023 was filed prematurely, after the Judge had rendered his decision on the merits of the claims and on the appellant's general

liability to pay costs but before the Judge had fixed the quantum of costs. AD/CA 124/2023 was subsequently filed to include the Judge's decision on the quantum of costs in the scope of this appeal, following our guidance in *Chan Pik Sun v Wan Hoe Keet and others* [2023] SGHC(A) 36.

Facts

Background of the Scheme

6 SureWin4U was started by Peter Ong and Philip Ong ("Peter" and "Philip" respectively) in or around July 2012, with Peter designated as its Chief Executive Officer. As it operated on a multi-level marketing strategy, the earlier investors, *ie*, the uplines, would seek to attract other investors (the downlines) to purchase various packages, with each package priced between 68,850 Hong Kong dollars (HK$) and HK$4,250,000. The uplines would receive bonuses if they succeed in attracting a downline investor. If the downline in turn ropes in further investors, *ie*, further downlines, the original upline will also receive bonuses. In addition, the more expensive packages would attract higher bonuses. Therefore, there was a financial incentive to attract as many downlines as possible to purchase packages (preferably, the more expensive packages). This was an intrinsic feature of the Scheme. The various packages are shown below:

Package	**Price in Yingbi**	**Price in HK$ (see Note 1)**	**Price in S$ (see Note 2)**	**Price in US$ (see Note 3)**
Bronze	8,100	68,850	11,178	9,072
Silver	21,000	178,500	28,980	23,520

White Silver	60,000	510,000	82,800	67,200
Gold	210,000	1,785,000	289,800	235,200
Platinum	376,200	3,197,700	519,156	421,344
US Property Package	340,200	2,891,700	469,476	381,024
Share Investment Package	500,000	4,250,000	-	-

Notes:

(1) Calculated based on SureWin4U's buying exchange rate of Yingbi 1:HK$8.5

(2) Calculated based on SureWin4U's buying exchange rate of Yingbi 1:S$1.38

(3) Calculated based on SureWin4U's buying exchange rate of Yingbi 1:US$1.12

7 The *main* selling point of the Scheme to potential investors was that their moneys were ostensibly channelled to professional gamblers to gamble at baccarat in casinos employing two methods purportedly devised by Peter to successfully beat the system. The two methods were referred to as the "99.8% method" and "100% method", the numbers being supposedly a reflection of their success rate, whereas the professional gamblers were known by a Mandarin phrase which literal translation was "living gambling tables". After purchasing those investment packages, investors would see periodic returns reflected in their accounts on the Scheme's website in the form of "Yingbi" credits, Yingbi being the "currency" devised for the Scheme. They then had the option of cashing out on the Yingbi or reinvesting the Yingbi in more investment packages.

8 The purchase of investment packages in turn entitled the investors to attend classes to learn about the Scheme's gambling methods. Introductory classes were known as the "99.8% class" and advanced classes, only open to investors who had purchased Gold Packages and above, were known as the "100% class".

The respondents' involvement in the Scheme

9 The respondents were all involved in or connected to the Scheme in some way. The first and second respondents, Wan Hoe Keet (Wen Haojie) ("Ken") and Ho Sally ("Sally") respectively, are husband and wife who joined the Scheme in October 2012. While their initial outlay was only $77,452, the Scheme proved extremely profitable for them, and they eventually cashed out between $7m to $10m before the Scheme collapsed.

10 In around a year, by 2014, Ken and Sally were influential figures in the Scheme. They were respectively referred to as "Teacher Ken" and "Teacher Sally" by the other investors, and were rainmakers for the Scheme, contributing to around 70% of the Scheme's earnings. The fact that Ken and Sally contributed about 70% of the Scheme's earnings only served to highlight the key and pivotal role they played in running the Scheme even though they might not have been the original founders. They were also held out to be the "Singapore representatives" of the Scheme who had purportedly earned HK$201m from their participation in the Scheme and who had also received a Ferrari and a yacht. In the circumstances, to describe them as investors in the Scheme would be an understatement to say the least.

11 To attract downlines, Ken and Sally would speak at the Scheme's seminars and extol the benefits of joining the Scheme. These pitches

emphasised that there were professional gamblers who were using the Scheme's gambling methods to generate profits for investors. This is starkly illustrated in one such pitch made by Ken presenting to a room of investors at a Scheme seminar:

> Ken: So, what do we do with the course fees we received? Surewin4U will allocate them to our "live gambling tables". Then, my friends, what are "live gambling tables"? They are those whom the company hire, and they are given training to allow them to go to the casinos to help our company benefit. Then this "live gambling table" will bring the, uh, the course fees — the capital — to casinos all over the world to do play [*sic*]
>
> Then my friends, let me tell you today, that *our skilled players ["live gambling tables"] are certainly not going into the casinos to gamble. It's absolutely not gambling. Why do I say it's absolutely not gambling? Let's first settle on what "gambling" means, my friends. Gambling is, when you enter [the casino], you have a 50% chance of winning, and 50% chance of losing*. So, you are betting and trying your luck on 50%-50% chances, on whether you could be lucky enough to leave the casino winning. Right?
>
> Crowd: Yes!
>
> Ken: Then, *if a mathematical company is already able to prove the winning rate is 99.8, perhaps even 100%; and if 50-50 is known as "gambling", then may I ask everyone, what is 99.8 to 0.2*?
>
> Crowd: Withdrawal!
>
> Ken: *That's called "cash withdrawal*", right? Therefore, *our group of skilled players, when they enter the casino, they do not bring with them the intention to gamble, but with the intention to work.* So, when they have profited from casinos all over the world, and return, what then? Have you realised something today? Today, my friends, when you spend on our company classes, what role do you play? You are the customer, right? Then, when you attend the classes, what role do you play? You are both our customer and our student, right?
>
> [emphasis added]

This transcription was extracted from a video which recorded the presentation by Ken. The text of the transcription is not disputed.

12 The third respondent, Ho Hao Tian Sebastian ("Sebastian"), is Sally's younger brother. He joined the Scheme around the time that Ken and Sally did, putting in around $27,000, and eventually became a "5-star" member of the Scheme. While it is unclear how much he profited from the Scheme, it was his evidence that he had at least ten Silver Packages. As one Silver Package cost around $28,980 (see [6] above), he would have earned at least about $280,000, tenfold of his initial outlay.

13 The fourth respondent, Strategic Wealth Consultancy Pte Ltd, is a company that Ken and Sally used to hold, among other assets, their earnings from the Scheme. It was previously known as SW4U Consultancy Pte Ltd (it was no coincidence that it bore an uncanny resemblance to **S**ure**W**in**4U**) and adopted its present name three days after the Scheme's collapse.

Sandra's investments

14 The appellant, Chan Pik Sun ("Sandra"), was introduced to the Scheme around March 2014. She was then in her early fifties and sold simple insurance plans working as a manager in an insurance company. She eventually invested in the Scheme in three separate tranches (hereinafter termed a "Tranche" in the singular and "Tranches" in the plural):

(a) On 1 April 2014, Sandra purchased two Silver Packages for HK$357,000 (the "First Tranche").

(b) She raised her investments significantly in May 2014 spending HK$12,092,100 on four Silver, three Platinum and one Gold Packages (the "Second Tranche").

(c) Finally, in August 2014, a month before the Scheme's collapse, she spent HK$24,138,300 on four US Property Packages and three Share Investment Packages (the "Third Tranche"). While a slightly higher figure of HK$24,316,800 was stated in Sandra's affidavit of evidence-in-chief (which included the price of one additional Silver Package), we adopt the lower of the two figures. This was the sum eventually adopted in Sandra's closing submissions and her Appellant's Case and we do not think that anything turns on this minor discrepancy.

The total price of the investment packages across all three Tranches thus amounted to HK$36,587,400.

15 In mounting her case, Sandra relies on several key events. What exactly transpired during those events is heavily contested. We examine these events subsequently, but for now it suffices to outline these events as follows:

(a) In March 2014, Sandra attended a seminar in Hong Kong's Royal Pacific Hotel to learn about the Scheme. There, she was introduced to Ken and Sally.

(b) In or around 1 to 3 May 2014, prior to the investment in the Second Tranche, Sandra attended a conference in Suntec City (the "Suntec Conference"). At the Suntec Conference, among other events, there was a gala dinner and also a 99.8% class that Sandra attended. Ken and Sally spoke at those events, alongside Peter and other members of the team. Promotional materials (which were the "Promotional Brochure" and the "Suntec Program Booklet") were also distributed at the conference.

(c) Between June 2014 and July 2014, prior to the investment in the Third Tranche, several events were significant to Sandra's case:

(i) Sandra's dinner with Peter, Ken and Sally in early June 2014 in Kowloon (the "June 2014 Dinner");

(ii) seminars in Hong Kong on 15 and 16 June 2014;

(iii) a conference in Sri Lanka (the "Sri Lanka Conference") between 27 June and 1 July 2014, which was when Sandra was introduced to the US Property Package;

(iv) Ken's initiation of a new and exclusive WeChat group on 3 July 2014 named "Dream ken Sally" (the "Dream Group Chat") which initial members were Sandra, Ken, and Sally and which later included Sebastian;

(v) a yacht meeting on 7 July 2014; and

(vi) a conference in Hong Kong (the "Hong Kong Conference") held between 13 and 17 July 2014, which was also the occasion when Sandra was introduced to the Share Investment Package. During that conference, there was a demonstration of the 100% method at a casino in Macau. Thereafter, Ken and Sally told the attendees, including Sandra, that only one team lost out of the eight teams of professional gamblers who conducted the demonstration, showing that the Scheme was a safe and profitable one which generated returns.

The collapse of the Scheme and subsequent events

16 In September 2014, SureWin4U collapsed with the arrest of its Taiwanese representative. The website of the Scheme became inaccessible.

17 Between 16 September and 21 September 2014, Sandra sent multiple messages asking Ken and Sally for a solution, and for a meeting. Ken and Sally claimed that they were unable to provide a solution.

18 Even by 5 October 2014, there was no solution in sight. Around that time, from 8 to 12 October 2014, Ken and Sally formed a group of ten investors including Sandra with the aim of recouping their investments by going to the casinos to gamble using the 100% method and gave the group S$148,000 to do so. However, not only did the group fail to recover their investments, they lost a substantial amount of that sum. We should add that Ken and Sally's gratuitous provision of the gambling fund of S$148,000 also served to underscore the inescapable inference that they were not merely investors in the Scheme.

19 Around that time, between October to November 2014, Ken and Sally lodged two police reports against Peter and Philip (the "Police Reports"). The first police report was lodged on 1 October 2014, while the second was lodged on 6 November 2014. In the report on 1 October 2014, Ken and Sally claimed that they "fear[ed] that they ha[d] become victims of an elaborate scam". However, in the Police Reports, Ken and Sally neither mentioned the fact that they had cashed out $7m to $10m from the Scheme by that time nor provided any supporting evidence such as screenshots to establish their allegations against Peter and Philip.

20 Subsequently, on or about 13 January 2015, Ken and Sally messaged Sandra stating that the group of 10 investors had dispersed and informed her that there was some balance money to be distributed. However, this distribution was never made. Further messages from Sandra to Ken and Sally were also ignored.

21 It was not till March 2015 that Sebastian reestablished contact with Sandra, telling her about a new potential "business opportunity" that Ken and Sally were going to be involved in. He invited her to join them in Kuala Lumpur between 20 to 23 April 2015 to find out more. Sebastian said that it "may [solve] everyone['s] problem if it is a good plan" and that all that was needed was a £1,000 investment, which would entitle Sandra to attend a seminar. They would be "first to understand de plan [*sic*]", and assured Sandra that the business model is "very profitable" and "it will not take long to see results".

22 Sandra rejected the offer. After which, Ken, Sally, and Sebastian stopped replying to her messages, even though she stated in desperation that "I am in the most difficult hard time in my life now, It seems no hope for me in the future… Can anyone help me? [*sic*]".

23 Things went silent for about three years thereafter. This was until on or about 10 June 2018, when it was reported in the *Macao Daily* newspaper that Peter had surfaced in Macau and was distributing cash from his winnings. He was reported to be heading a new scheme called "王子太阳城" in Mandarin which translates to "Prince Suncity" (the "Prince Suncity Scheme"). In relation to that, photographs emerged of a meeting in Macau (the "2018 Macau Meeting") where Ken and Sally were pictured alongside Peter and a group of other people, holding wads of cash (see [120] below).

The proceedings below

24 Soon after, on 15 August 2018, Sandra filed HC/S 806/2018 ("S 806") against all the respondents, claiming for fraudulent misrepresentation, conspiracy (by unlawful means or lawful means), negligent misrepresentation, and innocent misrepresentation.

The Missing Messages

25 There was one aspect of S 806 which was particularly troubling, which was the destruction of what we regard as evidence crucial to this case. Before the trial, Sandra applied for specific discovery against the respondents in HC/SUM 498/2021 ("SUM 498") seeking, among others, "[a]ll correspondence, whether via WeChat and/or e-mail, with Peter Ong and/or Philip Ong and/or any other SureWin4U members and/or SureWin4U investors". The fact that these correspondence with Peter, Philip and other investors existed is not in dispute.

26 However, Ken and Sally stated on affidavit that they had changed their phones sometime in February 2015 and did not keep any backup of any WeChat messages in respect of the Scheme (hereinafter referred to as the "Missing Messages"). We found this incredulous. It was even more incredulous that Ken and Sally did not preserve any of their messages with Peter and Philip between 2017 and 2018 even though they had by that time filed the Police Reports against Peter and Philip, and admitted that Peter and Philip had contacted them around the time of the 2018 Macau Meeting with "some unpleasant WeChat messages" and had asked them to work together on a new scheme that they were launching. Ken and Sally, as well as Sebastian, repeated this position at the trial and provided the following explanations:

(a) First, they each had a habit of changing their phones either annually or biennially. For Ken and Sally, the first time they changed phones following the Scheme's collapse was in 2015. As for Sebastian, while he was unsure about the exact date, he was uncertain that it was before April 2016.

(b) Second, whenever they changed phones, they each would not make any effort to "port over", back up or migrate any existing information, except contact numbers, to the new phone. This was despite Sally's admission that "there were messages in that handphone which are useful or relevant to this case".

(c) Third, they each were unable to recall with specificity what they did with their old phones. Sally claimed that she gave her old phone to either her helpers, her mother, or her friends. By the time of the trial, she then claimed that her mother was suffering from dementia while her helper had returned to the Philippines. In a similar vein, Ken testified that "the problem is I don't know who I had passed the phone to, if really I have passed the phone to someone else". Sebastian testified that he did not know where his old phones were or that he would let someone else use the phone when he "saw that [the] person's phone is old".

27 When asked why they did not preserve the Missing Messages, Ken claimed that despite having sought legal advice at the time of making the Police Reports, no one had advised him to do so. Sally claimed that she did not consider it important that she should at least keep some records in case a dispute arose with Peter. This was even though she admitted she was aware of the seriousness of the case and that the police may request documents from them and ask them to surrender their phones. Sebastian's explanation was that once he had changed his handphone, he "won't [*sic*] care where the old handphone was" and that he has "changed maybe 10 to 20 handphones" in the span of the seven years after the Scheme's collapse. Among the reasons he gave for the frequent change in handphones, were that: "I see new model, I like, I just change" and "because the phone dropped on the floor for a few times, I do not want the phone any more".

28 In the end, the only message that was produced was a message from Sally to Peter on 18 September 2014, eight days after the Scheme's collapse, which read: "We need you! Pl help us! [*sic*]" and "Many wants to commit suicide [*sic*]". We will return to the significance of the Missing Messages.

The decision below

29 Judgment in S 806 was delivered by the Judge on 14 April 2023 and is reported in *Chan Pik Sun v Wan Hoe Keet and others* [2023] SGHC 96 (the "Judgment").

30 The Judge first considered Sandra's claim for fraudulent misrepresentation with respect to four main representations, namely:

(a) the Scheme was safe and profitable (the "Safe and Profitable Representation");

(b) investors who purchased a US Property Package would "receive a title deed to a house in Detroit" (the "US Property Representation");

(c) in relation to the Share Investment Packages, that the "funds would be used to buy over a company that was going to be listed on the Singapore Stock Exchange in October 2014" (the "Share Investment Representation"); and

(d) if Sandra took out four sets each of the US Property Package and the Share Investment Package, she would become a "Seven-star Agent" and Hong Kong's number one salesperson (the "Hong Kong No 1 Representation").

The Safe and Profitable Representation

31 On the Safe and Profitable Representation, the Judge found that fraudulent misrepresentation was not made out. Each of the three Tranches were considered in turn.

32 In relation to the First Tranche, the Judge appeared to accept that the Safe and Profitable Representation was made by Ken and Sally, stating that he understood "Sandra's case [to be] not so much that Ken and Sally used the words 'safe' and 'profitable' but that this was a constant theme in Ken and Sally's description of SureWin4U" (see Judgment at [48]). On this premise, the Judge found that:

(a) First, what Ken and Sally said to Sandra about SureWin4U was a statement of their opinion, and not an actionable statement of fact (see Judgment at [50] and [51]).

(b) Second, Sandra understood the Scheme to be "safe" in the sense that *if* SureWin4U could not prove the 99.8% method, she would be refunded for what she had paid for her initial packages (see Judgment at [52]–[54]).

(c) Third, Ken and Sally did not represent to Sandra that SureWin4U was "safe and profitable" in the sense which Sandra deposed in her affidavit of evidence-in-chief she understood it: that "the Scheme was legitimate, not a scam, and that I would not lose the sums that I invested in it" (see Judgment at [55]).

(d) Fourth, and relatedly, what Ken and Sally said about SureWin4U was focused on the *viability* of its way of making money – by gambling. In describing SureWin4U, Ken and Sally were not talking about whether

SureWin4U was legitimate and not a scam (see Judgment at [58]). The Judge also found that whether SureWin4U was legitimate and not a scam was *not* Sandra's understanding of what Ken and Sally had said about the Scheme (see Judgment at [56]).

33 On the Second Tranche, the Judge held that Ken and Sally could not be held responsible for the full contents in the Promotional Brochure and the Suntec Program Booklet as those were distributed by SureWin4U and not Ken and Sally (see Judgment at [70]). Moreover, while the Promotional Brochure claimed that the Scheme was a "profitable and safe option", SureWin4U was not saying that they were legitimate and not a scam. Instead, it referred to the viability of the Scheme's business model for making money (see Judgment at [73]). The Judge however found that certain representations by Ken and Sally concerning their earnings of about HK$201m and a Ferrari they had allegedly received from their participation in the Scheme had some element of exaggeration (see Judgment at [76]). Nevertheless, even if their earnings of HK$100m had been accurately stated, that would not have made a real and significant difference to Sandra's decision to invest further (see Judgment at [85]). Relatedly, while Ken and Sally knew that they had not earned the full amount of HK$201m, the Judge found that they did not decide to exaggerate this figure to induce others to invest in SureWin4U. Ken and Sally's evidence that the figure had been provided by SureWin4U was accepted (see Judgment at [86]). As for the 99.8% class, the Judge concluded that it was conducted by Philip, rather than by Peter, Ken, and Sally as Sandra alleged (see Judgment at [87]).

34 In relation to the Third Tranche, the Judge held that none of the representations (nor all of them taken together) that Sandra attributed to Ken and Sally could amount to a representation that SureWin4U was "safe and

profitable" in the sense of the Scheme being legitimate and not a scam (see Judgment at [98]). Sebastian's messages with Sandra were also held not to have operated on Sandra's mind when she made the investments in the Third Tranche (see Judgment at [103]). Regarding the 100% class, the Judge did not believe that Sandra ever thought that SureWin4U had a 100% chance of winning. The Judge found that Sandra knew that there was still some risk of loss in SureWin4U's gambling methods, but she nevertheless believed in those methods (see Judgment at [106]).

The US Property Representation

35 As for the alleged misrepresentation "that investing in the US Property Package entitled [Sandra] to title deeds to houses in Detroit" (*ie*, the US Property Representation), it was held that these were not statements of fact, but rather either statements as to the future, or a promise (see Judgment at [108]). In buying the US Property Package, Sandra knew that it was a term of that package that she was entitled to a title deed to a house in Detroit and there was nothing false in that (see Judgment at [108] and [110]).

36 Further, the Judge held that the pleadings did not assist Sandra's case. While the Statement of Claim (Amendment No 1) ("Statement of Claim") mentioned the US Property Package as something that Ken and Sally promoted (at paras 53(d)–53(f)), these paragraphs were not referred to in para 73 of the Statement of Claim, where Sandra pleaded why the representations were false (see Judgment at [109]).

37 Her claim against Ken, Sally, and Sebastian in relation to the US Property Representation thus failed (see Judgment at [112]).

The Share Investment Representation

38 In her reply submissions, Sandra had formulated the Share Investment Representation in the following terms: "that her monies invested under the Share Investment Package would be used to acquire a company that was going to be listed on the Singapore Stock Exchange in October 2014". However, the Judge found that this was not a statement of fact, but either a statement as to the future or a promise (see Judgment at [113]). Sandra had also not proved that her money was not used by the Scheme to acquire a company that was to be listed, as there was simply no evidence of how the money was used (see Judgment at [116]).

39 The Judge also noted that this formulation involved a shift away from Sandra's pleaded case, in which she pleaded that Ken and Sally had represented that "SureWin4U had plans to buy over a company that was going to be listed on the Singapore Stock Exchange in October 2014"; this was pleaded to be false in that "SureWin4U had no real plans to nor did it acquire a listed company contrary to Ken and Sally's claims" (see Judgment at [114]). However, it did not follow that because SureWin4U did not acquire a company to be listed, that it had no plans to do so (see Judgment at [116]).

40 Another shift was noted in Sandra's oral closing submissions slides, in which the representation was reformulated as one that "Sandra's investment will be used to acquire a particular target company (*ie*, China Kunda Technology Holdings Ltd)" ("China Kunda"). However, it was not her pleaded case or her evidence that the particular target company was ever mentioned to her prior to her purchasing the Share Investment Packages. The fact of Ken's knowledge of China Kunda as the target company and the fact that it was already listed did

not help Sandra's case as a reverse takeover could have been contemplated (see Judgment at [118]–[119]).

The Hong Kong No 1 Representation

41 The Judge found that the Hong Kong No 1 Representation was never made by Ken and Sally (see Judgment at [125]). Even if this was made, it would not have been a statement of fact but a statement as to the future or a promise (see Judgment at [126]).

42 In any event, it was held that Sandra failed to prove that she had not become Hong Kong's top salesperson (see Judgment at [127]). There was also nothing false or fraudulent in what Ken, Sally or Sebastian said to Sandra about her performance and potential in the context of SureWin4U (see Judgment at [128]).

Sandra's conduct after the Scheme's collapse

43 In relation to Sandra's conduct in the aftermath of SureWin4U's collapse, the Judge made the following observations:

(a) First, the messages between Sandra and her upline showed a behaviour which was not that of someone who thought that Ken and Sally had defrauded her (see Judgment at [132]).

(b) Second, Sandra had told her downlines that there were risks in investing in the Scheme. This was inconsistent with her position that she thought her participation in the Scheme was free of risk because of the Safe and Profitable Representation (see Judgment at [133]).

(c) Third, Sandra stayed with Ken and Sally in October 2014. This showed that she did not think then that Ken and Sally had defrauded her or made false representations that had induced her into investing in the Scheme (see Judgment at [134]).

(d) Fourth, the Judge referred to a message Sandra had with one downline in which Sandra stated that she was going after Ken and Sally because they had made money from the Scheme, whereas others had lost money. It was significant that Sandra did not say that Ken and Sally had made false representations that had induced her and others to invest in the Scheme (see Judgment at [137]).

Unlawful means conspiracy and the other causes of action

44 The finding that Sandra did not rely on the alleged misrepresentations to invest in SureWin4U was fatal to the claims for both lawful and unlawful means conspiracy (see Judgment at [143]).

45 Negligent misrepresentation was not made out as it had been found that Sandra was not induced by the representations on which she relied in investing in the Scheme (see Judgment at [184]). There was also no duty of care owed by Ken, Sally, and Sebastian to Sandra – they were simply participants of the Scheme interacting with Sandra as a fellow participant (see Judgment at [199]). The Judge considered that it was an aspect of a typical Ponzi scheme (and SureWin4U was no different) that participants were incentivised to encourage others to participate in the scheme, and Sandra herself also did so in relation to her downlines (see Judgment at [189]).

46 The claim for innocent misrepresentation was also dismissed as Sandra did not explain how the respondents could be liable as such (see Judgment at [203]–[204]).

Costs

47 In the Judgment, the Judge had found that Sandra was liable to the respondents for costs, with the exact quantum to be fixed failing parties' agreement (see Judgment at [207]). As parties could only agree on costs of S$59,040.41 (for HC/SUM 4562/2018 and HC/SUM 2266/2020 and agreed disbursements), the Judge issued a further decision on 11 September 2023 fixing costs of $374,365.22 (inclusive of the S$59,040.41) in favour of the respondents.

The Parties' cases on appeal

Sandra's arguments

48 Sandra's case on appeal largely mirrors her arguments before the Judge.

49 In relation to the Safe and Profitable Representation, Sandra submits that she understood it to mean that the Scheme was legitimate (*ie*, it ran on a legitimate business model) and not a scam. On this basis, she argues that fraudulent misrepresentation is made out for each of the three Tranches.

(a) On the First Tranche, the Judge erred in finding that: (i) Ken and Sally were merely expressing their positive opinion about participating in the Scheme and in describing the Scheme's viability of making money through its gambling business model; (ii) Sandra did not rely on the representation and instead considered that there was no risk since she had been promised a refund if she could disprove the 99.8% method;

and (iii) Sandra's understanding of the representation had nothing to do with fraud.

(b) On the Second Tranche, the Judge erred: (i) in finding that the phrase "a profitable and safe option" in the Promotional Brochure was merely a reference to the viability of the Scheme's business model of making money; (ii) in downplaying Ken and Sally's exaggeration of their earnings from the Scheme; (iii) in finding that the Safe and Profitable Representation was not a real and substantial factor in Sandra's decision to invest in the Second Tranche; and (iv) in finding that Ken and Sally bore no responsibility for the Safe and Profitable Representation in so far as that representation was contained in the Scheme's brochures and promotional material.

(c) If the court agrees that the Safe and Profitable Representation operated on Sandra's mind in relation to the First and Second Tranches, it follows that the same representation induced her to invest in the Third Tranche.

50 Whilst the Safe and Profitable Representation purportedly permeated all three tranches of investments, the remaining three representations are said to be unique to the Third Tranche. In relation to the US Property Representation, Sandra's case is that it was represented to her that by purchasing the US Property Package, she would "receive a title deed to a house in Detroit", but this did not materialise after she purchased four such packages. In this regard, Sandra submits that the Judge erred in failing to recognise that statements as to future matters can amount to representations of fact when the maker of the statement did not honestly believe in the statement or had no reasonable grounds for making such an assertion. Here, the objective evidence points to the US

Property Package being a con job, and Ken, Sally, and Sebastian's behaviour were reckless at the very least. Therefore, the Judge should have found that the claim in fraudulent misrepresentation was established in respect of the Third Tranche based on the US Property Representation.

51 In relation to the Share Investment Representation, Sandra clarified that her case is that it was represented to her that "SureWin4U had plans to buy over a company that was going to be listed on the Singapore Stock Exchange in October 2014", which was false because "SureWin4U had no real plans to nor did it acquire a listed company". She argues that the Judge should not have dismissed this claim on the basis that it was a statement as to the future or a promise and that it was a term of the package. This is because Ken, Sally, and Sebastian did not honestly believe the representation and did not possess reasonable grounds for making it. Further, the Judge's acceptance of Ken's explanation of China Kunda as the target company for the acquisition did not cohere with the evidence at the trial, where a reverse takeover was not mentioned. The burden is on Ken, Sally and/or Sebastian to prove that the Scheme had real plans to acquire a company to be listed and that her money was used by the Scheme to do so.

52 In relation to the Hong Kong No 1 Representation, Sandra submits that Ken and Sally represented to her between 13 to 17 July 2014 that if she took out four sets each of the US Property and Share Investment Packages, she could become a "Seven-star Agent". In dismissing this claim, Sandra submits that the Judge erred in finding that: (a) Ken and Sally did not make the representation because events after the Second Tranche investment show otherwise; (b) the representation was not actionable as it was a statement of intention, because a misstatement of the state of a man's mind is a misrepresentation of fact; and

(c) Sandra's conduct after the Scheme's collapse showed that she did not rely on the representations.

53 Alternatively, in relation to all the representations, Sandra submits that the representations were made negligently. It was factually foreseeable and legally proximate for a duty of care to arise against Ken and Sally under the tort of negligence. They were key figures in the Scheme to whom investors looked up and voluntarily assumed responsibility for Sandra by creating the Dream Group Chat and taking Sandra under their wing. They "lavished" their attention on Sandra even though she was an indirect downline and one out of 1,500 purported investors from Singapore known to Ken and Sally. This duty of care was breached as they did not conduct due diligence or checks on their alleged representations.

54 As for the claims for conspiracy, it is argued that the respondents were co-conspirators with Peter and Philip in perpetuating the scam. As Ken, Sally, and Sebastian admitted, the Scheme involved unlawful means as it was fraudulent. Inappropriate weight was given to that concession in so far as the Judge held to the contrary by concluding that Sandra had to make out her claim in fraudulent misrepresentation to establish unlawful means. On whether there was an agreement or intention to injure, Sandra's case is that Ken, Sally, and Sebastian were not merely fellow participants with Sandra in the Scheme, but that their conduct both before and after the Scheme's collapse showed that they were instead working hand in glove with Peter and Philip to defraud investors. On this issue, the Judge erred in not drawing an adverse inference that Ken, Sally, and Sebastian were co-conspirators in light of the Missing Messages.

The respondents' arguments

55 The respondents submit that the Judge was correct in finding that the four representations that Sandra relied on were not actionable representations.

56 In relation to the Safe and Profitable Representation, the respondents disagree that the representation was inherently about the legitimacy of the business model on which the Scheme ran. They say that such an interpretation was neither supported by the evidence nor the understanding pleaded by Sandra. The Judge was also correct to find that the alleged representation was a statement of opinion and not an actionable statement of fact.

57 The respondents further submit that the Judge was correct in concluding the same for the other representations. Specifically:

(a) In relation to the US Property Representation, the respondents argue that Sandra did not plead why the representation was false. Further, any statement in relation to the package being a good opportunity cannot be elevated to anything more than an expression of Ken and Sally's opinion. Sandra also did not cross the evidential hurdle of proving that the representation was made without honest belief.

(b) In relation to the Share Investment Representation, the Judge was correct in finding that the "only thing factual about the Share Investment Representation, is that it was a term of the Share Investment Package that those who bought the package would acquire an interest in a company that SureWin4U would be acquiring" and that there was nothing false in this (see Judgment at [113]). Further, Sandra has failed to cross the evidential burden of showing that Ken, Sally, and Sebastian did not honestly believe the alleged representation, and did not possess

reasonable grounds for making it. Sandra also has not adduced any evidence to substantiate her allegation that her investment moneys were not used to acquire any company which was to be listed on the Singapore Exchange.

(c) In relation to the Hong Kong No 1 Representation, Sandra failed to plead why the alleged representation was false. The Judge was also correct in finding that the representation was not made to Sandra. Ken and Sally were in no position to promise that Sandra would become Hong Kong's top salesperson. Further, as correctly noted by the Judge, there is no evidence that Sandra was not the top salesperson in Hong Kong at the time the Scheme collapsed.

58 It is also submitted that the evidence of Sandra's conduct throughout the time of her involvement in the Scheme and in its aftermath make it abundantly clear that she did not rely on anything that was said to her by Ken, Sally, and/or Sebastian when investing in the Scheme. She does not mention that anything was guaranteed or represented to her by Ken and Sally, and even gave others advice and acknowledged that she knew the risk and was prepared to face up to what had happened. In respect of the First Tranche, the respondents submit that Sandra invested because she did not see any risk in doing so and did not rely on anything allegedly said to her by Ken and Sally. For the Second and Third Tranches, the respondents submit that it was Sandra's conviction in the Scheme, her assessment of the returns she could make, and her ambition to be a top investor that motivated her decision to make the investments.

59 According to the respondents, Sandra also failed to plead and show that the respondents had acted fraudulently. From the time they invested into the Scheme, Ken and Sally believed that they would get a refund of their money if

they were able to disprove the Scheme's formula. They were also receiving returns on their investment. While Ken and Sally were successful and made a significant amount of money from the Scheme, this did not mean that they knew more about the Scheme than any other investor.

60 As for the claim in negligent misrepresentation, the respondents argue that Ken, Sally, and Sebastian did not owe Sandra a duty of care and in any event did not breach any duty. The evidence shows that Sandra was familiar with the way the Scheme operated and was constantly discussing her investments with her uplines and downlines. She never questioned whether any due diligence or valuation had been undertaken or about the details of the company to be acquired under the Share Investment Package, or information as regards her standing within the Scheme.

61 Regarding loss, the respondents submit that Sandra has not produced any document in support of her alleged payment of the First Tranche investment. The documents produced in relation to the Second and Third Tranches are also incomplete and do not sufficiently detail crucial elements such as the name of the account holder from whom payment was made, and for whom payments were made. Sandra has also admitted that she had returns paid to her from the Scheme, which she used to buy packages and encashed for downlines to purchase Yingbi. She has not accounted for this. Ultimately, the loss of Sandra's investments was caused by the apparent fraudulent actions of Peter and Philip and cannot be attributed to Ken, Sally, and/or Sebastian.

62 Further or in the alternative, the respondents submit that Sandra was contributorily negligent as she saw no issue with investing such a substantial amount of money. She did not take reasonable care of herself and should be made to bear the blame for her loss.

63 Lastly, it is argued that Sandra's claim for conspiracy, whether by unlawful or lawful means, should fail. The Judge was correct in dismissing Sandra's claim for conspiracy by unlawful means as a result of dismissing her claim for fraudulent misrepresentation. There was also no element of agreement between the alleged conspirators and, in particular, no evidence that Ken and Sally had a close relationship with Peter or were conspiring with him. In this regard, an adverse inference should not be drawn from the Missing Messages. Lastly, Sandra has not adduced or alluded to any evidence to support the conclusion that Ken, Sally, and/or Sebastian intended to cause damage or injury to her, or acted with spite and maliciously, or that they were actuated by disinterested malevolence.

The issues

64 It was clear, by the time the appeal was heard, that Sandra's primary claim was for fraudulent misrepresentation. If the claim for fraudulent misrepresentation is resolved in her favour, it will be unnecessary for us to determine her claims in negligent or innocent misrepresentation. This however still leaves us with her claims for conspiracy, which appear to be a secondary and alternative basis for establishing liability.

65 On this understanding, the broad issues that arise in this appeal are as follows:

(a) what were the actionable misrepresentations and which of the respondents, if any, made them;

(b) whether the misrepresentations were made fraudulently either knowing that they were false and untrue, or made recklessly in

the sense that the representor(s) did not care whether they were true;

(c) whether Sandra had relied on the representations; and

(d) whether the respondents are liable in conspiracy by unlawful or lawful means.

Our decision

The law on fraudulent misrepresentation

66 It is common ground that the following elements must be established in a claim for fraudulent misrepresentation (see the Court of Appeal decision of *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]):

(a) First, there must be a representation of fact made by words or conduct.

(b) Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff.

(c) Third, it must be proved that the plaintiff had acted upon the false statement.

(d) Fourth, it must be proved that the plaintiff suffered damage by so doing.

(e) Fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

67 The mental element of *fraud* may be established by proving recklessness on the part of the representor. On this point, we can do no better than to refer to the explanation of Lord Herschell in the leading House of Lords decision of *Derry v Peek* (1889) 14 App Cas 337 ("*Derry*") (at 374):

> I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. *To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.* And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
>
> [emphasis added]

The above propositions are now an established part of Singapore law relating to fraudulent misrepresentation (see the Court of Appeal decisions of *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [32]–[33]; and *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 ("*Wishing Star*") at [16]–[17]).

68 As for what constitutes recklessness, four points are germane.

69 First, recklessness must be understood in the sense of "indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of the truth" (see the Court of Appeal decision of *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [62]). A person

who is indifferent to the truth cannot possibly have an honest belief in the truth of the representation.

70 Second, while the legal burden is ultimately on the representee to prove the representor's fraudulent state of mind, the evidential burden may in some circumstances fall on the representor to defend against the allegation that he had acted fraudulently. One such circumstance was aptly described by Salmon J in *Regina v Mackinnon and others* [1959] 1 QB 150 (at 155), which was cited with approval by VK Rajah JA in *Public Prosecutor v Wang Ziyi Able* [2008] 2 SLR(R) 61 ("*Able Wang*") (at [85]):

> … once it is proved that the [representation] is misleading, false or deceptive, and that there were no reasonable grounds for believing it, there exists powerful evidence that the [representor] who made the forecast for some purpose of his own either must have known it was untrue or had no real belief in its truth. Often in the case of alleged fraudulent statements the only evidence of dishonesty consists of evidence that no grounds exist on which any reasonable man could have believed in the truth of the statements. In my experience, juries are not slow in a proper case to draw the inference of fraud.

The extract above suggests that once it is established that a *false* representation was made and there were no reasonable grounds for the representor to believe it, the evidential burden shifts to the representor to show that he honestly believed in the representation.

71 Third, if an alleged belief was destitute of all reasonable foundation, this would suffice of itself that it was not really entertained, and that the representation was a fraudulent one (see the High Court decision of *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 ("*DBS Bank*") at [53], citing *Derry* at 375, *per* Lord Herschell). This proposition was put in substantially similar terms by the Court of Appeal of England and Wales in *Le Lievre and Dennes v Gould* [1893] 1 QB 491, where it was said that gross

negligence may amount to fraud if it were so gross as to be incompatible with the idea of honesty (at 500). In determining whether a representor's belief was reasonable, one factor that the court would consider is the importance or materiality of the representation in the circumstances of the case (see the High Court decision of *Liberty Sky Investments Ltd v Goh Seng Heng and another* [2020] 3 SLR 335 ("*Liberty Sky*") at [55] and [60]). The more significant the representation, the greater is the need for the representor to show that he had an evidential basis *ie*, honest belief in making the representation, failing which it is open for a court to find that the representor did not make the statement(s) honestly.

72 Fourth, in determining whether the representor had the requisite subjective honest belief in the truth of the statement at the material time, the court may consider whether there were "grounds on which a *reasonable person infused with the attributes of the accused* would have believed in the truth of the statement" [emphasis in original] (see *Able Wang* at [88]). In other words, the qualification, profession, intellect, experience and skills, amongst other personal attributes, of the representor would be considered in assessing whether there were indeed reasonable grounds for him to believe that the statement or information which he disseminated was true (see *Able Wang* at [87]). If the representor was in a position to discover the truth, his alleged belief may be found to be unreasonable (see *Liberty Sky* at [82]).

73 With these principles in mind, we turn to examine the evidence in relation to Sandra's claim for fraudulent misrepresentation.

The Safe and Profitable Representation

74 We first consider the Safe and Profitable Representation, which is the key representation that undergirds Sandra's entire claim for fraudulent misrepresentation.

The Safe and Profitable Representation was pleaded and was a statement of fact as to the legitimacy of the Scheme

75 In our view, the Judge failed to consider the proper context of the Safe and Profitable Representation. This was the crucial omission by the Judge when he opined that he understood Sandra's case to be "not so much that Ken and Saly used the words 'safe' and 'profitable' but that this was a constant theme in Ken and Sally's description of SureWin4U" (see Judgment at [48]). The Judge also understood the Safe and Profitable Representation as not relating to the *legitimacy* of the Scheme, but instead to: (a) the assurance that Sandra would be refunded what she had paid if she could disprove the 99.8% method, and (b) the viability of the Scheme (see Judgment at [52]–[60] and [61(b)]–[61(c)]).

76 With respect, we disagree with the Judge's understanding of Sandra's case on the Safe and Profitable Representation. While Sandra did pursue her misrepresentation claim on different fronts, it is clear that Sandra advanced her case on the Safe and Profitable Representation on the basis that Ken and Sally used the words "safe" and "profitable" when describing the Scheme. We also understand her case as being that the use of such words referred to the legitimacy of the Scheme in that there was *in fact a business model* where professional gamblers would use investors' moneys to generate returns for the Scheme using the Scheme's winning formulas. This understanding was pleaded by Sandra, repeated in her affidavit of evidence-in-chief, and featured prominently in her closing submissions below. Significantly, the Minority Judgment at [185] is

prepared to accept that this was how Sandra advanced her case on the Safe and Profitable Representation.

77 However, while it is noted in the Minority Judgment at [180] that the "key draw for investors of the Scheme was its purported winning formulas, *ie*, the 99.8% and 100% methods", it is crucial to bear in mind that Sandra's case was not that the winning formulas did not work or that the professional gamblers failed to deliver the returns in spite of using the formulas. The key draw of the Scheme was not simply that it purportedly had winning formulas, but that these formulas would be *used by professional gamblers* to generate returns for investors – a representation that was plainly false. It cannot be overemphasised that Sandra's case is *not* that she lost money gambling at the casinos using the 99.8% and 100% methods. She is not seeking a refund of her investments because the winning formulas did not work.

78 Nevertheless, the Minority Judgment says that what Sandra in fact understood about the safety and profitability of the Scheme when she invested was that the *gambling methods* were viable (at [190]). In other words, Sandra did not rely on the alleged understanding of the Safe and Profitable Representation that she now advances. With respect however, to say that Sandra was only concerned about learning the gambling methods would be incongruous with the fact that she made repeated investments into the Scheme. If her sole aim was to learn the gambling methods, why did she continue investing in the Scheme even after learning its methods? It is clear to us that the only reason why Sandra continued to invest in multiple packages in the Scheme was because she understood that her returns would come from the returns purportedly generated by the professional gamblers using the 99.8% and 100% methods. The different treatment of Sandra's understanding of the Safe and Profitable

representation is the key point that divides the Majority and Minority Judgments.

79 In this connection, it is important to understand that when Sandra said that there were risks involved in the investments, she was acknowledging that there might be risks that the winning formulas devised by the Scheme may not be as successful as claimed, *ie*, not a 99.8 or 100% chance of winning. Sandra was not by those statements accepting that there were risks that her investments might be used to pay other investors as returns instead of being used by the team of professional gamblers to play baccarat at the casinos to generate returns. This critical distinction appears to have been overlooked by the Judge. In this regard, we disagree with the Judge's finding at [133] of the Judgment that Sandra's acknowledgment of risks in investing in the Scheme was inconsistent with the Safe and Profitable Representation. Further, as Sandra argues and the respondents concede, the Safe and Profitable Representation permeates *all three Tranches* of her investments. This much is clear from the following.

80 In relation to the First Tranche:

(a) In her Statement of Claim, Sandra pleaded that she was first introduced to Ken and Sally at the Royal Pacific Hotel seminar in Hong Kong, where it was represented to her, among other things, that her investment in SureWin4U would be "safe" and that she should invest without hesitation because it was a "good project". In this context, Ken and Sally explained to Sandra that the Scheme generated income through professional gamblers employed by the Scheme; the professional gamblers were "guaranteed to generate returns because they used a special method developed by Ong which had a 99.8% chance of winning". Additionally, Ken and Sally told her that the other

attendees at the Royal Pacific Hotel seminar were all "high net worth individuals of a certain social status. If SureWin4U was not safe and reliable, there would not be so many people prepared to invest in it".

(b) These allegations were essentially repeated in Sandra's affidavit of evidence-in-chief. Further to this, Sandra stated therein that she had asked Ken and Sally again whether the Scheme was safe and that she was told by Ken and Sally that there was "no problem" and that she should invest as soon as possible. From these representations, she understood that the Scheme was "genuine".

(c) In her closing submissions below, Sandra signposted in no uncertain terms that the peculiar feature of the Scheme was that moneys from the investors would be "(ostensibly) channelled to professional gamblers to gamble at baccarat in casinos employing 2 methods [*ie*, the 99.8% and 100% methods]" and that the "winnings were then used to pay the promised returns". She also argued that the Safe and Profitable Representation was made by Ken and Sally in relation to the First Tranche investment.

81 In relation to the Second Tranche:

(a) In the Statement of Claim, it was pleaded that Ken and Sally represented among other things at a gala dinner during the Suntec Conference that the Scheme was "safe and profitable". Reference was also made to a class held in relation to the Suntec Conference where it was alleged that Ken and Sally represented that "professional gamblers easily generated more than 20% returns on the principal in less than an hour" and that the Scheme was "[h]ence … able to guarantee the returns of all the investment packages". The Promotional Brochure was also

distributed at the Suntec Conference which featured Ken and Sally extensively "in many photographs by [Peter's] side, with mountains of cash, Ferrari and yachts", and which described the Scheme as a good investment opportunity because it was extremely profitable but also safe at the same time.

(b) Sandra's pleaded case in her Statement of Claim was also repeated in her affidavit of evidence-in-chief.

(c) In her closing submissions, Sandra again emphasised that "2 persons [*ie*, Ken and Sally] … had told her that the Scheme was safe and profitable".

82 As regards the Third Tranche, it is also clear to us that the Safe and Profitable Representation was pleaded as also applying to the US Property and Share Investment Packages purchased in that Tranche. In other words, if it were established that there was an operative misrepresentation as to the existence of professional gamblers generating profits using investors' moneys when Sandra invested in the Third Tranche, her claim for misrepresentation would be broad enough to also include losses suffered as a result of purchasing the US Property and Share Investment Packages:

(a) Sandra pleaded in the Statement of Claim that "[i]n reliance on Ken, Sally and Sebastian's *continuing representations*, [Sandra] purchased four US Property packages and three Share Investment Packages in August 2014" [emphasis added]. Sandra's case must thus be taken to be that the Safe and Profitable Representation was a continuing representation following from the representations made in relation to the First and Second Tranches.

(b) In her affidavit of evidence-in-chief, Sandra also stated generally in relation to the Third Tranche that she was induced by the Safe and Profitable Representation to invest. She also deposed that "Ken and Sally emphasised again that SureWin4U was a very safe and profitable investment scheme which generated returns".

(c) Moreover, it was clear from the trial that the respondents themselves concede that the Safe and Profitable Representation, if established, would affect the entirety of Sandra's investments across *all three Tranches*, including Sandra's purchases of the US Property and Share Investment Packages. Ken claimed that his understanding was that the money from *all* packages would go towards the professional gamblers to play baccarat at casinos using the winning formulas to generate returns for investors. He testified that his understanding of the Scheme's business model was that "whatever the course fee that [SureWin4U] collected, [it] would [be] distribute[d] to their baccarat traders to trade for profit for the member [*sic*]". Sally also accepted that, apart from miscellaneous merchandise, the Scheme had "[o]nly one business and that is to beat the casino". She further accepted that, to generate income, the "only business [the Scheme was] doing … was this gambling at the baccarat table".

(d) While the US Property Packages would give investors like Sandra a chance to own a property in the US, these packages could not have been for the sole purpose of purchasing properties in the US. This type of package was similar to the other packages that Sandra purchased in the First and Second Tranche, except that over and above the expected gambling returns, the investor would also stand to own a property in Detroit. This was effectively a bonus and explained why the US Property

> Packages were priced at a premium. This conclusion is also supported by the Promotional Brochure itself, which stated that the "US real estate" would be "give[n] away" for "free" upon the purchase of the US Property Package. Indeed, the respondents in their reply submissions below accepted that the property in the US was "being given for free". Ken also confirmed in cross-examination that the US Property Package was like a Platinum Package, but with a property "throw[n] in".

83 We make three further observations on what we understand to be Sandra's case on the Third Tranche.

84 First, as regards the Share Investment Packages, Sandra pleaded that it was represented to her that the money would be used to acquire a company to be listed. This was repeated in her affidavit of evidence-in-chief. However, this is not inconsistent with the understanding above that the funds or part thereof from *all* the packages, including the Share Investment Package, would still be used to fund the professional gamblers. There is no indication that Sandra's case is that the Share Investment Representation was that *all* the moneys received by the Scheme from the Share Investment Packages would be used to buy over a company that was going to be listed on the Singapore Stock Exchange in October 2014.

85 Second, the claim against Sebastian is *solely* premised on Sebastian having represented to Sandra that "she would receive a title deed to a house in Detroit". If the misrepresentation claim with respect to the US Property Packages succeeds *solely* on the premise that the Safe and Profitable Representation was made, and *not* about the alleged representation that Sandra would receive a title deed to a house in Detroit, Sebastian would not be liable.

This was conceded by counsel for Sandra, Mr Lok Vi Ming SC ("Mr Lok") at the hearing of the appeal.

86 Third, Sandra's case is that to buy the Share Investment Packages, one has to also purchase the US Property Package. This is not disputed by the respondents. In our view, the upshot of this understanding is that Sandra's claim for misrepresentation in respect of the Share Investment Packages are connected to and stand together with the US Property Packages. If Sandra is able to recover losses for the purchase of the Share Investment Packages, it would follow that she would be able to recover her losses in respect of the US Property Packages.

87 Lastly, we express a final and more general point about what we understand to be Sandra's case. The Judge held that the Safe and Profitable Representation was a statement of opinion or a statement as to the future or a promise (see [32(a)] above), which was also a point made by counsel for the respondents, Mr Christopher Anand s/o Daniel ("Mr Anand") at the appeal hearing. Essentially, Mr Anand attempted to recharacterise the Safe and Profitable Representation by arguing that it was in substance a promise as to "how the money *will be used*" [emphasis added]. However, as explained at [76] and [80]–[82] earlier, Sandra's case is that the Safe and Profitable Representation referred to the legitimacy of the Scheme. It must therefore be clear that this representation, if made, was a statement as to present fact. The Scheme was already in operation by the time Sandra invested in the First Tranche, and it is artificial to assert that Ken and Sally only represented to Sandra that the Scheme *will be legitimate* after she had invested in it. This was not how Sandra pleaded and ran her case.

Ken and Sally made the Safe and Profitable Representation

88 In examining Sandra's primary claim for fraudulent misrepresentation premised on the Safe and Profitable Representation, the first task for the Judge was to determine whether this representation was in fact made by Ken and Sally before examining its proper interpretation and whether the other elements of the claim were made out.

89 However, it is troubling that the Judge did not squarely address this essential factual point. Instead, at [55] of the Judgment, he found that Ken and Sally did not represent to Sandra that "SureWin4U was 'safe' and 'profitable' in the sense which Sandra says she understood it: that 'the Scheme was legitimate, not a scam, and that I would not lose the sums that I invested in it'".

90 It was implicit from this statement that the Judge accepted that the Safe and Profitable Representation was in fact made by Ken and Sally but that it did not bear out Sandra's understanding. This point was also raised by Mr Lok at the hearing. With respect, we have some difficulty reconciling the Judge's assessment that an investment which was represented to be "safe" did not mean that it was not a scam. Those findings, in our view, were mutually exclusive. If the investments were represented as being safe, it must be clear that those investments could not be founded on a scam and must be legitimate.

91 Be that as it may, we have no difficulty in concluding that Ken and Sally made the Safe and Profitable Representation to Sandra in relation to all three Tranches. While Mr Anand submitted before us that the respondents never made the representation, we do not think that his argument is tenable when weighed against the objective evidence. To be clear, Sandra's case against Ken and Sally is not premised on them being the founders of the Scheme. While Ken and Sally

might not have been the founders of the Scheme, that does not mean they did not make the Safe and Profitable Representation to Sandra. That would depend on the objective evidence before the court. In this regard, we note that the Minority Judgment at [185] accepts that Ken and Sally used the words "safe and profitable" when they spoke to Sandra.

92 Beginning with a point of general application, it cannot be seriously disputed that the "safe" and "profitable" aspect of the Scheme was advertised as *the major* selling point in a bid to attract potential investors. The Scheme's Promotional Brochure in no uncertain terms described the Scheme as a "profitable and safe option" and touted it as one which enabled investors to "make a lot of money, but it's safe". While Ken and Sally might not have been the authors of the Promotional Brochure, we do not think that this detracts at all from the inference that it is more likely than not that Ken and Sally would have repeated the Safe and Profitable Representation to potential investors, including Sandra, as it was in their direct financial interest to attract more downlines. This is especially because the Safe and Profitable Representation was the entire business model of the Scheme and it is inconceivable that Ken and Sally did not repeat and promote the representation.

93 When Ken and Sally were asked during cross-examination about whether they had made the Safe and Profitable Representation at the Scheme's seminars, they were evasive and refused to offer a straight answer. Ken was presented with the Promotional Brochure and was asked about whether he was "affirm[ing]" and "confirm[ing]" the accuracy of the Safe and Profitable Representation in the Promotional Brochure every time he went out and spoke about the Scheme and shared about his personal experiences. He refused to provide a "yes" or "no" answer but said that he would share his views, beliefs, and experiences, that it was up to the listener to "perceive" the message. Sally

provided a similar response during cross-examination. Nevertheless, when Ken was subsequently pressed on whether he was a "messenger of … lies" when he made the Safe and Profitable Representation to potential investors at seminars, he eventually admitted that this was indeed his "experience" before the Scheme collapsed. This admission further supports the already strong inference that Ken and Sally must have, in general, made the Safe and Profitable Representation when they spoke about the Scheme to potential investors.

94 The next question is whether Ken and Sally *specifically* made the Safe and Profitable Representation to Sandra. As stated above (at [91]), we answer this in the affirmative in relation to all three Tranches and turn now to examine each Tranche in detail. Before examining the evidence in detail below, we pause to observe that our finding that Ken and Sally did make the Safe and Profitable Representation to Sandra is not inconsistent with the Judge's decision.

(1) First Tranche

95 On the First Tranche, Sandra's pleaded case is that she was introduced to Ken and Sally and the Scheme at a seminar at the Royal Pacific Hotel. According to Sandra, Ken and Sally introduced themselves as "Teacher Ken" and "Teacher Ho" and said that they were the Singapore representatives of SureWin4U and were on close terms with Peter, SureWin4U's Chief Executive Officer. Sandra also claims that Ken and Sally represented the following to her:

(a) the Scheme generated income through employed professional gamblers. The professional gamblers were guaranteed to generate returns because they used a special method developed by Peter which had a 99.8% chance of winning;

(b) each investor would be able to get at least a 10% monthly return depending on the package purchased; and

(c) Sandra's investment would be safe and profitable – according to them, the other attendees were all high net-worth individuals who had invested at least HK$100,000, thereby attesting to the safety of the Scheme.

To reassure herself that she would not lose her investment, Sandra asked Ken and Sally again if it was safe. They affirmatively told her that there was "no problem" and that she should invest as soon as possible.

96 Ken and Sally deny making such a representation and claim that no such seminar took place. They instead pleaded that one of their downlines, Nelly, had organised a meeting with Sandra at the Royal Pacific Hotel in or around March 2014, without Ken and Sally's knowledge. During the meeting, Nelly introduced SureWin4U to Sandra and introduced Sandra to Ken and Sally, who happened to be meeting their own accountant at the same time. Ken and Sally pleaded that the conversation between them and Sandra was brief and informal. They left it to Nelly to explain SureWin4U to their downlines and to any potential investors. They also claim that they neither introduced themselves as "Teacher Ken" and "Teacher Ho" nor said that they were the Singapore representatives of SureWin4U. At most, Ken and Sally state that they might have merely told her about their opinions about the Scheme, *ie*, that they had been quite lucky, and successful in their participation. In addition, they would have mentioned that Sandra had nothing to lose by attending a 99.8% class (by purchasing a package which was refundable if she could disprove that method). In this vein, they also aver that they were not notified when Sandra eventually invested in SureWin4U on 1 April 2014.

97 In our judgment, Ken and Sally made the Safe and Profitable Representation to Sandra in relation to the First Tranche. While Ken and Sally say that they left it to Nelly to explain the Scheme to Sandra, we do not find this account believable. It is important to first note that Ken and Sally do not deny that they did meet with Sandra on this occasion and that they had spoken to her. For successful uplines like themselves who had amassed huge profits from selling the Scheme packages to downline investors and who accounted for 70% of the Scheme's earnings (see [10] above), it is hard to imagine that they would pass up the opportunity to promote the Scheme in that instance, and in doing so, it is also more likely than not that the Safe and Profitable Representation was made (see [92] above). It was unlikely that Sandra would have taken the plunge to invest without any assurance that the Scheme was safe and profitable, given that the packages that she purchased came at substantial cost.

(2) Second Tranche

98 According to Sandra, the event that induced her to make the Second Tranche investment was the Suntec Conference, a major event with some 1,000 attendees. Along with the Promotional Brochure (see [92] above), attendees were provided with the "Suntec Program Booklet". Ken and Sally took centre-stage in it and were lauded for being among the top eight investors and the Scheme's second-highest earners. They were also mentioned as being one of the only five pairs of "Seven-star agents", the top tier of members in the Scheme. Sandra also highlights that the Suntec Conference included a gala dinner which saw Ken and Sally dressed elaborately, during which they spoke about how the Scheme lifted them out of poverty and that investors who followed in their footsteps could emulate their success. Crucially, it is Sandra's case that Ken and Sally made the Safe and Profitable Representation, thus echoing what was said in the Promotional Brochure. Sandra also avers that there was a 99.8% method

class which she attended at the Suntec Conference where Peter, Ken, Sally, and the rest of their team persuaded investors to put more money into the Scheme. Among other things, it was reiterated that the Scheme was a safe and profitable investment. Ken and Sally's account of their rags to riches story was itself to lend credence to the Safe and Profitable Representation.

99 Ken and Sally's case is that they did not invite Sandra for the Suntec Conference and were not aware that she had invested in the Scheme. The Promotional Brochure and the Suntec Program Booklet were prepared entirely by SureWin4U without their involvement and they were thus not responsible for its contents. While they admit to going up on stage at the gala dinner to speak about the benefits they received from the Scheme, they were not hard selling the Scheme or telling the attendees to invest but merely "sharing their opinions, beliefs and personal experience". In relation to the 99.8% class which Sandra attended, they deny having persuaded or attempted to persuade the attendees to "put more money into the Scheme" or making the representations alleged.

100 In our view, Ken and Sally must have made the Safe and Profitable Representation to investors including Sandra at the Suntec Conference. It is germane that they admit to speaking at the gala dinner. We are unpersuaded that what they spoke about can be simply characterised as relating to their "opinions, beliefs and personal experience". Again, given what Ken and Sally stood to gain by attracting more downlines for the Scheme, it was entirely in their interest to make a sales pitch for the Scheme. To explain how the Scheme purportedly worked, the Safe and Profitable Representation would have been key, and it was improbable that the representation was not made by Ken and Sally. Based on the transcription of Ken's presentation at [11] above where he described the winning rate of 99.8, perhaps even 100% as "cash withdrawal" and "not

gambling", it was completely in Ken's character to have hard sold the Scheme to Sandra.

(3) Third Tranche

101 The Third Tranche of Sandra's investments into the Scheme happened in August 2014, shortly before the Scheme collapsed in September 2014. It was then when Sandra doubled what she had invested in the Second Tranche thereby trebling her total investments to HK$36,944,400.

102 To recapitulate, Sandra's case is that a series of events led to her Third Tranche investments (see [15(c)] above):

(a) the June 2014 Dinner;

(b) seminars in Hong Kong on 15 and 16 June 2014;

(c) the Sri Lanka Conference between 27 June and 1 July 2014, which was also when she was introduced to the US Property Package;

(d) Ken's initiation of the Dream Group Chat on 3 July 2014;

(e) the yacht meeting on 7 July 2014;

(f) the Hong Kong Conference on 13 to 17 July 2014, which was also when Sandra was introduced to the Share Investment Package; and

(g) Ken, Sally, and Sebastian's continued motivation of Sandra to become Hong Kong's number one by purchasing the US Property and Share Investment Packages.

103 The Safe and Profitable Representation in Sandra's case was featured at the first four events while the remaining events were more related to the other representations (*ie*, the US Property Representation, the Share Investment Representation, and the Hong Kong No 1 Representation), which we will turn to in the subsequent parts of this judgment. For now, the focus is on the first four events as they relate to the Safe and Profitable Representation.

104 According to Sandra, she accepted Ken and Sally's invitation to attend the June 2014 Dinner in Kowloon together with 20 to 30 others. During the dinner, Ken and Sally reiterated the Safe and Profitable Representation and related to her that participating in the Scheme had enabled them to purchase a landed property in Singapore. They also provided her with more copies of the Promotional Brochure to distribute to potential investors.

105 On 15 June 2014, Sandra attended a seminar organised by Ken and Sally at Windsor House. At this seminar, they largely repeated their various representations made at the Suntec Conference and, in particular, the Safe and Profitable Representation. Unexpectedly, Sandra was invited to speak to the audience. Sally motivated her to do so saying that she could be the "2nd Sally" and that she could even in due course surpass the financial success of Ken and Sally. Sandra then shared briefly with the audience and ended her speech by telling Sally that "I will follow [her]". The next day, Sandra attended another Seminar at the Royal Pacific Hotel, where Ken and Sally again extolled the Scheme's safety and profitability and encouraged investors to purchase more investment packages or refer new investors to the Scheme.

106 In the same month, Sandra claimed that Ken and Sally organised the Sri Lanka Conference which Sandra attended together with a few of her downlines. According to Sandra, there were some 3,000 people in attendance. During the

conference, Ken and Sally organised a small-scale seminar for Sandra's team of downlines. It was during this event that they were introduced to the US Property Package. Ken and Sally also asked Sandra to join them at a private meeting with Peter in his Presidential Suite. According to Sally, the meeting was only for leaders who were members of Peter's "inner circle". At this meeting, Sally introduced Sandra to the other attendees as the "next top representative for Hong Kong", the next "Sally" of Hong Kong. Peter, Ken, and Sally told Sandra that the Scheme was doing well and had a bright and promising future. They then persuaded her to invest more and work on her sales figures.

107 Sandra also alleges that on 3 July 2014, two days after the Sri Lanka Conference ended, Ken started the "Dream Group Chat". Its initial members were Sandra, Ken and Sally. Sebastian then joined around 24 July 2014. Sandra says that it was pertinent that Nelly and Joanna, who were Sandra's immediate uplines, were not included. Ken started the chat by advising Sandra that she will meet the requirement of e-trader when she purchased 300,000 Yingbi. He then went on to say that "we will assess you on presentation, complan [*ie*, commission plan], back office operation when w[e] meet up". Sandra's case is that this meant that Ken and Sally had decided to take Sandra under their wing.

108 Ken and Sally's response is essentially a denial of their involvement in making the alleged representations. First, on the June 2014 Dinner, they say that they did not invite Sandra and that the dinner was organised by Peter as a networking exercise for the Scheme's significant investors, which Sandra became following her Second Tranche investment. Second, on the Sri Lanka Conference, they contend that it was organised and conducted by the Scheme, and not them. Third, on the private meeting with Peter in his Presidential Suite during the Sri Lanka Conference, Ken and Sally deny that they had arranged for Sandra to attend the private meeting, and that they would have only

recommended their direct downlines who they felt met Peter's criteria of being a "top" investor in the Scheme.

109 We first observe that Sandra's case in relation to the Third Tranche, in contrast to the other two Tranches, is that the Safe and Profitable Representation was made as a *continuing representation* (see [82(a)] above). As the High Court observed in *Yokogawa Engineering Asia Pte Ltd v– Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 (at [12]), there is a duty to correct a continuing representation that a party knows to be incorrect. To similar effect, the same court opined in *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 (at [44]) that a representation is of continuing effect until it is corrected.

110 In our view, it is significant that Ken and Sally did not deny that the said events that Sandra alleges took place. By that point, given Sandra's substantial investments into the Scheme, Ken and Sally must have known that Sandra was convinced of the Safe and Profitable Representation. This was especially since, after Sandra's investment in the Second Tranche, she started attending more Scheme events, which even included those which were reserved for an exclusive circle of investors. We observe that at no time did Ken and Sally disabuse Sandra of the false impression she had as regards the business model of the Scheme. Indeed, in arriving at this conclusion, we find that Ken and Sally made the Safe and Profitable Representation knowing that it was false, or at least being reckless (*ie*, indifferent) to as whether it was true or false, for reasons which we now explain.

Ken and Sally knew that the Safe and Profitable Representation was false

111 We first observe that it is common ground that the Safe and Profitable Representation was false. This much was admitted by Ken and Sally in cross-examination. While Mr Anand submitted that the Safe and Profitable Representation was true because Sandra was already getting returns from the investments, this failed to address the nub of the Safe and Profitable Representation, being that money from investors would be used by professional gamblers to generate winnings at casinos using the Scheme's gambling methods. That remains blatantly false.

112 We now turn to the question of Ken and Sally's state of mind at the material times when they made the Safe and Profitable Representation. At first blush, the inquiry into a representor's state of mind is usually one where direct evidence is absent. This is especially true in cases where fraud is alleged, since it would be rare for a fraudster to come clean about his deceit. As a result, even where direct evidence is not available, courts have not been slow to draw an inference of fraud if the surrounding circumstantial evidence is so compelling and convincing (see the High Court decision of *Peng Ann Realty Pte Ltd v Liu Cho Chit and others* [1994] 2 SLR(R) 682 at [33]; citing *Sumitomo Bank Ltd v Thahir Kartika Ratna and others and another matter* [1992] 3 SLR(R) 638 at [88]). In our judgment, this is one such case where an inference of fraud on Ken and Sally's part should have been made by the Judge. We find that Ken and Sally were bedfellows in the Scheme with its founders, Peter and Philip, and knew that the Scheme was false by the time they first made the Safe and Profitable Representation to Sandra, *ie*, before the First Tranche. It is not necessary for the purpose of the appeal to determine whether Ken and Sally were aware of or privy to the fraud when they first participated in the Scheme.

113 First, it is particularly troubling that Ken and Sally could not produce the Missing Messages that would have shed light on their relationship with the Scheme's founders and their knowledge of whether the Scheme was fraudulent. This was despite Sandra's admission in cross-examination that she had a "private chat" or a "personal chat" with Philip, and Ken's admission that he knew that the Missing Messages were relevant to the Police Reports he made in 2014 against the Scheme's founders and that, by then, he knew that he had to preserve documents and information which were relevant to court proceedings and court actions.

114 It was not just their failure to produce the Missing Messages but their contrived explanations which in our view justify the drawing of an adverse inference that Ken and Sally knew about the fraudulent nature of the Scheme at the time when the Safe and Profitable Representation was made to Sandra. We do so under s 116(*g*) of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act"), the relevant parts of which read:

> **116.** The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …
>
> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

115 As the Court of Appeal in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*") explained (at [19]), illustration (*g*) of

s 116 allows the court to draw an adverse inference as to any fact flowing from the nature of the evidence that would likely have emerged if evidence that could and should have been produced by a party is not so produced. The rationale for this presumption is one of "plain common sense": the natural inference from a party's failure to produce evidence which would elucidate a matter is that the party fears that the evidence would be unfavourable to it (see *Jones v Dunkel* (1959) 101 CLR 298 at 320–321).

116 The relevant principles governing the drawing of adverse inferences were endorsed by the Court of Appeal in *Sudha Natrajan* as follows (at [20], citing *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 at [43]):

> (a) In certain circumstances, the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the matter before it.
>
> (b) If the court is willing to draw such inferences, these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.

(d) If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn. If, on the other hand, a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled.

117 With these principles in mind, we are satisfied that an adverse inference should be drawn against Ken and Sally. It is clear that they were expected to produce the Missing Messages had those not been deleted, and their explanation for not preserving these messages was wholly unconvincing (see also, [26]–[28] above). Sally's evidence at the trial was that she had changed her phone and phone number in 2015 and could not remember who she gave the phone to. She said that she had decided to give her phone away because she was, in her own words, "very, very depressed", "[there was] so much of harassment" and she was told and encouraged by "SureWin members" and "people who care[d]" to "throw away the phone, to don't answer, get rid of everything, wash it off". She also said that it was her practice to never bring over messages and photographs from an old phone to a new phone. While Sally's evidence under cross-examination was that it was her practice to change her phones and not keep the messages in her phones after 2015, there was no such mention of this practice in her joint affidavit with Ken filed on 19 February 2021 in opposition to Sandra's application for specific discovery. This is highly probative of the inference that the Missing Messages were deliberately not preserved by Ken and Sally in order to avoid their discovery obligations.

118 We also find Ken's explanation at the trial highly unsatisfactory. Incredulously, he answered in the affirmative when asked whether his, Sally's, and Sebastian's phones "vanished into thin air" between 2015 to 2016; he even agreed that that was the "year of the vanishing phone". Although he had filed

the Police Reports earlier in 2014, he testified that he was ignorant of the need to preserve the Missing Messages and attributed his failure to preserve the messages to the purported absence of any advice to that effect by his lawyers. This was notwithstanding his acknowledgement that the police might need those messages. It was further admitted that even after discovery applications were taken out against him in an earlier separate suit in connection with the Scheme (that was not settled until late 2017) (the "Discontinued Suit"), and he had communications with Peter and Philip between 2017 to 2018, he did not preserve those messages. In sum, we do not find any reasonable or credible explanation for Ken and Sally's failure to preserve the whole of the Missing Messages or even a substantial part thereof.

119 We also find it extremely troubling that Sally was somehow able to produce only one message which she sent to Peter following the collapse of the Scheme (see [28] above). Sally deposed on affidavit that she had taken a screenshot of that message sometime between 2014 and 2015 to demonstrate to their downlines, who had been harassing them, that she and Ken had tried to get in touch with Peter, but there was no response from him. It appears to us that Sally was able to understand the benefits of preserving the message and yet she and Ken apparently failed to appreciate the importance of preserving the other messages with Peter, Philip and other investors relating to the Scheme despite filing the Police Reports on their purported losses. In our view, this is a clear case of selective preservation of evidence by Sally and Ken with a view to avoid their discovery obligations.

120 Further, there is independent evidence which shows that Ken and Sally must have known that the Scheme was fraudulent as they were in the top echelon of the Scheme and part of the inner circle of the Scheme's founders. This was evidenced by Ken and Sally's meeting with Peter in the 2018 Macau Meeting

connected with Peter's attempt to launch the new Prince Suncity Scheme (see [23] above), more than three years after the Scheme's collapse. This meeting was documented in photographs of Ken and Sally in close proximity with Peter depicting them smiling and holding up wads of cash:

121 Ken and Sally's account of how they had reestablished contact with Peter three years after the Scheme's collapse was patently suspect. According

to Sally, Peter called her on or around March or April 2018. Peter purportedly told Sally that he had "come up with a plan to help recover SureWin investors' money" and he "asked [Ken and Sally] to go over to Macau to meet up with him". Sally claimed to be "scared to answer the phone"; yet, she also admitted that she did not express any unhappiness towards Peter for his irresponsibility in running a scam and for absconding after the Scheme's collapse. By then, even based on Ken and Sally's own evidence, they already knew that the Scheme was a scam, had made the two Police Reports against Peter and Philip in late 2014 and had even been sued by another SureWin4U investor in April 2016 in the Discontinued Suit. She also said that she did not remember asking Peter what had happened to the money and where he had gone after the Scheme's collapse, even though she agreed that it would have been reasonable to expect a person in her situation to do so. It was also her evidence that after she had heard from Peter, she did not update the police despite the Police Reports having been made earlier. When Mr Lok commented that Ken and Sally were "look[ing] very happy" in the photographs taken at the meeting in Macau, Sally's evidence was simply that "[they had] to smile" as Peter was very "intimidating". All these in our view leads to the irresistible conclusion that Ken and Sally had a close relationship with Peter and Philip and were in the know about the fraudulent nature of the Scheme. They certainly did not behave in any way like victims of a fraud which they claimed to be in their Police Reports.

122 While Ken's affidavit of evidence-in-chief stated that he and Sally had wanted to go to Macau to find out what had happened to the Scheme, their eventual evidence at the trial was that they had gone there for more self-interested motives. Sally said that they wanted to "hear and understand what is the plan … for SureWin4U to recover all our money … for the [SureWin4U] members". Similarly, Ken stated that "apart from want[ing] to find out what

happened which has already passed, which is already history … *more importantly* is that he [told] us that he actually ha[d] a plan, so we're more interested in the plan" [emphasis added]. This was a very odd response. It is certainly very cavalier and completely inexplicable for Ken to describe what had happened to be "history" in the context of a scam where many investors (which they claimed included themselves) had lost millions of dollars. In our judgment, their choice to meet Peter without question to discuss a new proposal, even when there is nothing to suggest that Peter and Philip were no longer in the business of operating scams, is a strong indication that Ken and Sally knew about the Scheme's fraudulent nature *at the very least* when the Safe and Profitable Representation was made to Sandra. They were therefore quite ready to meet with Peter again to discuss the prospect of running another scam. If it were otherwise, it would be inexplicable why Ken and Sally were so comfortable with Peter to the extent that they were willing to travel all the way to Macau to meet with him with hardly any reservation. In our view, Ken and Sally found no necessity to question Peter about the scam because they were at all material times aware of the fraudulent nature of the Scheme.

123 In our view, the nature and the carefully crafted contents of the Police Reports do shed some light on Ken and Sally's knowledge that the Safe and Profitable representation was fraudulent. While Ken and Sally claimed to be innocent investors, Ken conceded during cross-examination that he did not provide any supporting documents such as screenshots from conversations with Peter and Philip in the Police Reports even though he still had the Missing Messages at that time. When further questioned on why he did not state in the Police Reports that he wanted to recover the HK$201m in earnings that he was held out to be entitled to in the Suntec Program Booklet, he simply responded with "frankly speaking, [it] never crossed my mind". The fact that the Police

Reports were bereft of so many essential details strongly suggests in our view that it was lodged, as Sandra submitted below, "as a façade in the hope that it would convince the investors that they too were victims of the Scheme". It is all the more damning that, apart from simply making the Police Reports, there is no evidence that Ken and Sally attempted to pursue any further legal action against Peter and Philip despite claiming to have lost millions, and they certainly did not allege that it was not possible to do so. In short, their conduct was certainly not how victims of a fraud who claimed to have lost millions of dollars and who by then were aware of the fraudulent nature of the Scheme would have behaved.

124 This leaves us with no doubt that it is appropriate to not merely infer that the Missing Messages would be against Ken and Sally's interest if produced, but that those messages would go towards showing that they were aware of the fraudulent nature of the Scheme. While the exercise of drawing an adverse inference will always involve a degree of uncertainty, this alone cannot curtail the court's power to draw the appropriate inference. Section 116 of the Evidence Act provides that "[t]he court may presume the existence of *any* fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case" [emphasis added]. The statutory language is clear that, provided the requirements for drawing an adverse inference is satisfied, the court may infer "any fact" which is likely to have happened. Among the different possible permutations of what could have happened, there is nothing to stop a court from drawing the most serious or damning inference against a party or to suggest that the court should prefer to take a more sanguine view of the party's conduct.

125 Our reading of s 116 of the Evidence Act is supported by *Sarkar on Evidence* vol 2 (14th Ed, 1993) at p 1555 which states, in relation to the corresponding provision in the Indian Evidence Act, that "[w]here a party suppresses a document, the court is bound to make *every presumption, consistent with facts* against the party" [emphasis added]. Indeed, such a position is consistent with the Court of Appeal's *dicta* in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 ("*Tribune Investment*") (at [50]) that "there is no fixed and immutable rule of law for drawing such inference", and with the commentary in Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 7th Ed, 2018) that "[n]o restriction is placed on the type of facts that may be presumed" (at para 12.067).

126 It is thus open to the court to draw an adverse inference as to any fact which is likely to have happened, notwithstanding that it might be the most serious or damning inference against the other party. In support of the inference of actual knowledge of the fraudulent nature of the Scheme on the part of Ken and Sally, the requirement in *Sudha Natrajan* (at [23]) that the court must have "some basis" for drawing the specific adverse inference and "must put its mind to the *manner* in which the evidence that is not produced is said to be unfavourable" [emphasis in original] is also satisfied. In examining whether there is "some basis", it is important to bear in mind that the court does not view each piece of evidence in isolation. As explained at [120]–[123] above, there is evidence, in the form of Ken and Sally's respective contrived explanations for their abject failure to preserve the Missing Messages when it was in their interest to do so if they were in fact innocent, the 2018 Macau Meeting, and the nature and contents of the Police Reports. In our view, the collective evidence provides a proper basis for inferring that Ken and Sally were in cahoots with the Scheme's founders in running the Scheme and must have had actual knowledge

that the Scheme was fraudulent when the Safe and Profitable Representation was made to Sandra. There is therefore "a case to answer" in respect of whether Ken and Sally actually knew of the fraudulent nature of the Scheme which is then "strengthened by the drawing of the inference" (in the words of *Sudha Natrajan* at [20(c)]).

127 We should also stress that the possibility that Ken and Sally might have reinvested their profits into the Scheme does not detract from our finding. It is clear that Ken and Sally had no skin in the game after they had recouped their initial capital outlay, and this is confirmed by the police report dated 6 November 2014 wherein Ken stated that they only had "total capital outlay" of $77,452. By the time the Scheme collapsed, they had already cashed out about $7m to $10m from the Scheme. This was a point rightly raised by Mr Lok during the cross-examination of Ken and Sally. Further to this, there is also no independent evidence that Ken and Sally reinvested the amount that they claimed in the police report to have put into the Scheme between October 2012 to September 2014, *ie*, $10.5m. And even if this were assumed to be true, the reinvestments were not inconsistent with Ken and Sally's knowledge that the Scheme was fraudulent because those were in fact generating returns for them. Rightly, Ken and Sally's claim that the reinvestments showed that they were acting honestly was challenged at the trial.

128 In the circumstances, it is eminently safe in our view to infer that Ken and Sally were bedfellows with Peter and Philip in the Scheme and knew that the Safe and Profitable Representation was false when they first made that representation to Sandra.

129 Finally, it leaves us to briefly mention that we accord no weight to the S$148,000 that Ken and Sally gave to the group of ten investors for them to

gamble at the casino using the 100% method after the Scheme's collapse. It is obvious that the amount they gave was very likely a façade created to convince the other investors that they too were innocent. As observed at [18] above, this is not how a normal innocent victim of a scam would act. This was more consistent with the key roles played by Ken and Sally as promotors of the Scheme.

Ken and Sally were also reckless

130 Even if the above adverse inference of actual knowledge should not be drawn against Ken and Sally, we are, in any event, satisfied that Ken and Sally were reckless at the material times when the Safe and Profitable Representation was made, in the sense that they were indifferent to the truth.

131 Sandra's case in her Statement of Claim is that Ken, Sally, and Sebastian made the alleged representations "either knowing that these representations were false and untrue or recklessly not caring whether they were true or false". While the allegation of recklessness might not have been sufficiently particularised, no objection was raised by the respondents on the lack of particulars, whether in the proceedings below or on appeal.

132 The broader inquiry here is whether the respondents knew the case they had to meet and were not deprived of the opportunity to adduce the relevant evidence. The sufficiency of pleadings is judged with reference to this question (see, for *eg*, the High Court decision of *Kim Hok Yung and others v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party)* [2000] 2 SLR(R) 455 ("*Kim Hok Yung*") at [5]–[6]*;* and the Court of Appeal decision of *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 ("*JTrust*") at [119]). It is for this reason

that the Court of Appeal observed in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 that "evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced" (at [18]).

133 The issue of recklessness was sufficiently ventilated at the trial and much of the cross-examination of Ken and Sally focused on the inquiry of whether they cared about the truth of their representations; and, as part of this inquiry, whether they had any basis for repeating the representations that they made. Among other questions, Sally was asked if she shared about the Scheme in the way that she did "not car[ing] whether it [was] accurate or not". As for Ken, he was questioned on his statements made in one of the Scheme's seminars that the Scheme had trained 118 professional gamblers and that more than 20,000 to 30,000 people had attended the courses ran by the Scheme. He was asked on whether he had any basis for repeating those figures or if he just "took it" from the company operating the Scheme and/or Peter and communicated it to everyone else at the seminar. It is therefore clear that the issue of recklessness featured in Ken and Sally's cross-examination. They had the opportunity to respond and were not taken by surprise.

134 From this fact, and from their respective testimonies at the trial, it is clear to us that Ken and Sally were at least content to parrot whatever the Scheme's promotional materials stated without taking any steps to ascertain the truth. As explained above, given their close relationship with Peter and Philip which would have afforded them the opportunity to ascertain the truth of their representation, and given that the Safe and Profitable Representation was fundamental to the Scheme (see [71]–[72] above), it beggars belief that they claim to have an honest belief in the Safe and Profitable Representation and yet did not do anything to check that what they were representing was true.

135 Taking the example of when Ken was questioned on his statement that the Scheme had trained 118 professional gamblers (see [133] above), his reply was that "[t]his [was] what [he] underst[ood] from the company". When asked whether he had met any of these 118 highly-skilled players", he replied "*some, but not all*" [emphasis added]. Yet, there is no evidence to support his assertion that he or Sally had ever met any of the professional gamblers. This assertion was also contradicted by his later testimony that *none* of the investors had seen the professional gamblers at work; in fact, he testified that the investors "including [Ken and Sally], we [were] not allowed to see [the professional gamblers] at work". These points relating to the professional gamblers are highly relevant because the nub of the Safe and Profitable representation concerned the deployment of such professional gamblers using moneys put in by the investors of the Scheme to generate returns. In relation to Ken's assertion that more than 20,000 to 30,000 people had attended the courses ran by the Scheme (see [133] above), he was asked whether he "just took [this statistic] from [the company] and just communicated it to everybody at the seminar". He answered in the affirmative when he testified, "[t]hat's what I understand from the company and the PowerPoint slides from the company". He said that he believed that Peter and Philip were telling the truth as they were able to produce a "winning cheque on their name" from the casino. Sally's evidence was similar in this regard. She was asked about a message she had forwarded to one "du zun group chat" (a group chat with the other investors whom Sally referred to as "leaders", and Peter and Philip) around May 2014, which stated that the Peter was "winning huge amounts of money at the casino in Sydney and has withdrawn another 1.18 million Aussie for everyone". When asked whether she "[did] not know for sure whether or not [Peter] actually won this sum of money", she prevaricated. She initially said "yes", but then quickly changed her response to "[a]h, no, we believe what he has put it out [*sic*]". The reason for

the second answer, she explained, was that "he always comes out, you know, with the image of the cheques".

136 Ken and Sally's responses at the trial provide a strong basis for us to conclude that they were content to parrot whatever statements they were told, including the Safe and Profitable Representation, without any proper evidential basis and without care about whether such statements were true. It is telling from the preceding paragraph that the only basis that was raised by them in cross-examination was that there were images of cheques that were being circulated by Peter and/or Philip to the investors.

137 Indeed, there is no evidence that Ken or Sally had *personally* seen the supposed cheques from the professional gamblers, as opposed to images of the supposed cheques. While Ken's affidavit of evidence-in-chief did refer to one instance where Peter (who was never portrayed as one of the purported professional gamblers) allegedly returned with a cheque which he claimed were winnings from the casino, this still did not mean that the cheque was generated by the professional gamblers working for the benefit of the Scheme's investors which is the heart of the Safe and Profitable Representation. The fact that Peter might have personally won at the casinos is irrelevant to the undeniable fact that the Safe and Profitable Representation was false.

138 Mr Anand also referred us to the gambling demonstration in July 2014 in Macau (see [15(c)(vi)] above) to advance the argument that Ken and Sally saw the professional gamblers in action. However, we are unpersuaded that the demonstration could have been or even was the evidential basis relied on by Ken and Sally to repeat the Safe and Profitable Representation. On their own evidence, Ken and Sally had invested in the Scheme close to two years prior, in October 2012. By 2014, they would have reaped huge profits from the Scheme

and it was more likely than not that they were repeating the Safe and Profitable Representation because they knew that they stood to gain financially by attracting more downlines, and not because they had witnessed the demonstration. In any event, the gambling demonstration occurred in July 2014, which was *subsequent to* the making of the Safe and Profitable Representation to Sandra with respect to the First and Second Tranches. It therefore appears that the only purported basis Ken and Sally had in making the Safe and Profitable Representation was that they had seen Peter producing images of allegedly winning cheques.

139 As explained at [71] above, the more significant the representation, the greater is the need for the representor to show that he had an honest belief in making the representation. Here, the evidence is clear that Ken and Sally were actively promoting the Scheme to investors or potential investors like Sandra that their investments would be channelled to professional gamblers to generate returns at the casinos playing baccarat using the Scheme's winning methods. This was the purported entire business model of the Scheme but yet Ken and Sally were content to parrot the Safe and Profitable Representation despite never having met any of the professional gamblers nor witnessed any of them actually playing and generating the huge profits at the casinos. At best, they claimed to have seen *images* of Peter (and not any of the professional gamblers) with purportedly winning cheques. If on the state of this evidence, repeating the Safe and Profitable Representation to investors does not amount to recklessness or indifference as to the truth, it is difficult to imagine what would.

140 Accordingly, Ken and Sally's own evidence points towards the conclusion that they were reckless in repeating the Safe and Profitable Representation. Given their close relationship to Peter and Philip, which allowed Ken to "deal directly" with them as he admitted in his police report

dated 6 November 2014, Ken and Sally would have had ample opportunity to ascertain the truth. Therefore, the fact that they had no reasonable basis to repeat the Safe and Profitable Representation notwithstanding that it was the fundamental premise of the Scheme must show that they were at the very least indifferent to the truth. Once it is properly appreciated that notwithstanding their indifference as to the truth of the Safe and Profitable Representation, Ken and Sally had by then reaped very substantial profits from the Scheme, it is perhaps easy to understand why they were indeed indifferent. Finally, the Minority Judgment at [184] observed that the Judge found Ken, Sally, and Sebastian to be "simple rather than cunning" and that he was best placed to assess their credibility. While we have explained why appellate intervention is justified on the evidence before the court, we should add that even if the Judge was correct in assessing them to be "*simple*", that might perhaps explain why they were willing to parrot whatever statements they were told, including the Safe and Profitable Representation, without any proper evidential basis and without care about whether such statements were true. By then, they were reaping substantial profits from the downline investments including Sandra's such that they simply did not care whether there was any evidential basis *ie*, honest belief for the representation.

Sandra relied on the Safe and Profitable Representation as Ken and Sally intended and suffered loss

141 On the element of reliance, we are satisfied that Sandra acted on the Safe and Profitable Representation made by Ken and Sally.

142 In a claim for fraudulent misrepresentation, there is no requirement for the representee's reliance to be reasonable (see *Panatron* at [24]). Similarly, in the House of Lords decision of *Standard Chartered Bank v Pakistan National*

Shipping Corpn [2003] 1 AC 959 (at [15]), which was cited with approval in *DBS Bank* (at [92]), it was held that if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either.

143 It is also important to note that there is also no requirement in a claim for fraudulent misrepresentation that the representation was the sole reason for the representee's reliance, so long as it played a "real and substantial" role in inducing the representee to act (see *Panatron* at [23]).

144 With these principles in mind, we discuss each Tranche in turn. On the First Tranche, we have no hesitation in finding that Sandra relied on the Safe and Profitable Representation given that the representation was the fundamental premise of the Scheme. In *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96 at 112, which was cited with approval by the Court of Appeal in *Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 (at [53]), the Court of Appeal of England and Wales opined that "there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced", although "the inference is only a prima facie one, and may be rebutted by counter-evidence". While the respondents submit that Sandra did "her own calculations, and was able to discern that the Silver packages generated better returns" and "did not see any risk in investing", this is quite besides the point as the prior question which must be answered is whether there was anything that showed that she did not rely on Ken and Sally's representation of the legitimacy of the Scheme in a real and substantial way. If the entire premise of the Scheme *ie*, that the investors' moneys were used by the team of professional gamblers

to play baccarat in casinos using the winning methods to generate returns, was false, it must be clear that Sandra would not have even applied her mind to do any calculations or assess her risk appetite. Therefore, the respondent's submission does not remotely rebut the factual presumption that Sandra was so induced in relation to the First Tranche.

145 As regards the Second Tranche, we are similarly persuaded that Sandra relied on the Safe and Profitable Representation in purchasing the Scheme's packages. Although Mr Anand referred to messages sent by Sandra to other investors or potential investors in which she stated that she was convinced by the classes organised by the Scheme in relation to its gambling methods and was prepared to give guarantees to others about the efficacy of the gambling methods, this submission had to do with the supposed *win-rate* of the gambling methods, and not whether the methods were actually used by professional gamblers to generate profits for the Scheme. The fact that Sandra was concerned about the win-rate of the gambling methods did not mean that she was not concerned with the actual existence of the business model of the Scheme premised on the deployment of professional gamblers. In our view, it is quite the opposite. That Sandra was convinced of the Scheme's gambling methods, and indeed saw initial returns from her investments, would have made her even more convinced about the Safe and Profitable Representation because the very essence of the Safe and Profitable Representation entailed the deployment of professional gamblers using those very gambling methods to generate winnings. It bears repeating that this was undoubtedly and admittedly false because contrary to the Safe and Profitable Representation, none of the investment moneys including Sandra's investments were used to fund professional gamblers. In our view, the fact that Sandra was convinced of the Scheme's gambling methods merely provided her with the validation to invest in the

Scheme so that her investments would be used by the professional gamblers to generate returns.

146 Turning to the Third Tranche, we find that reliance is established as well. While there was a gambling demonstration in Macau in July 2014 prior to the Third Tranche (see [15(c)(vi)] above), this does not detract from our conclusion. There is limited information about the demonstration and no independent evidence that the gamblers adopted the winning formulas or that they in fact generated returns beyond what Ken and Sally repeated to Sandra. Accordingly, we do not see a basis for finding that the Safe and Profitable Representation as made by Ken and Sally *was no longer operative* by the time Sandra invested the Third Tranche. If anything, the demonstration would have reinforced the Safe and Profitable Representation made earlier.

147 Further to these findings, we have no doubt that Ken and Sally intended for the representation to be acted on. Once it is proven that the Safe and Profitable Representation was material in inducing Sandra to act, Ken and Sally are presumed to have had the intention for the representation to be acted upon. The evidential burden then shifts to Ken and Sally to displace the *prima facie* case. It is also necessary to show actual inducement, although it is not necessary for Sandra to show that she entered into the transactions solely in reliance upon the misrepresentation (see the High Court decision of *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [53]–[56]). As explained above (at [144]–[146]), the Safe and Profitable Representation was the fundamental premise of the Scheme and played a real and substantial part in Sandra's decision to invest in all three Tranches. The veracity of this finding can simply be tested by asking whether Sandra would have invested in the Scheme if not for the Safe and Profitable Representation. The answer to that question would have been – of course not, because her

investments were intended to be channelled to the professional gamblers. In the context of Sandra's investments in the Scheme, it is meaningless to suggest that Sandra understood the Safe and Profitable Representation to simply mean that the 99.8% and 100% methods worked, and not that there were professional gamblers generating returns for the investors.

148 Lastly, we do not see merit in the respondents' contention that Sandra has not proven her loss. In measuring damages in a claim for fraudulent misrepresentation, the court assesses the position the representee would have been in if the fraudulent misrepresentation had not been made (see *Wishing Star* at [22]). Sandra initially claimed for various heads of loss, but eventually narrowed down her claim to that of the "mon[ey]s she invested in the Scheme", which she contends is valued at the total price of all the packages she bought over the three Tranches.

149 While Mr Anand challenged Sandra on the adequacy of the documentary evidence she produced, namely certain screenshots of the Scheme's website and various receipts of bank transfers, it is telling that it was never directly put to Sandra that she did not purchase those packages as alleged. The prices of the respective packages were not challenged as well. Moreover, while Sandra may have subsequently encashed some of the Yingbi by selling those to her potential downlines to enable them to join the Scheme, there is no evidence of how much she actually encashed for that purpose; and in any event, Sandra's unchallenged evidence is that she "only helped very few of them to do this". Sandra also testified that she never sold any of the Yingbi back to the Scheme to put the profits "into [her] own … pocket, and this was similarly not challenged. Finally, while Sandra candidly admitted that some of the Yingbi that she had in her account had gone towards purchasing "some of the investment packages", she said that "it [was] only very little" as this Yingbi was "from the rebates" that

she received from the packages. We accept her evidence in this regard. Given that she only participated in the Scheme for four months before she invested heavily in the Third Tranche, we find it unlikely that the consumer rebates that she received would have made a significant difference. We therefore find that Sandra has proven her loss as being HK$36,587,400, the total price of the investment packages she purchased over all three Tranches (see [14] above).

150 As all the elements of fraudulent misrepresentation have been made out on the basis of the Safe and Profitable Representation, which permeates all three Tranches, we allow the appeal in respect of the entire sum which Sandra claims and find Ken and Sally jointly and severally liable for that sum.

151 We now express our findings on the other representations which Sandra relies on in the appeal.

The Share Investment Representation

152 In our judgment, there was a separate representation apart from the Safe and Profitable Representation that operated in relation to the Third Tranche. This was the Share Investment Representation which, as we explained earlier (at [86]), would affect both the Share Investment Packages and the US Property Packages. To purchase the Share Investment Packages, one had to also purchase the US Property Packages. Therefore, if Sandra's claim for fraudulent misrepresentation succeeds on the basis of the Share Investment Representation, it must include the losses she suffered from purchasing the US Property Packages.

153 Sandra's case is that "in relation to the Share Investment Package, it was represented to [her] that the *funds would be used to buy over a company* that

was going to be listed on the Singapore Stock Exchange in October 2014" [emphasis added].

154 We find that the Share Investment Representation was made by Ken and Sally. Indeed, Ken confirmed in cross-examination that he told Sandra that there were plans to buy over a company listed on the Singapore Stock Exchange in 2014 and a large injection of funds was needed to take over the target firm ahead of the listing, and that was why the Scheme was selling the Share Investment Packages. Sally also admitted in cross-examination that she had shared about the Share Investment Packages with Sandra. From this, it is more likely than not that the key message – that funds would be used to buy over a company that was going to be listed on the Singapore Stock Exchange in October 2014 – would have been repeated by Sally to Sandra at that meeting.

155 In rejecting Sandra's claim on the Share Investment Representation, the Judge found that the purported representation was a statement as to the future or a promise. The Judge also found that it was a term of the Share Investment Package that purchasers would acquire an interest in a company that the Scheme would be acquiring, and that there was nothing false in this (see Judgment at [113]–[115]). The Judge also observed that even if the Scheme did not acquire a company to be listed, Sandra had failed to prove that (a) it had no real plans to do so or (b) that her money was not used by the Scheme to acquire a company that was to be listed. In this regard, the Judge opined that the Scheme "may well have used [the money] to acquire some company with a view to listing it" (see Judgment at [116] and [119]).

156 We disagree with the Judge in this respect. A statement as to the future or a promise can be regarded as a statement of fact as to the representor's state of mind if it can be shown that the maker of the statement had no honest belief

in the statement or had no reasonable grounds to make the statement (see the Court of Appeal decision of *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 ("*Chang Tse Wen*") at [83]). Therefore, the Share Investment Representation would be false if the Scheme had "no real plans to nor did it acquire a listed company", as Sandra pleaded.

157 Given that Ken and Sally were bedfellows in the Scheme with Peter and Philip and did not honestly believe that the Scheme was legitimate (at [112] above), they could not have had an honest belief that the Scheme had real plans to acquire a listed company. It is even more difficult to believe that Ken, Sally and Sebastian, who were in the upper echelons of the Scheme, would have not known that the Share Investment Package was not legitimate. While Ken in his fifth affidavit dated 5 May 2020 identified the target company the Scheme had sought to list as being China Kunda, China Kunda had already been listed on the Singapore Stock Exchange in 2008. It was therefore implausible that China Kunda was the target company which the Scheme sought to list, and the Judge's view that what was contemplated might have been a reverse takeover was, with respect, purely speculative.

158 As the Share Investment Representation was a key premise of the Share Investment Packages and therefore material, we readily draw the inference that Sandra relied on the representation and that Ken and Sally intended for Sandra to act on the representation.

159 To summarise, Sandra's claim for fraudulent misrepresentation in relation to the Share Investment Representation is an alternative basis in establishing Ken and Sally's liability for the losses resulting from Sandra's purchase of the Share Investment Packages and the US Property Packages in

the Third Tranche in light of our holding that the Safe and Profitable Representation applied to all three Tranches.

160 We turn to briefly comment on Sandra's case in relation to the other alleged misrepresentations. We do not find these aspects of her claim to be made out.

The US Property Representation

161 Beginning with the US Property Representation, we do not think that Sandra's claim is sufficiently particularised to be actionable. Sandra's case is that Ken, Sally, and Sebastian represented to her that by purchasing a US Property Package, she would "receive a title deed to a house in Detroit".

162 However, given the subject matter of the representation (*ie*, the acquisition of real property), it is meaningless to simply plead a representation to receive *a* title deed to *a* house in Detroit. It begs the question of, for example, what the type, land area, and location of the house would be. We emphasise that, as a matter of procedure, pleadings not only serve the important function of giving the other party fair notice of the case that has to be met but also define the issues which the court will have to decide (see the Court of Appeal decision of *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [61]). Failure to adequately plead the particulars of an alleged misrepresentation may lead to an unsuccessful claim (see *JTrust* at [116]). In this particular context, we do not think that the US Property Representation was sufficiently pleaded for us to determine Sandra's claim on that front. Taking an extreme example, Sandra's case cannot be taken to be that the US Property Representation would have been true as long as she received *any* property in Detroit, regardless of where it is located and no matter how small it was, as long

as it was *a* property. As we have explained at [82(d)] above, the US Property Packages could not have been for the sole purpose of purchasing properties in the US. This type of package was similar to the other packages that Sandra purchased in the First and Second Tranche, except that over and above the expected gambling returns, the investor would also stand to own *a* property in Detroit as a bonus to his investment.

163 The upshot of our conclusion regarding Sandra's claim on the US Property Representation would mean that Sebastian is not liable to Sandra at all, as Sandra's case against him is solely premised on the US Property Representation (see [85] above).

The Hong Kong No 1 Representation

164 In respect of Sandra's claim in fraudulent misrepresentation, this leaves us with her claim based on the Hong Kong No 1 Representation, which in our view is not actionable.

165 Sandra's case is that this representation was first made during the Sri Lanka Conference between 27 June 2014 and 1 July 2014. According to Sandra, Ken and Sally had asked Sandra to join them at a private meeting with Peter in his Presidential Suite. Sally told Sandra that the meeting was only for leaders who were members of Peter's "inner circle". She explained that although Sandra was not the top salesperson in Hong Kong, they had told Peter of her great potential. At this meeting, Sally introduced Sandra to the other attendees as the "next top representative for Hong Kong" and the next "Sally" of Hong Kong. Peter, Ken, and Sally told Sandra that SureWin4U was doing well and had a bright and promising future. They persuaded her to invest more and work on her sales figures.

166 Thereafter, another Presidential Suite meeting was held during the Hong Kong Conference between 13 and 17 July 2014. Sandra claims that at this meeting, Ken and Sally represented to her that if she took out four sets each of the US Property Package and the Share Investment Package, she could become a "Seven-star Agent" (*ie*, the top tier of members in the Scheme). In addition, they repeated what they had said at the first Presidential Suite meeting – that they saw potential in her and wanted to groom her to become Hong Kong's top representative. This was false, according to Sandra, in that "[d]espite investing in the US Property and Share Investment Packages, Sandra did not become Hong Kong's No. 1 Salesperson".

167 In dismissing her claim, the Judge found that Ken and Sally never made this representation and that even if they did, they were not statements of fact; it would be a statement as to the future, or at most a promise (see Judgment at [125]–[126]).

168 Without commenting on whether the representation was indeed made by Ken and Sally, we agree with the Judge that such a representation was simply a promise or a statement as to the future, which was not an actionable representation. We also do not think that Sandra can successfully argue that Ken and Sally did not have an honest belief that she could be Hong Kong's number one salesperson or a "Seven-star Agent". While the Scheme was not legitimate, it did not mean that tiered membership and accolades would not be granted to incentivise existing members to persuade others in joining the Scheme. Indeed, in the Suntec Program Booklet, there were "Five-star agents" and "Seven-star agents" listed therein. Accordingly, there is no basis to disturb the Judge's conclusions with regard to the Hong Kong No 1 Representation.

The claims in unlawful and lawful means conspiracy

169 Finally, we see no merit in Sandra's appeal against the Judge's dismissal of her claims in conspiracy, whether by unlawful or lawful means.

170 We begin with unlawful means conspiracy. As the Court of Appeal held in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") (at [112]), the following elements must be proved in such a claim:

(a) two or more persons combined to do certain acts;

(b) the alleged conspirators intended to cause damage or injury to the claimant by those acts;

(c) the acts were unlawful (including intentional acts that are tortious);

(d) the acts were performed in furtherance of that agreement; and

(e) the acts caused loss.

171 In our judgment, the claim in unlawful means conspiracy fails at the outset as it has not been established that there was an *intention* by the respondents to cause damage or injury to Sandra. Sandra must show that the unlawful means and the conspiracy were "targeted or directed" at her. This means that damage or injury to her must be intended as either a means to an end or an end in itself. It is not sufficient that harm to Sandra would be a likely, or probably or even inevitable consequence of the respondents' alleged conduct (see *EFT Holdings* at [101]). Lesser states of mind, such as an appreciation that a course of conduct would inevitably harm Sandra, would also "not amount to

an intention to injure, although it may be a factor supporting an inference of intention on the factual circumstances of the case" (see *EFT Holdings* at [101]).

172 Sandra's arguments (both in her submissions below and on appeal) focus on the element of combination but do not point to any evidence that the respondents specifically intended to cause her harm either as a means to an end or an end in itself. At most, Ken, Sally, and Sebastian intended for Sandra to invest more money into the Scheme through fraudulent misrepresentation, and that harm to Sandra was an inevitable consequence. However, from this alone, it cannot be said that the unlawful means and combination were "targeted or directed" at her.

173 If the mental element of unlawful means conspiracy is not even made out, it follows also that lawful means conspiracy, which has a more stringent mental element in that the conspirators' predominant purpose must be to cause injury or damage to the plaintiff, would not be established (see the High Court decision of *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 at [23(b)]).

174 Accordingly, we dismiss Sandra's appeal against the Judge's rejection of her claims in conspiracy.

Conclusion

175 We therefore allow the appeal in respect of Sandra's claim for fraudulent misrepresentation against Ken and Sally based on the Safe and Profitable Representation and the Share Investment Representation and order Ken and Sally to be jointly and severally liable to Sandra in the aggregate sum of HK$36,587,400. We uphold the Judge's conclusions on the remainder of her claims.

176 As for the costs of the appeal and below, the costs award in favour of Sandra must reflect the fact that she had failed on some of her arguments including her appeals against Sebastian and the fourth respondent. Taking into account the parties' respective costs schedules, we award her a proportion of her claimed appeal costs fixed at $50,000 inclusive of disbursements. As for costs below, adopting the costs award of $$374,365.22 by the Judge, we fix costs at $300,000 inclusive of disbursements in favour of Sandra. We also make the usual consequential order for Sandra's security for the costs of the appeal to be discharged.

Steven Chong
Justice of the Court of Appeal

Debbie Ong Siew Ling
Judge of the Appellate Division

Woo Bih Li JAD (dissenting):

Introduction

177 When a Ponzi scheme faces its eventual demise, it is not inconceivable for some investors to make a net profit from the scheme, alongside of course many others who suffer losses. In the ordinary course of things, it would hardly be surprising that the uplines who spent more time in the scheme and who would have had the opportunity to reap its benefits are more likely to be left with a profit, as opposed to their downlines who might not have had the time to realise their returns before the scheme's collapse. The fact that there are eventual winners and losers in the Ponzi scheme does not mean that the uplines who made money must be liable to compensate the downlines who suffered losses. Each case not only depends on its facts, but also the manner in which it is run by a plaintiff. If a cause of action is not made out, the gains and losses must lie where they fall.

178 The appellant Sandra has mounted her case on the grounds of fraudulent misrepresentation and/or conspiracy. In essence, she says that the some or all of the respondents are liable to compensate her for her investments in the Scheme because they had made a series of fraudulent representations to her which induced her to invest. Having considered the evidence, the Judge was unpersuaded and found that neither cause of action was made out. This is also the conclusion with which I agree. I understand however that the majority judgment ("MJ") takes a different view, and this judgment explains why I respectfully depart from the MJ's conclusion.

Facts

179 As the facts have been canvassed in detail in the MJ, I will only mention those facts which are salient to my judgment.

180 First, it is worth noting that a key draw for investors of the Scheme was its purported winning formulas, *ie*, the 99.8% and 100% methods, for which investors could attend the respective classes if they bought the right packages. Such was the importance of the winning formulas that investors were given a money-back guarantee: the course fees would be refunded to any investor who could disprove the winning formulas. This promise was recorded in a letter of undertaking which a new investor would have to sign before attending the classes. One version of the letter of undertaking stated that "the Master has agreed to impart his knowledge of a mathematical formula enabling a 99.80% success in the game of Baccarat" and that in consideration of that promise the "student agrees to pay the Master a sum of … to purchase [a] Student Package". Another version stated that "[i]f formula of winning ratio cannot be proven to be 99.80%, your fees will be refunded with no question asked". A promise in substantially similar terms could also be found in the Scheme's Promotional Brochure.

181 Sandra displayed ostensible excitement about the Scheme's gambling methods. She tried out the methods for herself and was even prepared to guarantee them to others. In an exchange on 1 July 2014, she told one Mr Yuan Jun ("Mr Yuan") that she had made a lot of money because she had "learned in the winner project that [she] ha[d] 99.8% winning chances and [she] did win it". She said that she could teach him "the gambling tactics" and encouraged him to sign up for the Scheme's classes. A few days later on 5 July 2014, Sandra similarly told one Ms Feng Jian Zhen ("Ms Feng") that if she (Sandra) strictly

followed the gambling method taught to her by the Scheme, she never lost. When Ms Feng asked her to elaborate on the gambling method in another exchange on 16 July 2014, Sandra explained that "when there is a clash between [her] own methods and the teacher's methods, [she would] choose the teacher's methods". A day later, Sandra then sent a message to Mr Yuan saying, "[j]ust learned [the] 100% [method] yesterday, feeling great … Now I believe in this project even more". Further to these, Sandra also told another Mr Zhou Jing Hua that she was willing to take him to the casino to prove the gambling method to him.

182 Also pertinent is that it is not in dispute that Ken and Sally were not the originators of the Scheme. They did not hatch the Scheme together with Peter and Philip and only joined the Scheme in October 2012 (see [9] above). Their unchallenged evidence was also that they kept reinvesting into the Scheme, and this statement was consistent with their Police Reports which stated that they had invested an estimated total of $10.5m into the Scheme before its collapse. The MJ mentions that there is no independent evidence that Ken and Sally reinvested $10.5m. However, it was undisputed that they had and remained investors in the Scheme until its collapse. Also, they were not challenged on the sum of $10.5m.

183 During the time of Ken and Sally's participation in the Scheme, they also saw images of cheques from the Scheme's founders, Peter and Philip. As the MJ also noted (see [135] above), Ken testified at the trial that Peter and Philip were able to produce a "winning cheque on their name". Sally too also gave evidence that Peter "always comes out … with the image of the cheques". The fact that Ken and Sally saw these images was not challenged.

184 Lastly, it is important that the Judge made a finding of fact, based on the testimonies of Ken, Sally, and Sebastian at the trial, that they were "simple rather than cunning, and that they genuinely did not think that SureWin4U was a Ponzi Scheme" (see Judgment at [176]). This was a finding as to witness credibility which the Judge was best placed to make having had the opportunity to preside over the trial, and an appellate court should not interfere with this finding unless it is "plainly wrong or against the weight of the evidence" (see the comments of the Court of Appeal in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41]). However, the MJ is of the view that the Judge had plainly erred in assessing the evidence before him. With respect, I have considered the reasons relied on by the MJ and do not think that appellate intervention is justified.

The Safe and Profitable Representation

The Safe and Profitable Representation referred to the Scheme's gambling methods

185 To begin with, I accept that Ken and Sally used the words "safe and profitable" when they spoke to Sandra. I am also prepared to proceed on the premise that Sandra advanced her case on the Safe and Profitable Representation in the manner that the MJ suggests – that it referred to the business model of the Scheme in the sense that the Scheme was legitimate and that moneys from investors would be used by professional gamblers to generate returns using the Scheme's winning formulas (see [76] and [80]–[82] above). However, even though that was how her case was advanced, it is not borne out by the evidence.

186 The question as to the meaning of a particular representation is tested from the perspective of a reasonable person in the position of the representee,

and in the light of the circumstances pertaining at the time. The true inquiry is what the representee understood by the words used, with this being generally assessed objectively. It also bears emphasis that the factual context or matrix within which the communication was made is of crucial importance (see *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 at [173]). In the present context, I am of the view that Sandra understood the Safe and Profitable Representation to mean that the 99.8% and 100% methods worked, and not that there were professional gamblers generating returns for the investors. While the former does not necessarily negate the latter, the point is that there is no evidence prior to the commencement of her investments showing that she relied on her understanding of the existence of professional gamblers.

187 As I mentioned above, the key draw of the Scheme was its gambling methods. Even on Sandra's testimony, attendees of the class on the 99.8% method had to sign agreements undertaking that they would not disclose the method to outsiders and would not use the methods taught within the next three months to "protect the confidentiality" of the method. The importance of the gambling methods to the safety and profitability of the Scheme was why Sandra made repeated references in her messages to others about how she had tried out the 99.8% and 100% methods and was even prepared to guarantee the Scheme to others (see [145] and [181] above).

188 That the safety and profitability of the Scheme related to its gambling methods was also evident in cross-examination, where Sandra also admitted that after she invested the First Tranche, she was "trying to see whether [she] could really get back [her] money on 1 May" because she was told that "if on 1 May, they could not explain to [her], they could not prove the method, they could not prove it mathematically, they could not prove that it was *safe, fast and*

legitimate, then [she] could get back [her] money" [emphasis added]. Therefore, Sandra understood the Scheme to be safe in the sense that the methods worked.

189 When asked during cross-examination about the guarantees she had purported to give to others about the efficacy of the gambling methods and her attempts to bring others to the casino, Sandra similarly said that she "could bring [the others] to the casino to show them" and that if "[she] could not prove to them that this *method* work[ed] mathematically and this method could not be proven by [a] third party that it [was] *safe*, then they would get their class fees back" [emphasis added]. In my view, this statement shows that Sandra's understanding of the safety of the Scheme is tied solely to its gambling methods.

190 In my view, Sandra had assumed that the Scheme was legitimate, an assumption which was unrelated to the Safe and Profitable Representation. In her mind, the Safe and Profitable Representation instead pertained solely to the viability of the gambling methods and not to the use of professional gamblers as the MJ concludes. The MJ also says (at [78] above) that otherwise Sandra would not have continued investing in the Scheme after learning its methods. However, that does not detract from the fact that in all the evidence that Sandra has adduced of messages between her and Ken and Sally, and between her and other investors/prospects, there is no suggestion that she placed reliance on the use of professional gamblers. The fact that there were no professional gamblers involved is therefore neither here nor there in so far as her alleged reliance on the Safe and Profitable Representation is concerned.

Ken and Sally were not fraudulent in making the Safe and Profitable Representation

The evidence falls short of establishing actual knowledge by Ken and Sally that the Scheme was false

191 I come to the allegation that Ken and Sally knew that the Scheme was false or fraudulent. The Appellant's Case uses various words to describe Ken and Sally, such as "inner circle" and "instrumental", "intimately involved", and "at the top of the Scheme's hierarchy". Various reasons were given.

192 First, Sandra argues that Ken and Sally were described as the founding members of the Scheme and Ken admitted that he had a direct line to Peter. However, they were not the originators of the Scheme. Neither did they hatch the Scheme together with Peter and Philip. They were described as founding members in publicity materials to give the impression that they were one of the earlier investors but that is quite different from saying that they hatched the Scheme together with Peter and Philip. Hence, I agree with the Judgment below (at [49]) that they were not the founders of the Scheme. Neither did they run the Scheme. They were only used to help market the Scheme. The fact that Ken had a direct line to Peter is also equivocal. It does not mean that he was in on the scam.

193 Second, Sandra contends that Ken and Sally were featured heavily in publicity materials. They were called "Seven-star agents" and were held out as having earned more than HK$201m from the Scheme and having received a Ferrari and a yacht (see [10] above). They were also the second highest earners and were responsible for 70% of the Scheme's revenue. However, in my view, these facts in themselves are neither here nor there. They do not suggest that Ken and Sally knew that the Scheme was false. Otherwise, by parity of

reasoning, the top earners or the third highest earners would also be implicated. The same could be said for any participant whose earnings were being touted. Even though Ken and Sally were doing well in the Scheme, this could also be said about Sandra. Yet, this does not mean that Sandra had sinister ambitions. It is also true that Ken and Sally did not correct some information about errors in their actual earnings and whether the Ferrari was fully a gift and that the yacht was acquired by their company instead of themselves. But again, this could also show that they were just too caught up in the excitement or frenzy and not necessarily that they knew that the scheme was a sham. In sum, while various people were used by Peter and Philip to whip up interest and greed, these people were more like puppets. They were not necessarily fraudsters.

194 Third, Sandra points out that Ken and Sally cashed out $7m to $10m in just under two years on an investment of $77,452. But this overlooks the point that Ken and Sally also kept reinvesting into the Scheme. If they knew that the Scheme was a scam, there would be no reason for them to reinvest, and indeed, it was their complaint that they lost money on the reinvestments. In any event, the information that Ken and Sally cashed out $7m to $10m came from Ken himself during cross-examination. If he and Sally had actual knowledge of the Scheme's fraudulent nature, they would have tried to hide the fact of their ill-gotten gains or lied to suggest a much smaller gain.

195 Turning to a separate point, it was suggested during the cross-examination of Ken that he bought other packages to "[show] other investors that [he was] still invested and still had skin in the game", and that he was "in effect, representing to investors like [Sandra] that because [he] had confidence in the scheme, they too should have confidence in the scheme". However, there is no evidence that Ken and Sally emphasised their continued investments to investors like Sandra and for that purpose. Furthermore, while it can be argued

that the reinvestments were also generating returns for them, this approach seems less likely to be adopted if they were the cunning perpetrators that Sandra seeks to portray them as. They would more likely have exited as soon as possible with their ill-gotten gains.

196 The MJ further notes that Ken and Sally gave a group of ten investors including Sandra S$148,000 to recoup their investments by going to casinos to gamble using the 100% method. This was from 8 to 12 October 2014 after the Scheme had collapsed in September 2014. The MJ concludes, at [18] and [129] above, that this gesture was likely a façade to convince other investors that Ken and Sally were innocent. However, the gesture may to the contrary be indicative of their innocence from fraud. The MJ is of the view that this is not how a normal innocent victim would act but, as I mention later, the situation is more nuanced because they did make money from the Scheme prior to their reinvestments. Importantly, even though professional gamblers were not involved by then, the group of investors which included Sandra did not reject the gesture. The fact that they used the 100% method to try and recoup some losses supports the point already made that Sandra's belief in the Safe and Profitable Representation was in the gambling method used and not in the use of professional gamblers.

197 I come next to the Police Reports which Ken and Sally made between October to November 2014 as mentioned in the MJ (at [19] above). There were two police reports. The first was by way of a letter dated 1 October 2014 from KhattarWong LLP, acting for Ken and Sally, to the Commercial Affairs Department. The second was a report made by Ken on 6 November 2014 to the police. Both reports refer to Dato' Sri Dr Ong Kean Swan and Dato' Dr Ong Tong Swan, *ie*, Peter and Philip respectively.

198 The MJ states (at [123] above) that the Police Reports are independent evidence for drawing the inference that Ken and Sally knew that the Scheme was fraudulent because they did not produce screenshots from conversations with Peter and Philip to the police even though they still had the Missing Messages at that time. There was also no good explanation from Ken as to why the Police Reports did not say that they wanted to recover HK$201m in earnings. Accordingly, the MJ accepted Sandra's argument that the Police Reports were lodged as "a façade in the hope that it would convince the investors that they too were victims of the Scheme". In short, this is not how victims of a fraud who claimed to have lost millions of dollars and who by then were aware of the fraudulent nature of the Scheme would have behaved.

199 However, in my view, that is precisely the point. If Ken and Sally were bedfellows with Philip and Peter in the Scheme as the MJ has found and were as cunning as Sandra is suggesting, and the Police Reports were a façade, the reports would have contained more direct and forceful accusations against Philip and Peter. The fact is that while Ken and Sally were not victims in the true sense of the word because they had in fact made money from the Scheme, they had also "lost" money because their reinvestments came to nought. Thus, it is not a straightforward binary situation, *ie,* they were either victims or were fraudsters. The situation is more nuanced. In any event, the first police report did mention that Ken and Sally were victims of an "elaborate scam" and that Peter and Philip had disappeared with their money. It also mentions that there were over 1,500 people in Singapore who could have signed up for the Scheme.

200 I also note that Ken and Sally could not take legal action against Philip and Peter because they in fact made money from the Scheme even if they were frustrated at the loss of their reinvestments.

201 I do not consider the omission to provide screenshots of conversations with Philip and Peter in the Police Reports to be material. The involvement of Ken and Sally in the Scheme was not in issue then and there is no evidence that the police asked for more evidence.

202 As for the omission in the Police Reports to seek recovery of HK$201m, this does not paint an accurate picture. Even though neither of the Police Reports mentioned specifically the figure of HK$201m, the figure of HK$201m was not necessarily Ken's loss. That was simply an exaggeration of Ken's gain in the marketing materials. The estimated loss was $10.5m and the second police report did say that Ken was hoping to recover his money.

203 I note also that the second police report mentioned that Ken dealt directly with Peter and Philip (whose names are Dato' Sri Dr Ong Kean Swan and Dato' Dr Ong Tong Swan respectively). If Ken was as cunning as portrayed by Sandra, it is unlikely that he would have mentioned this as it could be used against him, as is being done by Sandra to suggest that he was in cahoots with them. I add that any direct contact is not enough to suggest that Ken and Sally were in the inner circle to the extent that they knew that the Scheme was fraudulent.

204 In summary, I do not think that the Police Reports are unequivocal evidence of complicity by Ken and Sally in the fraud.

205 Next, I come to the 2018 Macau Meeting, which Sandra raises to suggest that Ken and Sally were in on the scam with Peter and Philip. I agree that on the one hand, logically, Ken and Sally should not want to have anything to do with Peter and Philip after the Scheme collapsed. They should have demanded an explanation. On the other hand, they were hoping that Peter and Philip would

make good their reinvestments. They also did not join any new scheme started by Peter and Philip in the end. As is consistent with the police report dated 6 November 2014 where Ken stated that it was lodged "in a hope to recover [his] mon[eys]", and from Ken and Sally's evidence at the trial (see [122] above), their concern was to recover the moneys which they had reinvested and not so much that a fraud had been perpetuated. While the MJ concludes that the Police Reports were a façade, I think that the evidence is equivocal at best. The reports could also be genuine and indicate that their concern was about getting their money back and not about bringing Peter and Philip to justice.

206 Furthermore, if indeed Ken and Sally were bedfellows with Philip and Peter in the Scheme, as the MJ concludes, there would be no reason for Ken and Sally to go to Macau to meet Peter. They would already have known that Philip and Peter would not grant them any relief and would have distanced themselves from Philip and Peter. In addition, they would have avoided being captured in photographs with Peter holding cash as that might have suggested a close link with Peter as Sandra now advocates. This was not the conduct of cunning fraudsters.

207 I add that Ken and Sally were not the only ones who went to Macau to meet Peter. One of the photographs show a group of ten persons while another shows a group of 20 persons (excluding two who were holding up a banner) (see [120] above). Who were these persons? What was their involvement? Sandra did not seek to establish from Ken and Sally their identities and why these persons were there. The presence of these others does not support any suggestion that Ken and Sally were part of a small group of fraudsters.

208 Therefore, while one might consider that Ken and Sally should have been more robust with Peter to claim their losses if they were indeed victims,

one should also recall that, on the other hand, they had made money from the Scheme. Hence, a less robust approach was not necessarily damning. I am of the view that the 2018 Macau Meeting is not unequivocal evidence of their complicity.

209 Therefore, up to this point and without relying on the Missing Messages to draw an adverse inference, the evidence in favour of Sandra's case falls far short of establishing actual knowledge on the part of Ken and Sally.

An adverse inference as to actual knowledge should not be drawn

210 With this in mind, I come to the Missing Messages. From the foregoing, I am of the view that Sandra is attempting to use the Missing Messages not to strengthen a case of actual knowledge that has been made out to the requisite burden of proof, but to fill an important gap in the evidence. While I agree that no good reason was provided for the inability to produce the Missing Messages and I do not condone this omission, I am of the view that an adverse inference should not be used where there is no case to answer on an issue based on other evidence. It is not meant to be a mechanism to shore up glaring deficiencies in a party's case, which on its own is unable to meet the requisite burden of proof (see *Tribune Investment* at [50]). There must first be a case to answer on that issue which is then strengthened by the drawing of the inference (see *Sudha Natrajan* at [20(c)]).

211 Furthermore, even if an adverse inference were to be drawn from the Missing Messages, what is the fair inference to draw? It is one thing to say that it may be generally inferred that the Missing Messages would be adverse to Ken and Sally's defence, but what exactly is the conclusion to be reached by this court? There are various permutations available. On one interpretation, it may

be inferred that Ken and Sally had actual knowledge of the Scheme's falsity. On another reading, it may also well be that Ken and Sally were reckless, or even simply negligent. The independent evidence that the MJ relies on, which relates to the Police Reports and the 2018 Macau Meeting (see [120]–[124] above), does not point in favour of the most damning inference. In other words, there is no case to answer at all and therefore the court should not draw the most damning inference against them.

212 The second difficulty with drawing an adverse inference is determining the point in time at which Ken and Sally allegedly found out that the Scheme was false. Sandra's investments were made in three Tranches at different times, and whether Ken and Sally knew that the Scheme was fraudulent from the get-go before Sandra invested the First Tranche, or whether they only found out about it subsequently, is material to the question of their liability to Sandra in respect of each Tranche. In this regard, the MJ says that Ken and Sally "knew that the Scheme was false by the time they first made the Safe and Profitable Representation to Sandra, *ie*, before the First Tranche" (see [112] above). However, the reasons relied on by the MJ do not show that Ken and Sally knew of the Scheme's falsity even before the First Tranche. While the MJ relies on the Police Reports and the 2018 Macau Meeting, those are equivocal at best as to whether actual knowledge is made out. More importantly, such evidence does not say anything about *when* Ken and Sally became bedfellows with Peter and Philip in the Scheme, bearing in mind that they were not involved in the Scheme from its inception. It is convenient for Sandra to suggest that any actual knowledge on Ken and Sally's part must have been before the First Tranche, but convenience is no substitute for concrete evidence.

Ken and Sally were also not reckless

213 I turn to Sandra's allegation that Ken and Sally were reckless, which is the second aspect of fraud as enunciated in *Derry* ([67] *supra*). It is clear that the Statement of Claim, while mentioning recklessness, does not specify how Ken and Sally were reckless. Sandra simply pleaded that Ken and Sally made the alleged representations "recklessly not caring whether they were true or false". The failure to particularise the allegation of recklessness is, in my view, fatal to Sandra's case.

214 In *Kim Hok Yung*, the statement of claim in question was framed similarly to the Statement of Claim in the present case, as follows (at [5]):

> 7 All the representations to the first plaintiff were made by the defendants, their aforementioned servants and/or agents:
>
> (a) knowing that they were false,
>
> (b) without any belief in their truth,
>
> (c) recklessly, without care as to whether they were true or false.

The High Court found that the allegation of fraud was insufficiently particularised as "details of the alleged fraudulent intent must be provided" so as to give the defendants a fair chance of refuting that element (see *Kim Hok Yung* at [5]–[6]). This is equally true for the Statement of Claim in the present case.

215 Notwithstanding Sandra's failure to particularise her allegation of recklessness, the MJ is of the view that the respondents knew the case that they had to meet and were not deprived of the opportunity to adduce the relevant evidence (see [133] above). They point to some instances at the trial when Ken and Sally were asked if they cared about the truth of their representations, and

say that "Ken and Sally's responses at the trial provide a strong basis for [them] to conclude that they were content to parrot whatever statements they were told, including the Safe and Profitable Representation, without any proper evidential basis and without care about whether such statements were true" (at [136] above). However, while it is true that Ken and Sally were asked questions during cross-examination about their representation, they were not asked questions about the specific steps they should have taken to reassure themselves of the legitimacy of the Scheme.

216 I am not persuaded that the evidence in totality shows that Ken and Sally did not care whether the Scheme was genuine. Besides satisfying themselves of the viability of the gambling methods, Ken and Sally saw images of cheques representing purported winnings. True, they did not inquire further about the genuineness of all the cheques shown and whether there were in fact professional gamblers at work, but neither did other investors including Sandra or any other high earner. It was also not put to Ken and Sally that they should have inquired more about the cheques or the existence of professional gamblers. The main feature to Ken and Sally, as well as to Sandra, was whether the Scheme's purported winning methods worked. This much is evident from Ken's testimony in his 5th Affidavit dated 5 May 2020, where he stated that after attending a class on the 99.8% method, he, Sally, and Sebastian "were convinced that the 99.8% formula had been proven", and that "even accountants who attended subsequent classes could not disprove the formula". It was not challenged that Ken and Sally "saw immediate returns from [their] investments in SureWin4U, in the form of regular increases in [their Yingbi] balance as stated on SureWin4U's website, and [they] were able to cash out substantial amounts of [Yingbi]". It was also not challenged that "many of [their] downlines were able to cash out substantial amounts of [Yingbi]". While Ken and Sally

might have been gullible, I do not regard their account of why they believed in the gambling methods as being so unreasonable that it clearly shows an absence of honest belief in whether the Scheme's gambling methods were genuine or in the legitimacy of the Scheme.

The other claims in conspiracy and negligent misrepresentation are also not made out

217 Both claims mounted on the US Property Representation and the Share Investment Representation are premised on actual knowledge that the Scheme was false or recklessness as to its legitimacy (see [50]–[51] above). As I do not think that actual knowledge or recklessness are made out, this finding disposes of those claims. The same can be said for the claims in unlawful and lawful means conspiracy. In addition, I agree with the views expressed in the MJ that the claim based on the US Property Representation is insufficiently particularised (see [162] above) and that the Hong Kong No 1 Representation is not actionable (see [168] above).

218 In this regard, it is also undisputed that Ken and Sally also purchased the packages associated with these two representations. I make the same point that if they knew that the Scheme was false, they would not have purchased such packages.

219 It leaves me to deal with the claim for negligent misrepresentation. Sandra submits that there was sufficient legal proximity to warrant the imposition of a duty of care on Ken, Sally and Sebastian. According to Sandra, given the Scheme's unorthodox *modus operandi*, it was reasonably foreseeable that Sandra would rely on their representation of the Scheme's safety and proximity. Furthermore, while Sally testified that she did not have to help

Sandra, she took steps to do so and actively encouraged her to invest vast amounts into the Scheme.

220 I disagree with that submission. In this regard, it is trite that a two-stage test guides the court's assessment of whether a duty of care exists. The first relates to the question of legal proximity and, if the first stage is answered in the positive, the second stage looks to policy considerations to determine whether this duty should be negated. These two stages are together preceded by the threshold question of factual foreseeability. An incremental approach is to be adopted, which means that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations, although the absence of a factual precedent does not prevent the imposition of a duty of care if it is fair and just to do so (see the Court of Appeal decision of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73] and [83]).

221 In the present case, the threshold question of factual foreseeability is an easy one to surmount. It cannot be seriously disputed that if Ken, Sally and/or Sebastian were negligent in their statements to Sally as to the Scheme's safety and profitability, it would be reasonably foreseeable that Sandra would suffer loss.

222 However, Sandra's claim for negligent misrepresentation fails for the absence of legal proximity on the part of Ken, Sally and/or Sebastian vis-à-vis Sandra. In her Appellant's Case, Sandra points to the High Court decision of *Zillion Global Ltd and another v Deutsche Bank AG, Singapore Branch* [2020] 4 SLR 425 ("*Zillion Global*") in support of her position that legal proximity is established because Ken and Sally knew far more than Sandra about the Scheme and thus knew how vulnerable Sandra would be by investing significant sums

into the Scheme. Sandra was also enamoured with Ken and Sally, which gave them a significant say over how much Sandra was investing into the Scheme. A further point which Sandra makes is that Ken and Sally voluntarily assumed responsibility for her by creating the Dream Group Chat (see [53] above) and by taking her directly under their wing when they had no obligation to do so. As Sandra was entirely reliant on them for advice, a duty of care must have arisen in those circumstances.

223 On the other hand, the respondents contend that Sandra was convinced of the 99.8% and 100% methods and was confident in her ability to exercise them to make money. They invite this court to affirm the Judge's finding that "[e]ach participant was invited to see and evaluate SureWin4U's gambling methods for themselves" (see the Judgment at [194]), and to also find that Sandra has not sufficiently particularised the alleged breach of duties in her Statement of Claim. They aver that Sandra was familiar with the way that the Scheme operated and further point to the absence of any evidence that Sandra had ever questioned whether any due diligence or valuation of the properties purported offered under the US Property Package had been undertaken, the details of the company to be acquired under the Share Investment Package, or information of her standing within the Scheme.

224 It suffices to briefly recount the applicable principles. As the High Court summarised in *Zillion Global* (at [126]), the inquiry of legal proximity takes into account the following considerations as articulated by the Court of Appeal in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 2 SLR 588 ("*NTUC Foodfare*"):

> (a) Proximity includes physical, circumstantial and causal proximity, and incorporates the twin criteria of voluntary assumption of

responsibility by the defendant and reliance by the plaintiff (see *NTUC Foodfare* at [40(a)]);

(b) Other proximity factors include (see *NTUC Foodfare* at [40(b)]):

(i) the defendant's knowledge in relation to the plaintiff of the risk of harm, or of reliance by the plaintiff, or of the vulnerability of the plaintiff; and

(ii) the defendant's control over the situation giving rise to the risk of harm and the plaintiff's corresponding liability.

(c) In cases of pure economic loss, there may be sufficient legal proximity between the parties even if the defendant does not voluntarily assume responsibility to the plaintiff and the plaintiff does not specifically rely on the defendant not to cause it loss (see *NTUC Foodfare* at [41]).

225 While Sandra attempts to analogise the present case to *Zillion Global*, I am not convinced that the comparison is apt. In *Zillion Global*, legal proximity was established as the defendant bank gave advice on wealth management to the plaintiffs and made recommendations to the plaintiffs regularly through its relationship manager and a team of experts, which comprised at least ten product specialists in various types of investments (at [128]–[129]). The plaintiffs were also found to have relied on the defendant bank to give such advice with reasonable care and skill (at [134]). In this context, the court found that there was an advisory relationship between the defendant bank and the plaintiffs that went *beyond the normal role of a salesperson* in the private banking context introducing products (at [131]). Indeed, the Court of Appeal in

Chang Tse Wen affirmed (at [43]) that this is one factor which may have a bearing on the question of legal proximity.

226 On the present facts before me, I do not see how Ken, Sally or Sebastian could be said to have assumed any advisory role beyond that of salespersons. They were not the founders of the Scheme. They did not run the Scheme. It is also telling that Sandra does not allege that Ken and Sally personally guaranteed the accuracy of their representation that the gambling methods were safe and profitable. Instead, even on Sandra's own evidence, they merely conveyed to her that, if the winning formulas could not be proven, it was "*SureWin4U* [which] would refund the investments" [emphasis added]. At best, it may be said that Ken, Sally, and Sebastian marketed the Scheme along with its money-back guarantee.

227 Moreover, as explained earlier (at [187] above), Sandra did not rely on the Safe and Profitable Representation given that she tried out the methods for herself, made money, and was even prepared to make guarantees towards others. She could not be said to be a vulnerable investor who was significantly reliant on Ken, Sally and/or Sebastian. It is also important to bear in mind that at no time prior to the commencement of legal action did Sandra allege that she had relied on any representation from Ken and Sally. Taken in totality, I do not think that the facts are such as to warrant the imposition of a duty of care. Given this, the inquiry of whether Ken, Sally and/or Sebastian are liable to Sandra for negligent misrepresentation stops here.

Conclusion

228 While it is unfortunate that Sandra lost a fortune from her investments in the Scheme, this does not mean that the respondents should be liable for her

losses. Ken, Sally and Sebestian were fellow investors who joined the Scheme earlier and who had more time to reap its profits before the Scheme's eventual demise. While they were used by the Scheme's founders to market the Scheme, this in itself was hardly surprising given the nature of the Scheme's multi-level marketing model. It does not follow, however, that they were fraudulent or owed those potential investors a duty of care. I would dismiss the appeal.

Woo Bih Li
Judge of the Appellate Division

Lok Vi Ming *SC*, Lee Sien Liang Joseph, Muk Chen Yeen Jonathan, Qabir Singh Sandhu and Clara Lim Ai Ling (LVM Law Chambers LLC) for the appellant;
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