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

[2025] SGHC 14

Suit No 1046 of 2020

Between

Vibrant Group Limited

… *Claimant*

And

(1) Tong Chi Ho
(2) Peng Yuguo
(3) Findex (Aust) Pty Ltd

… *Defendants*

JUDGMENT

[Civil Procedure — No case to answer]
[Tort — Misrepresentation — Fraud and deceit —Whether representation originated from defendant — Whether representation can be transmitted through third party]

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Vibrant Group Ltd
v
Tong Chi Ho and others

[2025] SGHC 14

General Division of the High Court — Suit No 1046 of 2020
Valerie Thean J
20−23, 27−29 August, 3, 10 September, 21 October 2024

27 January 2025 Judgment reserved.

Valerie Thean J:

Introduction

1 The plaintiff, Vibrant Group Limited ("Vibrant"), a company incorporated under the laws of Singapore and listed on the Singapore Exchange ("SGX"),[1] acquired Blackgold International Holdings Pty Ltd ("Blackgold Australia") and its group of companies under a scheme of arrangement on 13 July 2017 for a purchase price of A$ 37,635,863 (the "Acquisition").[2]

2 Blackgold Australia is the ultimate holding company of a group of companies (collectively, the "Blackgold Group"). Blackgold Australia is the sole shareholder of Blackgold Holdings Hong Kong Limited ("Blackgold HK").

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1 Bundle of Affidavits of Evidence in Chief Vol 1 ("1 BA") at 6, AEIC of Mr Khua Kian Keong at paras 1 and 5.

2 1 BA at 6, AEIC of Mr Khua Kian Keong ("Eric Khua") at para 3.

In turn, Blackgold HK wholly owns Chongqing Heijin Industrial Co., Ltd ("Heijin"), a company incorporated in the People's Republic of China ("PRC").[3]

3 Heijin is itself the parent company of various companies incorporated in the PRC. These PRC subsidiary companies (the "PRC Subsidiaries") were in the business of coal mining, coal trading and/or commodities logistics in Chongqing and include the following:[4]

(a) Chongqing Caotang Coal Mine Resources Development Co., Ltd ("Caotang");

(b) Chongqing Guoping Heiwan Coal Mine Resources Development Co., Ltd ("Heiwan");

(c) Qijiang Changhong Coal Industry Co., Ltd ("Changhong");

(d) Chongqing Baolong Mining Co., Ltd ("Baolong"); and

(e) Chongqing Guoping Shipping Transportation Co., Ltd ("Blackgold Shipping").

4 Caotang, Heiwan, Changhong and Baolong (collectively, the "Coal Mining Entities") were part of the Blackgold Group's coal mining arm, with each Coal Mining Entity owning one coal mine. Heijin was in the business of coal trading, while Blackgold Shipping was said to be in the business of commodities logistics and shipping.[5]

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3 1 BA at 8, AEIC of Eric Khua at para 10.

4 1 BA at 8, AEIC of Eric Khua at para 11.

5 1 BA at 9–10, AEIC of Eric Khua at para 13.

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5 In the course of its annual audit of Vibrant's financial statements for the year ending on 30 April 2018, Vibrant's auditors, KPMG LLP ("KPMG Singapore") found irregularities and recommended to Vibrant's Audit Committee that further investigations be carried out to ascertain the existence, accuracy, and completeness of the assets and liabilities acquired by Vibrant in its acquisition of Blackgold Australia.[6]

6 This suit arises out of the investigation that ensued. Vibrant brings alternative claims in deceit and negligent misrepresentation against the first defendant, Mr Tong Chi Ho ("Mr Tong"), who was at the material time the Chairman of Blackgold Australia, and the second defendant, Mr Peng Yuguo ("Mr Peng"), who was at the material time the Executive Director and Chief Executive Officer ("CEO") of Blackgold Australia.[7] Initially, Vibrant sued only Mr Tong and Mr Peng (collectively, "the Defendants").[8] It then added Findex (Aust) Pty Ltd ("Findex"), the Australian auditors who prepared Blackgold Australia's audited financial statements, as a third defendant to its action.[9] Findex successfully set aside the order granting Vibrant leave to serve its Writ of Summons and Statement of Claim (Amendment No 1) on Findex in Australia (see *Vibrant Group Ltd v Tong Chi Ho and others* [2022] SGHC 256).

7 At trial, neither Mr Tong nor Mr Peng gave evidence. After considering the evidence and arguments, I am of the view that Vibrant's claim in deceit is made out. My reasons follow.

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6 1 BA at 37, AEIC of Eric Khua at para 62.

7 1 BA at 7, AEIC of Eric Khua at paras 6−7.

8 Statement of Claim dated 30 October 2020.

9 HC/SUM 5329/2021, Statement of Claim (Amendment No 1) dated 3 December 2021.

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Background

8 Blackgold Australia was incorporated on 8 July 2010 and was listed on the Australian Securities Exchange through an initial public offering ("IPO") on 22 February 2011.[10] At Blackgold Australia's IPO, Vibrant subscribed for 38.5m shares for a price of A$ 10.1m, through a wholly owned subsidiary.[11]

Acquisition of Blackgold Australia

9 In early 2014, Mr Tong approached the CEO of Vibrant, Mr Khua Kian Keong ("Mr Khua"), regarding the prospect of Vibrant fully acquiring Blackgold Australia.[12] Negotiations were also ongoing at the time with another party, Matex International Limited, which subsequently announced on 1 April 2016 that it was no longer pursuing its proposed acquisition of Vibrant (the "Proposed Matex Sale").[13]

10 Vibrant thereafter commenced its evaluation of the proposed acquisition of Blackgold Australia (the "Review Process"),[14] which lasted from August to October 2016. Vibrant's Finance Team (the "Finance Team") which assisted this review comprised then-Chief Financial Officer ("CFO") of Vibrant, Mr Simon Sim ("Mr Sim"), Mr John Lim, and Mr Yong Kar Ming ("Mr Yong").[15]

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10 Chronology of Events for HC/S 1046/2020 dated 6 September 2024 ("Chronology") at S/Ns 8 and 9.

11 Chronology at S/N 10.

12 Chronology at S/N 11; 1 BA at 15, AEIC of Eric Khua at para 22.

13 Chronology at S/Ns 12 and 15; 1 BA at 16, AEIC of Eric Khua at para 26.

14 Chronology at S/N 16; 1 BA at 19, AEIC of Eric Khua at para 32.

15 3 BA at 6–7; AEIC of Mr Yong Kar Ming ("Yong") at para 5.

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11 On 9 September 2016, Mr Tong and Mr Tin visited Vibrant's office in Singapore[16] to give a presentation regarding the Blackgold Group to some of Vibrant's executives (the material used is referred to in the Statement of Claim and here as the "Corporate Presentation"), including Mr Sim and the then-Chief Investment Officer of Vibrant, Mr Thomas Woo. The Corporate Presentation set out information on the Blackgold Group's purported coal mining assets and business operations.[17]

12 On 10, 15 and 21 September 2016, Mr Tin provided the Finance Team with various financial documents, by way of a thumb drive and emails.[18] These financial documents comprised the following (referred to in para 21(f) of the Statement of Claim as the "Blackgold Financial Documents"):[19]

(a) the management accounts of the respective entities of the Blackgold Group up to July 2016 (including the ageing reports of the respective Blackgold Group entities for the half year ended on 30 April 2016), which were provided to Vibrant's Finance Team on 21 September 2016;

(b) the consolidated management accounts of the Blackgold Group for the financial years of 2015 and first half of 2016 (collectively with (a) above, the "Management Accounts"), which were provided to Vibrant's Finance Team on 15 September 2016;

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16 3 BA at 10, AEIC of Yong at para 13.

17 3 BA at 11, AEIC of Yong at para 17; 5 BA at 20, AEIC of Tin at para 36(d).

18 3 BA at 13−14, AEIC of Yong at paras 19−20; 5 BA at 19–20, AEIC of Tin at paras 36(a)−(b).

19 5 BA at 19−21, AEIC of Tin at para 36.

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(c) the audited financial reports of Blackgold Australia for the financial years ended in 2013, 2014 and 2015 (the "Audited Financial Reports"), which were provided to Vibrant's Finance Team on 15 September 2016 through a thumb drive (the "15 September Thumb Drive");

(d) the Corporate Presentation, which was sent by email to Vibrant's Finance Team on 10 September 2016; and

(e) a business plan for Blackgold Shipping comprising, amongst others, an explanation of Blackgold Shipping's business and operations, analysis of China's inland shipping and freight industry and shipping policy, and Blackgold Shipping's development plans (the "Shipping Business Plan") provided to Vibrant's Finance Team on 15 September 2016 via the 15 September 2016 Thumb Drive. A similar copy with formatting changes was sent on 26 September 2016.

13 The Finance Team then travelled to the Blackgold Group's headquarters in Chongqing from 19 to 22 September 2016 to collect information and documents (the "Pre-Acquisition Chongqing Trip"), and also meet with Mr Tong, Mr Peng, and other key members of Blackgold Group's management.[20] During the Pre-Acquisition Chongqing Trip, Mr Peng and Mr Tong suggested that some members of the Finance Team visit the coal mines purportedly owned by Caotang and Heiwan (the "Mines Visit"). The Mines Visit was organised by Mr Peng's personal assistant, Ms Tian Zongling ("Ms Tian"). Mr Sim, Mr John Lim, Yao Wenming (the Chief Geologist and Engineer of the Blackgold Group), Brian Varndell (an external geologist), and

[20] 3 BA at 17, AEIC of Yong at para 29.

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Mr Tin attended the Mines Visit.[21] While Vibrant contends in this suit that these mines were closed at the time of the Mines Visit, those who attended were given the impression that the mines were operational at the time, with mine workers seen transporting coal out of the mines in wheelbarrows.[22] Photographs were taken.[23]

14 On the same trip, the Finance Team also met with and interviewed the management of the Blackgold Group, including Mr Tong, Mr Peng, Mr Tin, and one Chen Shaokui ("Mr Chen").[24] Mr Chen was Blackgold Group's then-Head of Finance and Accounts.[25] The delineation of roles between Mr Tin, as the CFO of the Blackgold Group, and Mr Chen, as the Head of Finance and Accounts, was that Mr Chen would manage the day-to-day accounting and book-keeping functions of the Blackgold Group, while Mr Tin's focus, as the CFO, was on corporate transactions.[26] A copy of the Blackgold Group's ten largest suppliers and customers ("Top Customer List") was also provided to Vibrant's Finance Team during this trip.[27]

15 On 22 September 2016, the Finance Team met Mr Tong, Mr Chen, Mr Peng, Mr Peng's personal assistant, and Blackgold Group's then-General Manager, Mr Ou Jun, who was also Mr Peng's brother-in-law (the "22 September Meeting"). Further representations were allegedly made at the

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21 5 BA at 22, AEIC of Tin at paras 41−42.

22 5 BA at 22−23, AEIC of Tin at para 43.

23 4 BA at 690.

24 5 BA at 23, AEIC of Tin at para 44.

25 5 BA at 9, AEIC of Tin at para 13.

26 5 BA at 10, AEIC of Tin at para 15.

27 5 BA at 21, AEIC of Tin at para 37.

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22 September Meeting, and a copy of the minutes of the meeting (the "22 September Meeting Minutes") were subsequently circulated by Mr Tin to the attendees.

16 Following the Review Process, the Finance Team reviewed and summarised the information and documents with which it had been provided with during the Review Process. Based on the said information and documents, it prepared and issued an internal report dated 10 October 2016 (the "Financial Review Report"). The Financial Review Report was provided to Vibrant's Board of Directors.

17 In addition, in early 2017, Vibrant was informed that the audited interim financial report of Blackgold Australia for the half year ended on 30 April 2016 and the audited financial report of Blackgold Australia for the financial year ended on 31 October 2016, were publicly available for download via the Australian Stock Exchange website.[28]

18 Vibrant completed the Acquisition on 13 July 2017.[29] At the time of the Acquisition, Mr Tong owned around 5.7% of the shares of Blackgold Australia, while Mr Peng owned, through another entity, approximately 61.3% of the shares of Blackgold Australia.[30]

Events following the Acquisition

19 Sometime in May 2018, Vibrant's auditors, KPMG Singapore commenced its annual audit of Vibrant's financial statements for the year

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28 5 BA at 21, AEIC of Tin at para 38.

29 1 BA at 26−28, AEIC of Eric Khua at para 42.

30 1 BA at 11, AEIC of Eric Khua at para 17.

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ending on 30 April 2018.[31] KPMG Singapore informed Vibrant in June 2018 that it was unable to complete the audit as it had identified certain irregularities and discrepancies in respect of coal mining and coal trading receipts and sales invoices of some of the PRC Subsidiaries (the "Irregularities").[32] KPMG Singapore recommended that additional procedures be carried out to ascertain the existence, accuracy, and completeness of the assets and liabilities acquired by Vibrant in the Acquisition.[33]

20 Following this, Mr Khua verbally instructed Mr Peng to retain and preserve all the files, records and documents in the Blackgold Group's headquarters in Chongqing, to be reviewed and examined by Vibrant's staff and appointed auditors.[34]

21 Mr Tin travelled to Chongqing on 19 June 2018.[35] On 20 June 2018, he met Mr Peng and Mr Chen at the Blackgold Group's office in Chongqing to discuss the Irregularities (the "First Chongqing Meeting").[36] It is disputed whether Mr Tong was present at this meeting.[37] The significance of this meeting is that Mr Peng and Mr Chen allegedly made some admissions. The attendees acknowledged the presence of fabrications in the financial information and concluded that the only way to ascertain the extent of the fabrication in the

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31 1 BA at 36, AEIC of Eric Khua at para 60.

32 1 BA at 36−37, AEIC of Eric Khua at para 61.

33 1 BA at 37, AEIC of Eric Khua at para 62.

34 1 BA at 38, AEIC of Eric Khua at para 64.

35 5 BA at 28, AEIC of Tin at para 57.

36 5 BA at 29, AEIC of Tin at para 60.

37 1st Defendant's Closing Submissions dated 1 October 2024 at para 24.

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financial information was to revise the same by removing the fraudulent transactions (the "Clean-Up Exercise").[38]

22 On 22 June 2018, Mr Peng instructed Mr Chen to work on the Clean-Up Exercise. The finance staff of the Blackgold Group performed the Clean-Up Exercise over the next few weeks by manually keying in transaction information arising from hard copy supporting documents into the XinZhongDa accounting system used by Blackgold Group.[39] While this was ongoing, Mr Chen periodically sent Mr Tin, in multiple tranches, revised financial information for various entities in the Blackgold Group arising from the Clean-Up Exercise.[40] Eventually, Mr Tin compiled the revised financial information into a set of revised management accounts as of 30 June 2017 and 30 April 2018 (the "Revised Management Accounts"), which he sent to KPMG Huazhen.[41]

23 On 20 July 2018, Mr Khua and a member of the Finance Team, Mr Yong, travelled to Chongqing.[42] Mr Khua, Mr Sim, Mr Peng and Mr Tin met at Blackgold's Chongqing office (the "Second Chongqing Meeting").[43] An audio recording of the meeting was (surreptitiously) made by Mr Tin. Mr Peng is alleged to have made various admissions in the Second Chongqing Meeting.

24 Later that same day, Mr Khua and Mr Tin met Mr Chen at the same office ("Third Chongqing Meeting", and collectively with the Second

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38 5 BA at 29−30, AEIC of Tin at para 60.

39 5 BA at 32, AEIC of Tin at para 67.

40 5 BA at 31−33, AEIC of Tin at paras 64−71.

41 5 BA at 43, AEIC of Tin at para 105.

42 1 BA at 38, AEIC of Eric Khua at para 65.

43 5 BA at 35, AEIC of Tin at para 79.

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Chongqing Meeting, the "Recorded Chongqing Meetings").[44] Mr Peng later joined the meeting.[45] Like before, Mr Tin surreptitiously recorded this meeting and Mr Peng is alleged to have made various admissions at this meeting.

25 Finally, on 25 July 2018, Mr Peng, Mr Tong, Mr Chen, one Liu Haiming ("Mr Liu"), Mr Tin and Mr Yong met in Mr Peng's office.[46] During the course of this meeting (the "Extended Clean-Up Exercise Discussion"), Mr Peng suggested a new, total clean-up exercise of the accounts (the "Extended Clean-Up Exercise").[47] Mr Peng assigned Mr Liu to be in charge of the Extended Clean-Up Exercise.[48] Mr Liu said that he would lead the Extended Clean-Up Exercise from Fengjie county, where Mr Peng was previously a government official,[49] and that some of the financial documents in Chongqing would be moved to Fengjie county for this purpose.[50] When Mr Liu asked for two weeks to complete the Extended Clean-Up Exercise, Mr Tin and Yong disclosed the fact that a Special Audit was imminent to explain why two weeks was too long.[51]

26 Mr Khua had in the meantime returned to Singapore. When he discovered on 26 July 2018 that the documents were going to be moved to Fengjie county, he instructed that the documents should not be moved out of

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44 5 BA at 36, AEIC of Tin at para 82.

45 5 BA at 36, AEIC of Tin at para 84.

46 3 BA at 25, AEIC of Yong at para 53; 4 BA at 707.

47 5 BA at 36, AEIC of Tin at para 85; 3 BA at 26, AEIC of Yong at para 53.

48 5 BA at 37, AEIC of Tin at para 85.

49 5 BA at 16, AEIC of Tin at para 30.

50 5 BA at 37−38, AEIC of Tin at para 88.

51 5 BA at 37−38, AEIC of Tin at para 88.

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Chongqing city.[52] Mr Tin tried to stop the movement of documents, but Mr Liu said that the documents were already on the way to Fengjie county. Mr Liu agreed to return the documents upon being pressed.[53]

27 Despite various excuses and assurances by Mr Peng and Mr Chen, the documents were not returned.[54] For more than a week, Mr Tin repeatedly sought but received no answers from various Blackgold personnel. Finally, on the morning of 9 August 2018, Mr Chen informed Mr Tin that he would arrange for the books and records to be transported to Chongqing City on the same day.[55] At 1.11pm on the same day, Mr Chen sent Mr Tin a photo via WeChat, which showed that the books and records had been loaded onto a Honda Odyssey to be transported to Chongqing.[56]

28 Later in the afternoon of the same day, Mr Tin was informed by Chen that the motor vehicle transporting the books and records had caught fire and had been destroyed (the "Fire Incident").[57] Mr Chen confirmed on 10 August 2018 that all the physical books and records of Blackgold Group for the past ten years up to April 2018 were destroyed in the fire. Mr Tin proceeded to make a police report in Fengjie county.[58]

29 On 16 August 2018, the Fengjie County Public Security Bureau issued a report which stated that the fire could have been caused by a mechanical

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52 5 BA at 38, AEIC of Tin at para 89.

53 5 BA at 38, AEIC of Tin at para 89.

54 5 BA at 38−39, AEIC of Tin at para 90–92.

55 5 BA at 41, AEIC of Tin at para 98.

56 5 BA at 41−42, AEIC of Tin at para 98.

57 5 BA at 42, AEIC of Tin at para 99.

58 5 BA at 42, AEIC of Tin at para 100.

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failure of the motor vehicle.[59] However, on 5 December 2018, the Chongqing Fire Bureau (at the provincial level) issued a Decision on the Fire Re-investigation, revoking the decision previously made by the Fengjie County Public Security Bureau, and stating that "the cause of the fire is found to be incorrect".[60]

30 On 21 August 2018, Vibrant's Audit Committee appointed a Special Auditor to conduct a Special Audit. The Special Audit Report was issued on 24 January 2019.[61]

Issues

31 As a preliminary matter, I first consider the implications of the Defendants' failure to give evidence.

Absence of evidence from defendants

32 Neither Mr Tong nor Mr Peng gave evidence. Mr Tong submitted that there was no case to answer at the end of the claimant's case. Mr Peng did not testify nor call witnesses to testify on his behalf.

33 Regarding Mr Peng, he first applied, in HC/SUM 1474/2024 ("SUM 1474"), to give evidence by way of video-link from China, pursuant to s 62A(1)(*c*) of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act"). In that application, he put forward two main reasons: first, that his poor medical condition prevented him from travelling long distances, and second, that he had

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59 5 BA at 42, AEIC of Tin at para 102.

60 5 BA at 43, AEIC of Tin at para 103.

61 1 BA at 41, AEIC of Khua at para 71.

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been placed under an expenditure restriction by the Wuhan Maritime Court (the "Expenditure Restriction Order").[62]

34 I dismissed SUM 1474 on 8 July 2024. First, Mr Peng's affidavit did not adduce sufficient evidence of his medical condition. Second, the Expenditure Restriction Order provided that Mr Peng could apply to the Wuhan Maritime Court for an exception if it was "necessary for life and work". There was no evidence that he had sought and been refused such approval.[63]

Legal effect of the absence of evidence from the Defendants

35 The parties did not dispute that the evidential rules set out in the Court of Appeal case of *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 ("*Ma Hongjin*") apply in the present case. Therefore, it suffices for Vibrant to establish a *prima facie* case on each of the essential elements of the claim.

(a) Under general law, the plaintiff bears the legal burden of proving its case against the defendant in a civil case on a balance of probabilities (at [24]). The legal burden is the burden on the plaintiff to prove the existence of any relevant fact necessary to make out its claim on a balance of probabilities (at [27]). The evidential burden is the responsibility to "contradict, weaken or explain away the evidence that has been led" (at [28]).

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62 2nd Defendant's Written Submissions for the Hearing of HC/SUM 1474/2024 dated 4 July 2024 at paras 7–13.

63 Plaintiff's Written Submissions in HC/SUM 1474/2024 dated 4 July 2024 at paras 12−15.

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(b) A party's establishment of a *prima facie* case on a particular fact on which it bears the legal burden denotes the point at which the evidential burden will shift to the defendant (at [30]).

(c) Where a defendant submits that there is no case to answer, the plaintiff fulfils its burden of proving its case on a balance of probabilities by establishing a *prima facie* case on each of the relevant facts in issue (at [31]−[32]).

36 Relevantly, a *prima facie* case entails the following:

(a) The court assumes that any evidence led by the plaintiff is true, unless it was inherently incredible or out of common sense (*Lena Leowardi v Yap Cheen Soo* [2015] 1 SLR 581 ("*Lena Leowardi*") at [24]).

(b) If circumstantial evidence is relied on, it does not have to give rise to an irresistible inference as long as the desired inference is one of the possible inferences (*Lena Leowardi* at [24]).

(c) The evidence is subjected to a minimal evaluation as opposed to a maximal evaluation. However, if there is no evidence in support of any fact in issue, or any evidence is manifestly unreliable and should be excluded from that score, a submission of no case to answer will succeed (*Relfo Ltd v Bhimji Velji Jadava Varsani* [2008] 4 SLR(R) 657 at [20]).

37 Furthermore, it is undisputed that, while the court would expect relatively stronger and more cogent evidence before reaching a conclusion of

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fraud,[64] the standard of proof does not change merely because fraud is alleged: see *Chua Kwee Chen and others (as Westlake Eating House) and another v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39]; *Syed Ahmad Jamal Alsagoff (administrator of the estates of Shaikah Fitom bte Ghalib bin Omar Al-Bakri and others) and others v Harun bin Syed Hussain Aljunied and others and other suits* [2017] 3 SLR 386 at [50].

Issues for determination

38 The elements of the tort of deceit were set out in the recent Court of Appeal decision of *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 ("*UniCredit*") at [53], citing its previous decision of *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]. These are that:

(a) a representation of fact was made by words or conduct;

(b) the representation was made with the intention that it should be acted on by the plaintiff or a class of persons including the plaintiff;

(c) the plaintiff had acted upon the false statements;

(d) the plaintiff suffered damage by so doing; and

(e) the representation was made with knowledge that it was false, either made wilfully or in the absence of any genuine belief that it was true.

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64 Plaintiff's Closing Submissions dated 3 October 2024 ("PCS") at para 35; 1st Defendant's Closing Submissions dated 1 October 2024 ("1DCS") at para 5; 2nd Defendant's Closing Submissions dated 3 October 2024 at ("2DCS") para 45.

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39 The essence of the tort of deceit is fraud, and this tort vindicates the right not to be lied to (*UniCredit* at [53]). It is not a defence to the tort that the claimants acted incautiously and failed to take steps to verify the truth of the representations which a prudent man would take: see *Panatron* at [24].

40 At trial, the Defendants did not dispute that the representations asserted in the Statement of Claim had in fact been made prior to the acquisition. These representations, which are set out in full in Annex 1, fall into five broad categories.

(a) First, the "Coal Trading Representations", which included representations that the Blackgold Group's coal trading business was profitable and contributed to a significant portion of the Blackgold Group's total revenue.[65]

(b) Second, the "Mining Representations", that the coal mines owned by Caotang and Heiwan were active and would remain so, while Baolong's dormant coal mine was in a position to commence substantial production in due course.[66]

(c) Third, the "Shipping Transportation Representations", that Blackgold Group had a well-established and profitable shipping transportation business operated by Blackgold Shipping.[67]

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65 1 BA at 24, AEIC of Eric Khua at para 39(a).

66 1 BA at 24, AEIC of Eric Khua at para 39(b).

67 1 BA at 24, AEIC of Eric Khua at para 39(c).

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(d) Fourth, the "Receivables Representations", that the Blackgold Group had no significant aged debts due and owing to it, and that the Blackgold Group faced no issues with collection of its receivables.[68]

(e) Fifth, the "Overall Value Representations", that the Blackgold Group ran profitable business operations, had significant growth potential, and was worth significantly more than the Acquisition Price and represented a good investment.[69]

41 The defendants dispute the following:

(a) First, that the representations were made by the Defendants.

(b) Second, that the representations were false.

(c) Third, that the Defendants knew that the representations were false.

(d) Fourth, that the Defendants had made the representations with the intention that they should be acted upon by Vibrant.

(e) Fifth, that Vibrant was thereby induced to make the acquisition.

(f) Finally, the measure of damages that Vibrant is entitled to.

42 For the reasons below, I find on the requisite standard of proof that Vibrant succeeds in its claim for deceit and has proved its loss arising therefrom. It is therefore unnecessary for me to deal with the alternative claim in negligent misrepresentation and I do not do so.

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68 1 BA at 24, AEIC of Eric Khua at para 39(d).

69 1 BA at 24, AEIC of Eric Khua at para 39(e).

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Were the Representations representations of fact?

43 An actionable representation for the purposes of an action in deceit must be a representation of fact (*POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165 ("*POA Recovery*") at [102]) being "a statement of present fact and not one with any element of futurity" (*POA Recovery* at [103], citing *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Raffles Town Club*") at [21]). This makes it vital to differentiate between an actionable representation and a future promise (*Raffles Town Club* at [21]). Furthermore, statements of opinion do not constitute actionable misrepresentations (*POA Recovery* at [103]).

44 The statements listed at paras 25(d)(i), 25(d)(ii), 26(a)(viii), 26(c)(iii), 26(c)(iv), 27(b)(v) and 27(c)(ii) of Annex 1 were statements of opinion and or broad non-specific ambitions for the future and I exclude them from the analysis. The remaining alleged representations are termed in this judgment as "Representations of Fact".

Were the Representations of Fact made by Mr Tong and Mr Peng?

Parties' positions

45 The Defendants argue that Vibrant cannot prove that the Defendants were the ones who made the Representations.

46 Mr Tong's general case is that Vibrant's evidence fails to prove that Mr Tong manipulated, or instructed the manipulation of, the affected financial documents and records.[70] As for Mr Peng, his arguments on this issue can be condensed into the following points:

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[70] See, *eg*, 1DCS at para 29.

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(a) Mr Peng was not involved in preparing, presenting, reporting, declaring, affirming and/or providing the Blackgold Financial Documents.[71] Mr Tin was the person who provided the Blackgold Financial Documents to Vibrant,[72] and on Mr Tin's own account, Mr Peng did not know exactly what documents Mr Tin had passed to Vibrant.[73] Nor had Mr Peng expressly told the Finance Team that Mr Tin was providing the documents on his behalf.[74] Neither did he prepare the Management Accounts, Top Customer List, the Audited Financial Reports, the Corporate Presentation, or the Shipping Business Plan.[75]

(b) Mr Peng did not make any representations at the 22 September Meeting. As for the 22 September Meeting Minutes, these were not representations from Mr Peng as he did not prepare the minutes, the minutes were sent to the Finance Team by Mr Tin who did not copy Mr Peng, and the 22 September Meeting Minutes do not record the identity of the party or parties who made the statements therein.[76]

47 Vibrant rebuts these arguments by its response that the Blackgold Financial Documents were endorsed, affirmed and/or approved by the Defendants, and provided to Vibrant with their authorisation. It is not necessary for the Defendants to have personally uttered each and every representation, or personally communicated the same to Vibrant. All that is required is that each of Mr Peng and Mr Tong intended the misrepresentation to be communicated

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71 2DCS at Heading VI(A)(1)(a).

72 2DCS at para 52.

73 2DCS at para 53.

74 2DCS at para 55.

75 2DCS at para 58.

76 2DCS at para 65.

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to Vibrant through a third party: *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2023] 4 SLR 202 ("*UOB v Lippo (HC)*") at [109].

Legal test for a representation

48 The tort of deceit requires that the defendant make a false statement to the plaintiff. As a starting point, this generally requires that the defendant himself engage in some kind of a positive act or representation, with mere silence being insufficient (*Clerk & Lindsell on Torts* (Michael A Jones, Anthony M Dugdale, Mark Simpson gen eds) (Sweet & Maxwell, 23rd Ed, 2020) ("*Clerk & Lindsell*") at para 17−06). Various forms of active non-verbal conduct, nevertheless, may amount to a misrepresentation (*Clerk & Lindsell* at para 17−08), such as pledging goods knowing one has no title to them, or ordering goods on credit for someone known to be insolvent, or presenting company accounts to a buyer in the knowledge that they have been doctored (citing *MAN Nützfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at [79] onwards). In some cases, the mere doing of business with another may in itself carry a representation that the business is *bona fide* and in accordance with established practice (*Clerk &Lindsell* at para 17−08, citing *Lindsay v O'Loughnane* [2012] BCC 153 at [100]−[119]). Furthermore, there is no need for the false representation to be made by the defendant to the plaintiff directly; it is sufficient that the defendant intended the misrepresentation to be communicated to the plaintiff through a third party: see *UOB v Lippo (HC)* at [109], referencing Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016 at para 14.016). Finally, a person may be liable in deceit as a joint tortfeasor if he is a knowing and active party to a scheme to defraud, even if he has not himself said anything and the actual representation has been made by someone else (*Clerk &Lindsell* at

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para 17−10, citing *Dadourian Group International Inc v Simms* [2009] 1 Lloyd's Rep 601 ("*Dadourian*") at [72]−[94]).

49 I assess the dispute in this context.

Analysis

50 Vibrant's case is that the misrepresentations were made to it through the following means:

(a) through the Blackgold Financial Documents,[77] which are:

(i) the Management Accounts;

(ii) the Audited Financial Reports;

(iii) the Top Customer List;

(iv) the Corporate Presentation; and

(v) the Shipping Business Plan; and/or

(b) orally by Mr Tong and/or Mr Peng, at:

(i) early discussions (the "Initial Discussions"); and/or

(ii) subsequently during the 22 September Meeting and at other points of the Pre-Acquisition Chongqing Trip.[78]

51 I deal with these various categories in turn.

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77 Statement of Claim, paras 18 – 21; PCS at para 39.

78 PCS at para 39.

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The Audited Financial Reports and Management Accounts

52 The Representations of Fact contained in the Audited Financial Reports may be attributed to the Defendants by virtue of the Directors' Declaration in each report signed by Mr Tong. I reproduce the example from 2014; the others largely follow the same format, with at most minor changes in wording:[79]

> In accordance with a resolution of the directors of Blackgold International Holdings Limited, the directors of the Company declare that:
>
> 1. the financial statements and notes, as set out on pages…, are in accordance with the Corporations Act 2001 and:
>
> a. comply with Australian Accounting Standards, which as stated in accounting policy Note 2 to the financial statements, constitutes explicit and unreserved compliance with International Financial Reporting Standards (IFRS); and
>
> b. give a true and fair view of the financial position as at 31 October 2013 and of the performance for the financial year ended on that date of the Group;
>
> 2. the Chief Executive Officer and Chief Financial Officer have each declared that:
>
> a. the financial records of the Company for the financial year have been properly maintained in accordance with s 286 of the *Corporations Act 2001*;
>
> b. the financial statements and Notes for the financial year comply with the Accounting Standards; and
>
> c. the financial statements and Notes for the financial year give a true and fair view; and
>
> 3. in the directors' opinion there are reasonable grounds to believe that the Group will be able to pay its debts as and when they become due and payable; and

[79] 6 BA at 304, 467 and 606.

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> 4. the directors have been given the declaration required by s 295A of the Corporations Act 2001 from the Chief Executive Officer and Chief Financial Officer.

53 This declaration, signed by Mr Tong, is a representation that emanated from him. As for Mr Peng, while he did not sign the Directors' Declaration himself, he has made representations to Mr Tong (see S/N 2 in the extract above) which Mr Tong then communicated to the world at large. In making these representations to Mr Tong, Mr Peng must have known that these representations would feature in the Audited Financial Reports. This leads to the further inference that Mr Peng intended for his representations to be communicated to a class of recipients (those relying on the Audited Financial Reports). Mr Peng has not adduced any evidence to show otherwise. I thus find that the representation originated from Mr Peng despite being made through Mr Tong.

54 Therefore, the Directors' Declaration amounts to an express representation by Mr Peng and Mr Tong that the various representations in the Audited Financial Statements are true. In short, they adopted the representations in the Audited Financial Statements.

55 Regarding the Management Accounts, it was accepted that Mr Chen prepared these. The Defendants sought to distance themselves while Mr Tin's understanding was that Mr Chen took instruction from either Mr Peng or Mr Tong.[80] Pertinently, the Management Accounts were important documents, foundational to any buyer's review. Mr Tong and Mr Peng both knew that they would be sent to Vibrant. It is logical to infer that Chen prepared them with Mr Tong and Mr Peng's knowledge, under their authority and with their approval.

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80 5 BA at 14, AEIC of Tin at para 24.

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Mr Khua's evidence was also that Mr Tong, despite his title as a non-executive chairman, and Mr Peng were the controlling minds and business drivers of the Blackgold Group.[81] As the Defendants furnished no evidence to the contrary, Vibrant has raised sufficient evidence to fulfil its burden of proof in relation to the Management Accounts.

The Corporate Presentation

56 Mr Tong does not appear to dispute in his submissions that he was present at the Corporate Presentation, though he disputes his involvement therein.[82] However, Mr Tin's evidence, which he maintained under cross-examination,[83] is that Mr Tong had personally prepared and/or updated the slides for the Corporate Presentation ("Corporate Presentation Slides").[84] Mr Tin's evidence is not inherently incredible. Mr Tong would have spearheaded the presentation as Chairman of Blackgold Australia. I find that Mr Tong made the representations in the Corporate Presentation.

57 As for Mr Peng, since he was not at the Corporate Presentation, he is not responsible for the representations therein. Mr Tin conceded in cross-examination that he was not aware that Mr Peng prepared or provided the Corporate Presentation to Mr Tong.[85] The evidence indicates that Mr Tong was familiar with operational details, and thus it cannot be inferred that Mr Peng must have assisted Mr Tong on this presentation.

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81 1 BA at 12, AEIC of Tim at para 18.

82 Transcript 21 August 2024 at 43:8−11.

83 Transcript 21 August 2024 at 43:8−16.

84 5 BA at 22, AEIC of Tin at para 39.

85 Transcript 22 August 2024 at 40:15−24.

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Shipping Business Plan and Top Customer List

58 For the Shipping Business Plan and Top Customer List, there is no evidence regarding whether Mr Tong or Mr Peng had any role in preparing these specific documents. On Mr Tin's evidence, Mr Tong rarely discussed operational matters.[86] Mr Tin also testified that Mr Peng did not prepare the Shipping Business Plan.[87] Therefore, there is insufficient evidence to find that the representations in the Shipping Business Plan or Top Customer List were made by Mr Tong or Mr Peng.

The oral representations

(1) Initial Discussions

59 Mr Khua's evidence was that various statements were made by Mr Tong in early conversations when Mr Tong and him met for breakfast or tea, at the restaurants in the Marina Bay Sands hotel lobby or at the lounge on the 55th floor, to discuss the profitability and growth potential of the Blackgold Group.[88] These would have been understood to be preliminary conversations to be followed by documentation and checks. Indeed the Review Process thereafter followed. An alternative frame would be to hold that there would be no reasonable reliance on these early conversations.

(2) 22 September Meeting

60 Mr Yong's evidence was that Mr Tong and Mr Peng made various statements to the Finance Team during the Pre-Acquisition Chongqing Trip,

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86 Transcript 21 August 2024 at 17:22−25.

87 Transcript 22 August 2024 at 40:25−28.

88 1 BA at 18-19, 21, AEIC of Eric Khua at paras 30-31, 37.

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including during the 22 September Meeting.[89] He also remembered that during the 22 September Meeting, the Finance Team queried Mr Tong and Mr Peng on certain issues, to which Mr Peng responded.[90] Mr Tin's testimony largely corroborated Mr Yong's evidence.[91] Their accounts are not inherently incredible and are further supported by contemporaneous evidence in the form of the 22 September Meeting Minutes.[92] These had been prepared by Mr Peng's personal assistant, and were circulated by Mr Tin on 26 September 2016.[93] They show that the topics mentioned by Mr Yong and Mr Tin were indeed covered at the meeting.[94]

61 I am not persuaded by Mr Peng's submission that he did not make any representations at the 22 September Meeting.[95] Mr Peng's main argument in this regard is that Mr Tin could not recall whether Mr Peng had in fact made certain statements during the 22 September Meeting,[96] and that Mr Yong also could not identify which statements were made specifically by Mr Peng.[97] But that is not exactly what the witnesses said. Mr Tin and Mr Yong maintained thatMr Peng and Mr Tong had made the statements, but they could not remember, *as between Mr Peng and Mr Tong*, who had made certain statements.[98] Given the passage

89 3 BA at 18−19, AEIC of Yong at paras 32−33.

90 3 BA at 19, AEIC of Yong at para 33.

91 5 BA at 23−24, AEIC of Tin at para 45.

92 7 BA at 252−267.

93 5 BA at 24, AEIC of Tin at para 46.

94 7 BA at 261−267.

95 2DCS at para 63.

96 2DCS at para 63(a).

97 2DCS at para 63(b).

98 PCS at para 60, Transcript 21 August 2024 at 44:29−45:10; Transcript 22 August 2024 at 47:20−48:24; Transcript 28 August 2024 at 40:2−48:24.

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of time since the 22 September Meeting, it is unsurprising that Mr Tin and Mr Yong could not remember who, as between Mr Peng and Mr Tong, had made certain statements; conversely, their straightforward answers reinforce their honesty as witnesses.[99] In any event, the statements at the 22 September Meeting may be attributed to both Mr Peng and Mr Tong as they chaired and were the main players at the 22 September Meeting. It was a presentation by, or an interview of, the key members of Blackgold Australia's management.[100] Their chairing the meeting and affirming the presentation was a *positive act* amounting to an adoption of the other presenters' or interviewees' statements.

62 For the avoidance of doubt, I do not find that the 22 September Meeting Minutes themselves contain any representations. I agree with Vibrant that they are merely corroborative evidence of the representations made during the 22 September Meeting.[101]

Summary of which representations were made by the Defendants

63 To summarise, I find that:

(a) the representations asserted to have been made in the Initial Discussions, Shipping Business Plan and Top Customer List were *not* made by Mr Tong or Mr Peng;

(b) the representations in the Management Accounts and Audited Financial Reports were made by Mr Tong and Mr Peng;

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99 PCS at para 60.

100 3 BA at 17, AEIC of Yong at para 31.

101 PCS at para 64–65.

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(c) the representations in the 22 September Meeting were made by both Mr Tong and Mr Peng; and

(d) the representations in the Corporate Presentation were made by Mr Tong alone.

64 The Representations of Fact which are not attributable to either Mr Tong or Mr Peng (see [63(a)] above) are at paras 25(c), 27(b)(i)−27(b)(iv), and 29(a) in Annex 1. All the Representations of Fact which are attributable to at least one of the Defendants are termed, at the next stage, as "Attributable Representations of Fact". I next consider whether any of the Attributable Representations of Fact were false.

Falsity

Parties' positions

65 Vibrant alleges that all the Representations were false. Mr Tong appears to take no position on the falsity of the Representations, save that if the Representations were false, Mr Tong had no part in making them.[102] Mr Peng, however, argues that the Representations were not false for the following reasons:

(a) Belinda Tan did not travel to Chongqing and thus could not testify as to the veracity of the documents obtained by the Special Auditor's team.[103]

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102 1DCS at para 3.

103 2DCS at para 73.

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(b) The transactions or financial information of the Blackgold Group prior to 1 July 2017 were not within the temporal scope of the Special Audit Report. Consequently, the Special Auditor did not make any conclusions as to whether the Audited Financial Reports contained false or inaccurate information.[104]

(c) The Special Audit Report did not make conclusive findings on the Coal Trading Representations, Mining Representations, and the Shipping Transportation Representations, but made speculations that were mere conjecture.[105]

66 I disagree with these objections. First, Mr Peng's objection that Belinda Tan never travelled to Chongqing is spurious. The team worked under her direction, they reported to her regularly, and she would check in with the team face-to-face to observe the progress of the investigation.[106] Given the extent of the investigation, it is understandable that she could not conduct every interview or personally verify each and every document that the team reviewed.[107] This does not detract from the accuracy of the Special Audit Report, or the Special Auditor's process of investigation. This is sufficient for the purposes of a *prima facie* case. Second, while the remit of the Special Audit may be limited to the Review Period, the court may draw appropriate inferences from any facts that the Special Audit may have uncovered, even if the inferences which I draw fall outside the Review Period. Third, the reason that the Special Audit did not make a conclusive finding on the Representations is that the time period of the

104 2DCS at paras 70−72.

105 2DCS at paras 75−77.

106 Transcript 29 August 2024 at 9:20−27.

107 Transcript 29 August 2024 at 10:22−27.

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Representations fell outside the Review Period of the Special Audit, which was defined as lasting from 1 July 2017 to 30 April 2018.[108] The fact remains that the Special Audit uncovered various facts and pieces of evidence which allow me to infer that the statements made were false.

67 I therefore turn to examine whether each of the Attributable Representations of Fact was false.

Were the Attributable Representations of Fact false?

The Mining Representations

68 The Attributable Representations of Fact falling within the category of the Mining Representations are set out at paras 26(a)(i)−26(a)(ix), 26(a)(ix), 26(b), 26(c)(i), 26(c)(ii) and 26(d) of Annex 1.

69 There is insufficient evidence of the mine lives and coal reserves of the Caotang, Heiwan and Baolong Mines to conclude whether the representations at paras 26(a)(i), 26(a)(ii), 26(a)(v) and 26(a)(ix) of Annex 1 were false. The remainder of the Mining Representations were false because: (a) the Heiwan and Caotang Mines were closed and/or ceased operations prior to the Acquisition and remained so thereafter; and (b) the Baolong Mine was closed and was unlikely to have received significant investment. I elaborate.

70 The Special Audit uncovered several pieces of evidence pointing to the Heiwan Mine being closed prior to the Acquisition. First, a notice issued by the Chongqing Municipal People's Government on 23 August 2016 stated that the Heiwan Mine was to be closed by 10 September 2016 (the "23 August 2016

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108 PCS at para 90.

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Notice").[109] Second, Heiwan had received compensation of around RMB 8m from the government at the end of 2017 for the closure of the Heiwan Mine – this was verified by Heiwan's original bank statements obtained directly from the banks, as well as through inquiries made by Vibrant's legal counsel, Zhonghao Law Firm.[110] Third, the monthly production reports show that the Heiwan Mine had no production from May 2017 to April 2018 (April 2018 being the latest date reflected on the production reports).[111] In view of this evidence, I infer that the Heiwan Mine was indeed closed, at the latest, by early 2017, and probably as early as 10 September 2016. Thus the representations as to the Heiwan's Mine's output and Heiwan's sales (at paras 26(a)(vi), 26(a)(vii), 26(b) and 26(c)(i) of Annex 1) were false.

71 Regarding the Caotang Mine, the main piece of evidence that points to it being closed arose from the Special Auditor's inquiry with the Fengjie County Administration Bureau of Safety Working (a "confirmation request"). The bureau responded to this confirmation request that "Caotang had closed its mine and ceased operation since 22 January 2016 and only resumed operations on 26 July 2018".[112] However, even when the Special Auditor visited the premises of the Caotang Mine on 5 September 2018, after the stated period in the confirmation request, the Special Auditor observed that: (a) the coal mine was not in operation and there was no employee working at the site; (b) the main entrance to the coal mine was closed and locked; and (c) the majority of the infrastructure and property, plant and equipment were located in the coal mine

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109 Agreed Bundle of Documents Vol 16 ("16 AB") at 142, para 4.2.18; 16 AB at 332.

110 16 AB at 143 at para 4.2.19(b); 16 AB at 146, para 4.2.26.

111 16 AB at 142, para 4.2.17; 17 AB at 8.

112 16 AB at 138, para 4.2.5(a).

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wells and were not properly tagged.[113] From the foregoing, I infer that the Caotang Mine had closed on 22 January 2016 at the latest. I also infer from the Special Auditor's further verification via its visit on 5 September 2018 that the Caotang Mine had not in fact subsequently reopened.[114] Thus the representations regarding the output and sales of the Caotang Mines (set out at paras 26(a)(iii), 26(a)(iv), 26(b) and 26(c)(i) of Annex 1) were false.

72 The most important implication of my finding that the Caotang Mine was closed since 22 January 2016 is that its sales figures must, as a matter of mathematical logic, have been false. I explain. For the period of 1 November 2015 to 30 April 2016, Caotang recorded sales of RMB 64.27m, and for the longer period of 1 November 2015 to 31 October 2016, it recorded sales of RMB 134.58m. Mathematically, this means that Caotang's recorded sales from 1 May 2016 to 31 October 2016 must be RMB 134.58m less RMB 64.27m, which is RMB 70.31m.[115] Having accepted that Caotang's mine was closed from 22 January 2016 onwards (until 2018 at the earliest), Caotang cannot have generated any actual sales during the period of 1 May 2016 to 31 October 2016. Therefore, I infer that the RMB 70.31m of sales recorded for that period were false. Furthermore, since the sales figures of Caotang were a component of Heijin's sales figures, the overstatement of Caotang's sales also undermines the truth of any representations regarding the coal trading revenue of Heijin, as I discuss later.

73 As for the Baolong Mine, the evidence suggests that it was unlikely to have received significant investment. First, the Baolong Mine had been shut

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113 16 AB at 138, para 4.2.6.

114 PCS at para 108.

115 17 BA at 26, AEIC of Belinda Tan at paras 69−72.

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down prior to the Acquisition, with Baolong receiving RMB 5m in compensation from Wushan County Baolong Town Finance Bureau in December 2016 and June 2017 for the closure of the mine.[116] The Special Auditor had reached this conclusion based on Baolong's bank statements obtained directly from the banks.[117] Second, there was a notice issued by the Chongqing Administration of Land Resources and Building dated 27 November 2017, stating that the mining permit of the Baolong Mine had been automatically cancelled upon expiry on 21 September 2017.[118] This means that the Baolong Mine could only have been open until 21 September 2017 at the latest. Furthermore, I note that the list is titled "List of Automatic Abolition of the Mining License for Closed Mines", which suggests that the Baolong Mine's permit was cancelled as a result of it being already closed or non-operational prior to the date of expiry of the licence. This is *prima facie* evidence that the Baolong Mine was likely closed in or around early 2017, and its mining licence certainly expired on 21 September 2017. In view of this, and given that operations at the Baolong Mine were allowed to lapse, I am prepared to infer that there was little to no investment in the Baolong Mine (see para 26(c)(ii) of Annex 1).

The Coal Trading Representations

74 The Attributable Representations of Fact falling within the category of the Coal Trading Representations are set out at paras 25(a)(i)−25(a)(iv), 25(b)(i) and 25(b)(ii) of Annex 1. They were false because the coal trading revenue purportedly earned by Heijin, the main contributor to the Blackgold Group's

116 16 AB at 148, para 4.2.36.

117 16 AB at 148, para 4.2.36.

118 16 AB at 148, para 4.2.35; 17 AB at 37, S/N 7 ("Wushan County Maojiawan No. 1 Mine of Chongqing Baolong Mining Co., Ltd").

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coal trading business, was likely significantly inflated and/or entirely fabricated. There are several pieces of evidence pointing to this.

75 First, the entire sales of Heijin amounting to RMB 2bn during the Review Period was excluded in the revised Management Accounts,[119] which had been prepared after excluding the falsified transactions. In other words, the truth is that Heijin had *no sales* during the Review Period. This is a significant overstatement of Heijin's sales. I find it likely that, if Heijin had zero sales during the Review Period, it would have low or zero sales just prior to the Review Period. It is not likely in the ordinary course of events that Heijin would have, in line with the Representations, been generating significant sales volume just before the Review Period but suddenly recorded zero sales immediately once the Review Period commenced.

76 Second, Caotang's sales figures were clearly overstated by around RMB 70.31m (see [72] above). As Caotang's sales were a component of Heijin's sales figures, the overstatement of the former would have contributed to the overstatement of the latter.

77 Therefore, I infer that the revenue figures for earnings by Heijin, and thus the Blackgold Group's coal trading business prior to the Acquisition, were false.[120] This renders the Attributable Representations of Fact at paras 25(a)(i)−25(a)(iv), 25(b)(i) and 25(b)(ii) of Annex 1 false.

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119 17 BA at 17, AEIC of Belinda Tan at paras 45−46.

120 PCS at para 98.

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The Shipping Transportation Representations

78 The Attributable Representations of Fact falling within the category of the Shipping Representations are set out at paras 27(a) and 27(c)(i) of Annex 1. The Shipping Representations painted a picture that Blackgold Shipping was operating a well-established and profitable shipping transportation business. However, the Special Auditor uncovered evidence indicating that Blackgold Shipping's vessels were time-chartered, contradicting the Shipping Representations.

79 Of the eight vessels, the Special Auditor managed to find a copy of the actual chartering contracts for two of them, Guoping #16 and Guoping #18,[121] which spanned the period from 3 September 2015 to 2 September 2018 (for Guoping #16) and from 23 October 2015 to 22 October 2018 (for Guoping #18). These were signed by a manager of one of Blackgold's subsidiaries, on behalf of Blackgold Shipping and the chartering customers. Therefore, there is objective evidence that at least Guoping #16 and Guoping #18 were time-chartered to customers starting from before the Acquisition.

80 As for the other vessels, the Special Auditor did not manage to find any direct evidence that they were time-chartered prior to the Acquisition. However, Mr Tin relayed information from one Mr Yao Qinping ("Qinping"), an employee of Blackgold Shipping, who had knowledge of the shipping business of Blackgold Shipping (Qinping refused to be interviewed by the Special Auditor due to concerns regarding his personal safety and reputation).[122] Mr Tin stated that Qinping told him the following:[123]

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121 16 AB at 167–168, para 5.2.19; 16 AB at 598−608.

122 16 AB at 85, para 1.4.3.

123 16 AB at 166−167, para 5.2.18.

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(a) Blackgold Shipping did not provide any freight services during the Review Period. All eight shipping vessels owned by Blackgold Shipping had been time-chartered to customers for a period of three years (from 2015 to 2018).

(b) The management of Blackgold Group had issued tax invoices to customers for fictitious services to "beef up sales figures and also to earn on VAT rebate".

(c) Moneys earned from time-chartering the shipping vessels had not been directed to Blackgold Shipping's bank accounts.

81 Furthermore, the Special Auditor discovered an outsourcing agreement dated 27 April 2018 (the "Outsourcing Agreement"), within an email titled "Blackgold Shipping operational outsourcing agreement (27 April 2018)" dated 2 May 2018.[124] The Outsourcing Agreement entitled Guoxing, the counterparty to the Outsourcing Agreement, to take over the operations of Blackgold Shipping, including its eight vessels, from 28 April 2018 to 31 December 2021 for a fee of approximately RMB 17.8m.[125]

82 The Outsourcing Agreement is significant because it contained the expiry dates of the then-existing chartering contracts for the eight shipping vessels and their respective annual charter fees[126] (presumably to facilitate Guoxing's taking over of the ships upon the expiry of the chartering contracts). These existing chartering contracts would have been the same ones that Blackgold Shipping had entered into at or around the time of the Acquisition,

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124 16 AB at 168, para 5.2.20; 16 AB at 609−626.

125 16 AB at 169, para 5.2.20.

126 16 AB at 169, para 5.2.20.

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such that the Outsourcing Agreement provides evidence of their existence. These chartering contracts, signed individually for each ship, were due to expire around April to October 2018 (the expiry date for each ship being different). The total annual charter fees payable under these chartering contracts were stated as amounting to RMB 5.4m. Admittedly, it was not clear from the Outsourcing Agreement exactly when the chartering contracts commenced; however, I am prepared to infer that the chartering contracts likely lasted at least one year (given the reference to annual chartering fees). Given that their expiry dates were around one year after the Acquisition (April 2017), I am prepared to infer that the chartering contracts likely commenced prior to the Acquisition, and therefore, the eight vessels owned by Blackgold were time-chartered prior to the Acquisition.

83 I now turn to Blackgold Shipping's revenue. First, the transaction descriptions in the sales ledger showed the recorded sales and accounts receivable to have been generated from freight sales. But, as I have explained above, it is likely that the eight vessels were all time-chartered, which means they could not have been used to provide freight services.[127] Second, since the sum total of the maximum *annual* charter fees that could be earned under the chartering agreements set out in the Outsourcing Agreement was RMB 5.4m, this calls into question Blackgold Shipping's recorded sales of RMB 42.46m from 1 November 2015 to 31 October 2016,[128] which happens to be a period of one year. The inference is that the recorded sales of Blackgold Shipping for that period could be overstated by at least RMB 37.06m[129] (being RMB 42.46m less RMB 5.4m). Third, based on an analysis of Blackgold Shipping's ledgers and

127 17 BA at 20, AEIC of Belinda Tan at para 55.

128 17 BA at 27, AEIC of Belinda Tan at para 75.

129 17 BA at 27, AEIC of Belinda Tan at para 75.;

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its original bank statements obtained from the banks, the Special Auditor found that moneys earned from chartering the vessels were not transferred to Blackgold Shipping's accounts directly from the chartering customers, but were instead transferred to Blackgold Shipping via intermediaries.[130] The lack of apparent logic in the routing of the money casts further doubt on the veracity of Blackgold Shipping's sales for the Review Period.[131]

84 Therefore, based on the evidence, I infer that all of the ships owned by Blackgold Shipping were time-chartered. The Attributable Representations of Fact specified at paras 27(a) and 27(c)(i) of Annex 1 were false.

The Receivables Representations

85 The three Attributable Representations of Fact falling within the category of the Receivables Representations set out at paras 28(a), 28(b) and 28(c) of Annex 1 were false, for the following reasons.

(1) Significantly aged debt due and owing from Liupanshui

86 First, the Special Auditor found a significantly aged debt from Liupanshui of approximately RMB 21.57m allegedly due to Heijin. This debt arose from a coal sales contract between Heijin and Liupanshui signed in July 2013. As of 30 June 2014, the outstanding payment for goods owed by Liupanshui amounted to RMB 21.57m.[132] It bears mentioning that Heijin had commenced its claim against Liupanshui for this debt well prior to the Acquisition – in fact, the statement of claim was accepted by the intermediate

130 16 AB at 170, para 5.2.21.

131 PCS at para 118(c).

132 16 AB at 175, para 6.2.3(a)(i).

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court on 16 November 2016. The court judgment issued by the Second Intermediate Court of Chongqing, in respect of the action brought by Heijin against Liupanshui, was dated 29 August 2017.[133] For completeness, the Special Auditors did not find any cash inflow to Heijin's bank accounts from either Liupanshui or its guarantor (Guizhou Shengxin Minerals Group Investment Co Ltd) during the Review Period.[134] As the debt was incurred latest on 30 June 2014, it was significantly aged as of the time of the Acquisition. The representation set out at para 28(a) of Annex 1 was false.

(2) A major debtor was insolvent at the time of Acquisition

87 Second, Heijin recognised account receivables of approximately RMB 118.01m due from Changxing Southern Mechanical and Electrical Supplies Co Ltd ("Changxing Southern").[135] This debt arose from nine sales contracts for coal between Heijin and Changxing Southern since 2012.[136] The outstanding payment was guaranteed by three companies and six individuals.[137] Heijin submitted its statement of claim to the court in respect of its claims against Changxing Southern on 17 April 2017, and the Court of Changxing County in Zhejiang County issued a judgment dated 13 July 2017.[138] Changxing Southern and two of its guarantors were declared insolvent by the court on 15 March 2017 and subsequently liquidated.[139] This was prior to the Acquisition. Therefore, Changxing Southern owed significant trade receivables

133 16 AB at 175, para 6.2.3(a); 16 AB at 630−638.

134 16 AB at 176, para 6.2.3(a).

135 16 AB at 176, para 6.2.3(b).

136 16 AB at 177, para 6.2.3(b)(i).

137 16 AB at 177, para 6.2.3(b)(ii).

138 16 AB at 176, para 6.2.3(b); 16 AB at 640−648.

139 16 AB at 177, para 6.2.3(b)(iii).

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to Heijin and had defaulted prior to the Acquisition. The statement set out at para 28(b) of Annex 1 was false.

(3) Receivables purportedly due and owing were not acknowledged by debtors

88 Third, approximately RMB 179.51m was due from Fengjie Xinyu Minerals Co Ltd ("Fengjjie Xinyu"). The Special Auditor attempted to verify this amount by sending a confirmation letter to Fengjie Xinyu on 12 September 2018 to confirm the balance and related transactions but received no response. The Special Auditor's further efforts to contact Fengjie Xinyu on 7 November 2018 by way of telephone calls went unanswered. The Special Auditor also conducted a site visit to the registered address of Fengjie Xinyu on 6 September 2018 but found that the address belonged to another company called Fengjie Liucun Agricultural Development, which was unrelated to Mr Peng and his affiliates.[140] Ultimately, the Special Auditor could not confirm if there was a debt due from Fengjie Xinyu, or whether Fengjie Xinyu itself even existed.[141] The statement set out at para 28(c) of Annex 1 was false.

The Overall Value Representations

89 The Attributable Representations of Fact falling within the Overall Value Representations are set out at paras 29(a) and 29(b)(i)−29(b)(iv) of Annex 1. In view of the falsity of the previous categories of representations, especially those relating to the financial state of the various entities in the

140 16 AB at 178, para 6.2.3(c).

141 PCS at para 122(c).

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Blackgold Group, it follows that the Overall Value Representations, to the extent that they relate to the value of the Blackgold Group, were also false.[142]

90 In addition, the auditors discovered that the Blackgold Group had maintained multiple sets of accounting records for Caotang and Heiwan in the XinZhongDa accounting system, each of which differed significantly from the other sets.[143] Some of these records were labelled "Listing" and "Tax", among others. The "Listing" records appeared to correspond to the Management Accounts (before revision). On the other hand, the "Tax" records appeared to be for the purpose of reporting to the local tax authorities as the figures therein were consistent with the relevant records filed with the tax authorities in the PRC. Further, the "Tax" records showed the lowest amount of non-current assets for both Caotang and Heiwan, presumably to reduce the tax liabilities of those entities.[144] Worse, the XinZhongDa accounting data appears to have been modified up until the date of 15 August 2018,[145] which is after the Fire Incident on 9 August 2018. This is problematic because any modification of the XinZhongDa accounting data should have been done pursuant to the Clean-Up Exercise, which in turn was supposedly premised on hard copy supporting documents (see [22]). The fact that modifications to the XinZhongDa accounting data were still taking place after the physical records were destroyed suggests that the modifications were made without any basis.

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142 PCS at para 124.

143 16 AB at 80, para 1.2.2(iv); 16 AB at 92, para 1.5.20.

144 16 AB at 92, para 1.5.20.

145 16 AB at 124, para 3.2.11.

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Conclusion on Falsity

91 In the next section, I exclude the statements that were not false, and refer to the remaining statements as the "Attributable False Representations of Fact".

Knowledge

92 For Mr Tong and Mr Peng to be liable in the tort of deceit, they must have made the Attributable False Representations of Fact with the knowledge that the Attributable False Representations of Fact were false, or alternatively, they must have made the Attributable False Representations of Fact recklessly.

Parties' positions

93 Vibrant submits that Mr Tong and Mr Peng made the representations knowing that they were false, or recklessly, for the following reasons:[146]

(a) First, given their positions in the Blackgold Group, the Defendants must have known that the Blackgold Financial Documents were false given their degree of involvement in the business.

(b) Second, the Defendants' decision to rapidly commence the Clean-Up Exercise after the discovery of the Irregularities indicates that they knew about the falsities at all material times.

(c) Third, Mr Peng made key admissions on multiple occasions which show that he knew the Representations were false at the material time. Mr Peng also implicated Mr Tong.

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146 PCS at para 134.

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(d) Fourth, the Fire Incident suggests that Mr Tong and Mr Peng had an incentive to destroy evidence that was unfavourable to them.

94 Mr Tong distances himself from the fraud, although he does not appear to deny that the falsifications occurred. He makes the following points:

(a) First, Mr Tong had no reason to suspect or know that the accounts were fabricated as they were audited, and reviewed by the CFO, the Audit Committee, and the Board of Blackgold Australia.[147]

(b) Second, upon discovering the fraud, Mr Khua did not demand that Mr Tong give up the proceeds that Mr Tong received from the Acquisition.[148] In any case, Mr Khua had no good reason to suspect that Mr Tong had instructed the fabrication of the accounts just because Mr Tong was the Chairman of Blackgold Australia prior to the Acquisition.[149]

(c) Third, Mr Tin had no specific evidence that Mr Tong was aware of the falsification of the accounts.[150] Just because Mr Peng implicated Mr Tong does not mean that Mr Tong was in fact aware of the falsification.[151] There was also no reason for Mr Peng to have to explain to Mr Tong that he was conducting the Clean-Up Exercise if Mr Tong was responsible for the falsification.[152]

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147 1DCS at para 27.

148 1DCS at para 8.

149 1DCS at para 9.

150 1DCS at para 15.

151 1DCS at para 17.

152 1DCS at para 18.

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(d) Fourth, Mr Tong was not present at the First Chongqing Meeting.[153] In any event, if Mr Tong had known that the accounts were fabricated, there would be no need for Mr Tong to have a serious talk with Mr Peng after Mr Peng confessed to the same.[154]

95 Mr Peng's overall submission on this point is that Vibrant has not adduced enough circumstantial or direct evidence to make out a *prima facie* case that he made the representations knowing that they were false, or recklessly.[155]

(a) First, it was Mr Chen, and not Mr Peng, who was in charge of preparing the financial accounts and/or records of the Blackgold Group. Therefore, he would not have known that the Blackgold Financial Documents contained false financial information.[156]

(b) Second, the audio recordings of the Recorded Chongqing Meetings shows that Mr Peng was not aware of any falsification of the financial information of the Blackgold Group prior to the Acquisition. In any case, he did not admit that he had personally created the falsifications.[157]

Hearsay objections

96 I first address Mr Tong's submission that the parts of the testimonies of Mr Khua and Mr Tin implicating the Defendants constitute inadmissible

153 1DCS at para 24.

154 1DCS at para 25.

155 2DCS at para 81.

156 2DCS at paras 82−84.

157 2DCS at paras 85(b)−(c).

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hearsay.[158] Counsel for Mr Tong does not appear to appreciate that the Evidence Act allows for hearsay statements to be admitted under certain conditions. This includes where a person is compellable but refuses to give evidence, and where a person cannot be produced as a witness. I reproduce the relevant portions of s 32 of the Evidence Act:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> 32. —(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made by person who is dead or who cannot be produced as witness;**
>
> (*j*) when the statement is made by a person in respect of whom it is shown —
>
> (i) is dead or unfit because of his or her bodily or mental condition to attend as a witness;
>
> (ii) that despite reasonable efforts to locate him or her, he or she cannot be found whether within or outside Singapore;
>
> (iii) that he or she is outside Singapore and it is not practicable to secure his or her attendance; or
>
> (iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he or she refuses to do so;
>
> …
>
> (3) A statement which is otherwise relevant under subsection (1) is not relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

97 Section 32(1)(*j*)(iv) was applied in the Court of Appeal decision of *Gimpex Ltd v Unity Business Holdings and others and another appeal* [2015]

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158 1DCS at paras 7, 11 and 17.

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2 SLR 686 ("*Gimpex*"). One of the parties had tried to admit a report which had been written by a surveyor, who was unwilling to come to court (*Gimpex* at [124]). The Court of Appeal held that the fact that the party had attempted to procure the attendance of the makers of the report, but the witnesses had refused, was sufficient for the report to be admitted under s 32(1)(*j*)(iv) of the Evidence Act (*Gimpex* at [127]). In the present case, the two Defendants are competent but have refused to give evidence. Vibrant cannot be reasonably expected to do more to secure their attendance. Therefore, I admit all the statements made by Vibrant's witnesses regarding the statements of Mr Tong and Mr Peng pursuant to either s 32(*j*)(iii) or s 32(*j*)(iv) of the Evidence Act. For completeness, I also do not exercise my discretion under s 32(3) to exclude any of the same.

Analysis

98 I now turn to consider the evidence giving rise to the inference that Mr Tong and Mr Peng knew that the Relevant Representations were false at the time they were made. In particular, I infer that Mr Peng was involved in the falsifications, and that Mr Tong knew about these falsifications due to his close working relationship with Mr Peng.

Mr Peng was involved in the falsifications

99 As a starting point, Mr Peng admitted that the financial accounts and records of the Blackgold Group had been inflated and falsified. Vibrant alleges that these admissions were made on a number of occasions, which I now go through in chronological sequence.

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(1) The First Chongqing Meeting

100 The First Chongqing Meeting took place after KPMG Singapore identified the Irregularities, and Mr Tin came to Chongqing on 20 June 2018 (see [21] above). This was the month *before* the executives of Vibrant, including Mr Khua, came to Chongqing. Mr Tin convened this meeting between Mr Peng, Mr Tong, Mr Chen and himself to discuss the Irregularities.[159] On Mr Tin's evidence, Mr Peng and Mr Chen admitted that they had fabricated some of the transactions, and that some of the sales figures reflected in the financial information and management accounts were inflated.[160] He maintained this position in cross-examination.[161] Mr Tin's account of the meeting is not inherently incredible, as it is plausible for the key personnel of Blackgold to have been more candid in an internal meeting without Vibrant's executives. Therefore, I infer that Mr Peng made these admissions.

(2) The meeting with Mr Tom Huang

101 Mr Tin testifies that, at a meeting on 25 June 2018 between him, Mr Tong, Mr Peng and an audit partner from KPMG Huazhen, Mr Tom Huang, Mr Peng admitted to the parties that the financial information previously provided to KPMG Huazhen had been fabricated, in that the transactions in the bank statements had been fabricated to inflate the sales, costs of sales, and fixed assets.[162] Mr Tin testified that after this meeting, he immediately called Mr Khua and Mr Sim to inform them of what had happened.[163] Mr Peng's

159 5 BA at 29, AEIC of Tin at para 60.

160 5 BA at 29, AEIC of Tin at para 60.

161 Transcript 22 August 2024 at 59:4−26.

162 5 BA at 31, para 65.

163 5 BA at 31−32, para 65.

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counsel challenged this account on the grounds that Mr Tin had no call logs of such a call, and that there was no email correspondence from KPMG Singapore regarding this incident.[164] The absence of a call log or email correspondence is not determinative of the issue. Neither Mr Tong nor Mr Peng contradicted Mr Tin on oath, and Mr's Tin's evidence is not inherently incredible. I accept his evidence.

(3) The Second Chongqing Meeting

102 On 20 July 2018, Mr Khua and various employees of Vibrant arrived in Chongqing and convened the Second and Third Chongqing Meetings (see [23]−[24] above). They took place one after another on the same day. I term these two meetings the Recorded Chongqing Meetings as they were surreptitiously recorded in audio recordings by Mr Tin, with transcripts of the same and translations thereof subsequently being produced by Vibrant.

103 However, the transcripts were of poor quality, and were not vetted by Mr Tin initially.[165] He admitted on the stand that parts of the translated transcript did not reflect the speakers' meaning.[166] There were also typographical errors such as an identification of Mr Khua as "Mr Huo", when there was no such "Mr Huo".[167] Mr Tin then conceded that he had neither gone through the translated transcript "in detail" nor verified if all the speakers had been correctly identified.[168] As I pointed out to the parties, it was not acceptable for the identification of the speakers to have been done by anyone other than Mr Tin,

164 Transcript 22 August 60:28−61:14.

165 Transcript 23 August 2024 at 9:13−10:22.

166 Transcript 23 August 2024 at 9:31−10:14.

167 Transcript 23 August 2024 at 11:22−12:17.

168 Transcript 23 August 2024 at 13:1−7.

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given that the transcripts formed part of his evidence.[169] After I gave Mr Tin an opportunity to go through the audio recordings and check the translated transcripts, Vibrant presented a revised set of translated transcripts to the court. Nevertheless, a perusal of the revised translated transcripts did not aid Vibrant. There was no express admission by Mr Peng at this meeting that he fabricated the financial records of the Blackgold Group.[170] Vibrant tries to rely on the fact that Mr Peng repeatedly apologised to Mr Khua and said that he felt guilty and sorry. These apologies do not necessarily lead to the inference that Mr Peng fabricated the accounts.

104 Furthermore, while Mr Khua claims that Mr Peng admitted to having manipulated or "dressed up" the accounts,[171] there are a number of difficulties with this allegation. First, it is inconsistent with Mr Tin's testimony that Mr Peng did not expressly admit to fabricating the accounts at the Second Chongqing Meeting. Second, Mr Khua claims that the term used by Mr Peng to refer to dressing up the accounts was "调账", but in other parts of the transcript, the parties appear to use that same term to refer not to falsifying of the accounts, but to rectifying them[172] based on the auditor's requirements. Therefore, I find that Mr Peng did not make any express admissions that he had fabricated the accounts at the Second Chongqing Meeting.

(4) The Third Chongqing Meeting

105 The Third Chongqing Meeting took place later on the same day (20 July 2018) as the Second Chongqing Meeting between Mr Khua, Mr Chen and

169 Transcript 23 August 2024 at 13:8−14:6.

170 5 BA at 35−36, AEIC of Tin at para 81.

171 1 BA at 38, AEIC of Eric Khua at para 65.

172 P4A at 42−44.

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Mr Tin. Mr Peng joined this meeting midway. A key exchange during the Third Chongqing Meeting occurred when Mr Khua raised the prospect of criminal liability at the meeting. He said that to avoid criminal liability, Vibrant management would need to know how the discrepancies in the financial documents and records had come about, what the extent of those problems were, and how they could be solved. In response, Mr Peng made some admissions. I reproduce the translated transcript of the exchange:[173]

> Khua: …Whoever commits a crime under criminal law is responsible. But now we are not deciding who does what, we want to know this. We want to make big things small and small things nothing. Then hope that. We need to know when this thing happened, and then we know how to explain it, how to know it, and how to solve it. How big is this fire?
>
> Peng: From November 2017 to April this year [2018], as I mentioned above, for the sake of having good financial performance, *we created some falsifications*, back then.
>
> Khua: When? When? When was it? Which period was correct? Come on come on. I said I need to know which period is correct.
>
> Peng: Now we can say that everything given to you during this period is true, including-
>
> Khua: No, then that one is still wrong. Not without. No, the report. For the financial report, listed in the Australian exchange for 2017, was there any falsifications in there?
>
> Peng: There shouldn't be any in there. *But I also can't guarantee that*. We have to check back over the years. So I said to check backwards, so I said need to verify ownself.
>
> [emphasis added]

This suggests that Mr Peng was involved in (having used the word "we"), and knew about, falsifications in the financial documents of the Blackgold Group. Furthermore, he also suggested that there could be some falsifications in the financial documents around the time of the Acquisition.

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173 P5A at 31−32.

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106 The translated transcript of the Third Chongqing Meeting corroborates Mr Tin's testimony that Mr Peng admitted that he had made falsifications and that he took responsibility for the same.[174]

(5) The Extended Clean-Up Exercise Discussion

107 The Extended Clean-Up Exercise Discussion took place on 25 July 2018 between Mr Tin, Mr Yong, Mr Peng, Mr Tong, Mr Chen and Mr Liu. Mr Yong, who does not appear to have participated in the Recorded Chongqing Meetings, attended this meeting at the behest of Mr Tin, as Mr Khua had by this time returned to Singapore.[175] While this meeting was not recorded unlike the Recorded Chongqing Meetings, there is an important documentary record of the meeting in the form of two contemporaneous logs kept by Mr Yong. The first was a daily log that he kept throughout this visit to Chongqing.[176] More significantly, the second log was a specific "day log", which Mr Yong kept for the day of 25 July 2018. The very fact that Mr Yong thought, at the time, to keep a specific day log for 25 July 2018 suggests that events of that day were indeed significant. Indeed, this was Mr Yong's stated reason for keeping the day log.[177]

108 Mr Yong's daily log records the following under the entry for 25 July 2018:[178]

> During the meeting, Peng Yuguo started with the comment that the falsified accounts dated before 2016 which was previously claimed. They are having problem to collect the outstanding

174 5 BA at 36, AEIC of Tin at para 84.

175 5 BA at 37, AEIC of Tin at para 86.

176 3 BA at 26, AEIC of Yong at para 55.

177 3 BA at 27, AEIC of Yong at para 56.

178 4 BA at 707.

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> receivables from debtors as the amounts are not accurate. Hence, he suggested to perform a total clean up exercise to present the true financial figures.

The day log for 25 July 2018 records the same comment as above, and more:[179]

> During the meeting, [Mr Peng] started with the comment that the falsified accounts dated before 2016 which was previously claimed. They are having problem to collect the outstanding receivables from debtors as the amounts are not accurate. Hence, he suggested to perform a total clean up exercise to present the true financial figures.
>
> [Mr Tin] enquired [Mr Peng] why do they propose to roll back from July 2014 and whether there are any falsified accounts before that period. To this, [Mr Peng] commented that he couldn't be sure himself…

109 To be clear, what Mr Yong meant by "the falsified accounts dated before 2016 as previously claimed" is that the financial accounts and records of the Blackgold Group have been inflated and falsified prior to 2016, and possibly from 2011.[180] This is a further admission following the revelations in the Third Chongqing Meeting, in which Mr Peng only admitted to making falsifications from 2017 onwards.

110 Mr Peng emphasizes that Mr Yong does not record any express statement by Mr Peng during the Extended-Clean Up Exercise Discussion to the effect that Mr Peng falsified the financial records of the Blackgold Group prior to 2017.[181] I accept that. However, Mr Peng's various admissions must be taken together. First, he expressly admitted in the Third Chongqing Meeting that he had falsified financial documents from November 2017 onwards. During the Extended Clean-Up Exercise Discussion a few days later, he then admitted that

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179 4 BA at 710.

180 3 BA at 25, AEIC of Yong at para 53.

181 2DCS at para 85(b); Transcript 27 August 2024 at 39:1−7.

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the falsifications in the financial documents pre-dated 2017 and may extend as far back as 2011 or 2014. If I accept Mr Peng's argument, it would mean that Mr Peng was only involved in falsifications in and after 2017, but somehow came to know about falsifications prior to 2017 despite not being involved in them. This explanation is not credible and it is also not supported by any testimony or explanation from Mr Peng. It is more believable that Mr Peng had been involved in all the falsifications, even those pre-dating 2017, but that he was being economical with the truth during the Third Chongqing Meeting in order to minimise his apparent culpability.

111 From Mr Peng's various admissions during the First and Third Chongqing Meetings, the meeting with Mr Tom Huang, and the Extended-Clean Up Exercise Discussion, it is clear that Mr Peng was involved in the falsification of the financial documents of the Blackgold Group. I note at this juncture that this finding of knowledge disposes of Mr Peng's argument, which I do not find credible in any event, that he is a "layperson" and had no idea that the Blackgold Financial Documents were false.[182]

Mr Tong was aware of the falsifications

112 I now explain the reasons why I find that Mr Tong was similarly aware that the Attributable False Representations of Fact were false.

(1) Mr Tong and Mr Peng enjoyed a close working relationship

113 Mr Peng and Mr Tong had a close personal and working relationship. Mr Tin averred that Mr Tong and Mr Peng had an especially close

[182] 2DCS at paras 82−84.

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relationship,[183] in which Mr Peng would often invite Mr Tong to his home whenever Mr Tong was in Chongqing.[184] Furthermore, Mr Peng's only daughter addressed Mr Tong as godfather,[185] and exchanged text messages with Mr Tong.[186] Mr Tin's description as to how Mr Peng and Mr Tong conducted the 22 September Meeting also suggests that they worked closely together:[187]

> So I don't---frankly, I don't remember exactly who said what and it's not stated in the minutes. So---but, in general, I think Peng Yuguo will be the one, like, explaining the strategy, explaining the main directions of the company. And then James Tong would add in, you know, in terms of the discussion, he will always chip in to elaborate further, especially on strategies and the implications.

114 Second, Mr Khua was also under the impression that Mr Peng and Mr Tong worked closely together to the extent that he regarded them as "one party":[188]

> Q Correct, okay. Then I ask you, if you believe that 1st defendant was the mastermind behind his purported fraud, why did you not similarly confront the 1st defendant about the alleged fraud and ask the 1st defendant to make good the loss? Why?
>
> A Well, *as far as I'm concerned*, both are---*both are one party*, you know, both are considered one party. You know, one is the chairman, one is the CEO and they are very close by relate---I mean, somehow by---I don't know what relationship but *they are very close*. And most of the time, I dealt with Mr James Tong most of the time, right. Rather, more---more than 80%, 90% of the time, I dealt with Mr James Tong representing Blackgold.

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183 5 BA at 15, AEIC of Tin at para 27.

184 5 BA at 15, AEIC of Tin at para 27.

185 5 BA at 15, AEIC of Tin at para 28.

186 5 BA at 15−16, AEIC of Tin at para 28.

187 Transcript 21 August 2024 at 45:6−10.

188 Transcript 20 August 2024 at 39:27−40:4.

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> [emphasis added]

115 Third, Mr Peng himself alluded to his close working relationship with Mr Tong on a number of occasions during the Recorded Chongqing Meetings. From the Second Chongqing Meeting, where Mr Peng appears to be trying to appease Mr Khua by explaining the history of the Blackgold Group and why the various write-offs had to occur, Mr Peng gave an indication of the duration and depth of his working relationship with Mr Tong:[189]

> Peng: …I also wish to, with Mr Henry Chua, share my thoughts, how I, relate to this company… In 2001, before July 30th, and you all may not know it, belonged to just myself, plus four other shareholders…
>
> So, at the second stage, from the year of 2011, 20th February, this is when we were listed in Australia, and the shareholdings were restored…
>
> Last year 13th July, after the listing in Australia, *Mr Tong was fully in charge*…
>
> …
>
> So to-date, after the delisting, and the Vibrant acquisition, it has been a year plus. I feel sorry for what has happened, really feels guilty, I sorry to you, but truthfully speaking, personally I have something to say, but… *All the plans and strategies, from the date of listing, was with Mr Tong. We made plans/strategies together.* How did we do it? Because it is about the capital market, I don't understand how its done, right? Include roadshows, really Mr Khua… Including your investment, we probably met two or three times.
>
> [emphasis added]

And from the Third Chongqing Meeting:[190]

> Khua: Your finance is managed by who? Who is the head of department?

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189 P4A at 9–12.

190 P5A at 23.

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> Peng: This is what we did after planning. I recall at that time, *I did this with Mr Tong*. After that, Finance team prepared for each company accordingly, right? The task is completed, right?
>
> [emphasis added]

116 Taken together, I find that Mr Peng's description of his working relationship with Mr Tong, along with descriptions from Mr Tin and Mr Khua as to their observations of Mr Peng's working relationship with Mr Tong, lead to the inference that Mr Peng and Mr Tong shared a close working relationship. In particular, the fact that all of Mr Peng's "plans and strategies, from the date of listing", were done with Mr Tong, makes it unlikely that Mr Tong would have been unaware of any fabrications that Mr Peng was involved in.

(2) Mr Tong was not surprised by the revelation of the false records

117 Mr Tin's evidence was that Mr Tong was not surprised by the revelation of the falsities in the First Chongqing Meeting of 20 June 2018. Preliminarily, while Mr Tong disputes his presence at this meeting,[191] he did not give evidence. Mr Tin avers that Mr Tong was present, and Mr Tin has provided his sworn testimony at trial. Mr Tong has not. I accept Mr Tin's sworn testimony.

118 Furthermore, the messages that Mr Tong sent to Mr Tin on 21 June 2018, the day after the First Chongqing Meeting, are probative. I reproduce the translated exchange between Mr Tong and Mr Tin:[192]

> [9.49 AM]
>
> Tong (partly in Chinese): Hi Good morning, regarding the guarantee issue, please comfort [Mr Khua] when you have time, many thanks.
>
> Tin: OK

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191 1DCS at para 24.

192 7 BA at 355–356.

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> Tong: Thanks
>
> Tin: Can you ask if Chen finished the account? I am with them in the car. Not convenient to call
>
> Tong: OK and thanks
>
> Tin: Worried that Chen is wasting time
>
> Tong (in Chinese): I understood
>
> [9.55 AM]
>
> Tin: Thanks
>
> [12.54 PM]
>
> Tong: Hi How far [Mr Khua] is fine? Thanks.
>
> [1.13 PM]
>
> Tong (in Chinese): It may be necessary to re-prepare the report of our ongoing operations, hoping that there will not be too much overall impacts and we can pass it.
>
> [4.23 PM]
>
> Tong: Hi, I am in the airport and will call you when I arrive SH, many thanks
>
> [4.27 PM]
>
> Tin: Ok take care
>
> [4.35 PM]
>
> Tong (in Chinese): I had a serious talk with Mr Peng. He clearly understood the serious relationship. He had spent all their finances and worked overtime to make it happen. I will call you in Shanghai!

119 The last message is difficult to decipher given the poor quality of the translation. However, Mr Tin explained his understanding of this message, which was that Mr Tong had had a serious talk with Mr Peng, who now understood the seriousness of the issue, and would mobilise all the staff of the finance department to work overtime to clean up the accounts by excluding the fraudulent transactions (the "Clean-Up Exercise").[193] In the absence of any other

193 5 BA at 30, AEIC of Tin at para 62.

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evidence, I adopt Mr Tin's interpretation of this message, without which the message appears somewhat nonsensical.

120 Mr Tong was at the First Chongqing meeting. The totality of the messages sent by Mr Tong to Mr Tin on the same day (regarding the "guarantee issue", whether Eric Khua was "fine", and the necessity of "re-prepar[ing] the report of our ongoing operations")[194] suggest that Mr Tong and Mr Tin had a common understanding of what needed to be done, and why. Furthermore, the fact that Mr Tong directly acknowledged the seriousness of the matter suggests that he and Mr Tin had a shared understanding of what this serious matter was. The two men had such a common understanding because Mr Tong was at the First Chongqing Meeting. On the contrary, if Mr Tong had not been at the meeting, these messages would, in order to make sense, have to be preceded by an explanation that Mr Tong had heard about the falsifications from someone. Mr Tong has not adduced any WeChat messages to show that this was the case.

121 Having accepted that Mr Tong was at the meeting, and also accepted Mr Tin's account of the same, I conclude that Mr Tong did not seem surprised when Mr Peng and Mr Chen informed Mr Tin that the transactions were fabricated, and did not question Mr Peng or Mr Chen about this revelation.[195] This would not make sense if Mr Tong were an uninvolved Non-Executive Director who had not known that the Blackgold Financial Documents were falsified. An honest person in his position who was previously unaware of the falsifications would have been shocked upon hearing these revelations, or would at least have sought to find out more information concerning the same. Indeed, Mr Tong's reaction is very telling when compared to Mr Tin's, who appears to

194 7 BA at 355−356.

195 5 BA at 29, AEIC of Tin at para 60.

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have been truly unaware of the fabrications. Mr Tin immediately asked Mr Peng and Mr Chen what the extent of the fabricated transactions was, and told them that they had to come clean about the extent of the fabrications.[196] One would have expected Mr Tong, as the Non-Executive Chairman of the Blackgold Group, to have taken the lead in questioning Mr Peng and Mr Chen, but instead it fell to Mr Tin to do so. I therefore infer that Mr Tong already knew, prior to the First Chongqing Meeting, that the Management Accounts were falsified.

(3) Mr Peng implicated Mr Tong

122 Mr Tin recalled a conversation that he had with Mr Peng on 16 July 2018 in the Blackgold Group's office in Chongqing.[197] While he initially averred on affidavit that this conversation had taken place some time between 4 and 8 July 2018, he clarified at trial that his memory had been jogged on his most recent birthday about a month prior to trial, such that he recalled the conversation as having occurred on his birthday in 2018.[198] In this conversation, Mr Tin asked Mr Peng who was responsible for the falsification of the financial information. Mr Peng's response, in Chinese, was something along the lines of "[e]veryone in the China office knows [Mr Tong] is the one responsible for the falsification." Mr Tin remembered this part of the conversation as it was the first time Mr Peng had explicitly named the person responsible for the falsifications.[199]

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196 5 BA at 29−30, AEIC of Tin at para 60.

197 5 BA at 35, AEIC of Tin at para 78; Transcript 21 August 2024 at 29:25−30.

198 Transcript 22 August 2024 at 65:19−66:4.

199 5 BA at 35, AEIC of Tin at para 78.

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123 While counsel for Mr Peng pointed out that Mr Tin could not recall conveying this exchange to Vibrant's auditors,[200] I do not think this is sufficient for me to reject Mr Tin's evidence of this exchange. There could be any number of reasons as to why Mr Tin might not have conveyed this exchange to Vibrant's auditors, such as perhaps not being asked a question necessitating this information.

(4) Other counterarguments

124 Mr Tong submits that there would have been no need for him to have had a serious talk with Mr Peng if they were both colluding in a fraudulent scheme.[201] To my mind, a plausible explanation for this is that the serious talk was not about the *fact* of the falsifications *per se*, but about how to remove the falsifications for the purposes of the audit. This is borne out by the rest of the message, which goes into the measures that Mr Peng had suggested during the "serious talk". Alternatively, it is possible that Mr Tong never had this serious talk with Mr Peng at all, and merely said this to appease Mr Tin. Neither scenario detracts from a conclusion that Mr Tong knew about the falsifications.

125 In addition, I am not persuaded by Mr Tong's objection that Mr Tin was "skewing the evidence he gave in his AEIC to pin the blame on [Mr Tong]", on the basis that Mr Tin failed to mention to the Special Auditor that Mr Peng would liaise with Mr Tong regarding financial information.[202] Mr Tong also objects that Mr Tin had no direct evidence that Mr Tong knew about the sales and financial information of the Blackgold Group.[203] I am of the view that

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200 Transcript 22 August 2024 at 66:7−17.

201 1DCS at para 25.

202 Transcript 21 August 2024 at 38:5−39:24; 1DCS at paras 13−14.

203 1DCS at para 15.

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Mr Tin was entitled to draw these inferences, having observed the Defendants during the time he worked with them. I have also found Mr Tin to be a reliable witness and do not agree that he "skewed" his evidence.

The visit to Caotang and Heiwan

126 It follows from the evidence that Caotang and Heiwan Mines were closed that the visits to the two mines during the Chongqing Pre-Acquisition Trip were staged. What the group saw, and the photographs they took, did not reflect the true state of affairs. It is not disputed that this visit was made at the suggestion of Mr Tong and Mr Peng, and was arranged by Mr Peng's personal assistant, Ms Tian. This reflects Mr Tong's and Mr Peng's intention to deceive.

The Fire Incident

127 The Fire Incident, which occurred after the Extended Clean-Up Exercise Discussion, suggests that Mr Tong and Mr Peng had an incentive to conceal the financial records that were destroyed. During the discussion, Mr Tin and Mr Yong disclosed the fact that a Special Audit was imminent, in response to a request from Mr Liu for two weeks to complete the review.[204] Subsequently, the documents were moved to Fengjie county and were not returned despite Mr Khua's express instructions. After much prevarication from Mr Peng, Mr Chen and Mr Liu over several days, the Fire Incident took place.

128 First, the timing of the Fire Incident is suspicious. This was after the Irregularities were discovered, and after Mr Tong and Mr Peng found out that a Special Audit was imminent. Second, Mr Tong and Mr Peng were in positions of authority over the persons involved in the (alleged) Extended Clean-Up

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[204] 5 BA at 37−38, AEIC of Tin at para 88.

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Exercise at Fengjie county, who included Mr Chen and Mr Liu, and these persons were observed to have worked under the instructions of Mr Peng. Third, the cause of the fire was suspicious. While the Fengjie County Public Security Bureau initially issued a report which stated that the fire could have been caused by a mechanical failure of the motor vehicle,[205] the (provincial-level) Chongqing Fire Bureau revoked that decision, stating that "the cause of the fire is found to be incorrect".[206] I also agree with Vibrant that it is incredible for a motor vehicle to suddenly catch fire, and with no conclusive cause ever having been determined despite an investigation and a further review of that investigation.[207] The most likely inference is that Mr Tong and Mr Peng staged the Fire Incident to destroy the financial documents and records of the Blackgold Group as they had something to hide. The alternative explanation, that the Fire Incident was the result of a purely coincidental vehicular fault, is significantly less likely considering its timing just after Mr Tong and Mr Peng came to know of the impending Special Audit *and* after the documents had been removed to Mr Peng's hometown of Fengjie county. It is likely that Mr Tong and Mr Peng procured the destruction of the financial documents of Blackgold Group. This is suggestive of, or at least consistent with, their involvement in the falsification of the Management Accounts.

Conclusion on knowledge

129 In conclusion, there is a *prima facie* case that Mr Tong and Mr Peng knew that the Attributable False Representations of Fact were false.

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205 5 BA at 42, AEIC of Tin at para 102.

206 5 BA at 43, AEIC of Tin at para 103.

207 PCS at para 170.

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Intention

130 I further conclude from the same facts that Mr Peng and Mr Tong made these representations with the intention that Vibrant should act upon the representations by completing the Acquisition.

Reliance

131 The Court of Appeal has made clear that where the tort of deceit is concerned, the misrepresentations "need not be the sole inducement to [the plaintiffs], so long as they had played a real and substantial part and operated in their minds, no matter how strong or how many were the other matters which played their part in inducing them to act" (*Panatron* at [23]).

132 In this context, I return to the finding that Mr Tong was responsible for statements in the Corporate Presentation but Mr Peng was not (see [56]). Looking at the representations as a whole, the statements that Mr Tong and Mr Peng were jointly responsible for were sufficient to have induced the transaction. These are sufficient to ground their joint and several liability. In this section I therefore exclude the representations made in the Corporate Presentation (these are at paras 26(a)(iii), 26(a)(vi) and 26(a)(vii) of Annex 1) and I refer to the statements remaining undeleted in Annex 1 as the Crucial Representations.

133 In this case, it is clear to me that the Crucial Representations played a real and substantial part and operated in the minds of the executives of Vibrant, including Mr Khua, in inducing them to complete the Acquisition. Mr Khua testified that following the review process, the Finance Team summarised the information, representations and documents which it had been provided with

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during the Review Process into the Financial Review Report.[208] This information included, among others, the coal production of the various mines,[209] the profit and loss of the Blackgold Group,[210] and the representations from the 22 September Meeting,[211] which I have accepted to be false in large part. The Financial Review Report was provided to Vibrant's Board of Directors for their consideration, following which Vibrant's management decided to proceed with the Acquisition.[212] As a matter of common sense, the executives of a company like Vibrant would rely on the financial information presented to them in order to decide whether to acquire an asset or a company.

134 Mr Peng's only objection to this logic is that Mr Khua's evidence is "bare assertion" and that there is no evidence that the Relevant Representations induced Vibrant to enter into the Acquisition.[213] I reject this submission. Mr Khua and the other directors are the agents through which Vibrant acts. Since the information in the Financial Review Report operated on their minds, inducing them to act on behalf of Vibrant, it can be said that the information in the Financial Review Report acted on the mind of Vibrant. Mr Khua's sworn testimony as to his state of mind at the time of the Acquisition is material evidence, not mere assertion. I accept his testimony.

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208 1 BA at 26−27, AEIC of Eric Khua at para 42.

209 1 BA at 473.

210 1 BA at 475.

211 1 BA at 467−496.

212 1 BA at 27, AEIC of Eric Khua at para 42.

213 2DCS at para 87.

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135 Therefore, I find that the Crucial Representations induced Vibrant to enter into the Acquisition. Mr Tong and Mr Peng are jointly and severally liable for Vibrant's loss.

Loss

136 Vibrant claims for the following heads of loss:[214]

(a) The price that Vibrant paid for the Acquisition (the "Acquisition Price") of A$ 37,635,863.

(b) Costs and expenses to investigate the Irregularities and the purported assets and accounting records of the Blackgold Group.

137 The Court of Appeal in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 ("*Wishing Star*") stated the following regarding the calculation of damages:

(a) The purpose of damages for tortious misrepresentation is to put the victim into the position in which he would have been, if the misrepresentation had not been made, and not to protect his expectation by putting him into the position in which he would have been, if the representation had been true (at [28]).

(b) The potential amount of damages awardable for a fraudulent misrepresentation exceeds even that awardable for a negligent misrepresentation. In particular, damages awarded with respect to a negligent misrepresentation are constrained by the doctrine of remoteness of damage (as manifested in the concept of reasonable

214 PCS at para 245.

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foreseeability). However, damages awarded with respect to a fraudulent misrepresentation are not subject to such a constraint, and are recoverable even if they are not reasonably foreseeable (at [22]−[23]).

138 In my view, it is quite clear that if the Crucial Representations had not been made, Vibrant would not have acquired Blackgold Australia. The Management Accounts and Audited Financial Statements were fundamental to the decision. Therefore, the position that Vibrant would have been in, had the Crucial Representations not been made, is that it would have not paid out the Acquisition Price, but would also not have ownership over the Blackgold Group.

139 The conclusion above requires a valuation of the value accruing to Vibrant as a result of its ownership over the Blackgold Group. The Defendants allege that the value of the Blackgold Group exceeds the Acquisition Price, such that Vibrant did not suffer any loss as a result of the Acquisition. Their submissions are premised on the testimony of Vibrant's expert witness on damages, Mr Terence Ang ("Mr Ang"), that the Net Asset Value ("NAV") of Blackgold Australia, at the date of Acquisition, was still A$ 77,037,450 even after adjusting for the accounting irregularities.[215]

140 Mr Ang's approach, as summarised by Vibrant, was the following:[216]

(a) He compared the NAV of the Blackgold Group at the date of Acquisition, before any revisions or adjustments (A$ 210,421,120) to the Acquisition Price (A$ 37,635,863).

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215 1DCS at para 39; 2DCS at paras 103−107.

216 PCS at para 251.

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(b) He identified the reduced NAV of the Blackgold Group after taking into account the quantifiable revisions set out in the Special Audit Report arising from the Irregularities (A$ 77,037,450). *He then calculated the "value" of the Blackgold Group by proportionally reducing the Acquisition Price according to the proportion by which the NAV had been reduced (around 63.39%)*, producing a figure of A$ 13,778,897.[217]

(c) He then took into account other losses incurred by Vibrant for which there were no conclusions and/or quantifications indicated in the Special Report. For instance, the Special Report did not conclusively determine if the mines were non-operational, and whether the receivables should be written-off.[218] This resulted in an additional downward NAV adjustment of over A$ 13,778,897, resulting in an NAV of nil.[219]

141 I do not agree with Mr Ang's reasoning in the part of the summary that I have italicised at [140(b)] above. There is no evidence that the purchase price bore any relation to the NAV of the Blackgold Group, or any specific proportion thereof. Therefore, the NAV of the Blackgold Group, after taking into account the conclusive findings of the Special Auditor, should be taken as A$ 77,037,450 at the time of Acquisition.

142 Notwithstanding, I agree with Mr Ang (see [140(c)] above) that other losses for which there were no conclusions indicated in the Special Report, must

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217 PCS at para 251(b); 23 BA at 21, para 2.1.12.

218 23 BA at 21, para 2.1.11.

219 PCS at para 251(c); 23 BA at 21, para 2.1.11.

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also be taken into account. These include the losses arising from the non-operational status of Caotang's and Heiwan's mines, and the writing-off of the mine infrastructure and equipment therein.[220] This follows from my findings above that the mines owned by Caotang and Heiwan were not open at the time of Acquisition. This was a finding that the Special Auditor declined to expressly make (and thus did not make adjustments for) because it was outside their temporal scope of work (see [66] above).[221]

143 Drawing from Mr Ang's calculations, the adjustments that would have to be made for the book value of Property, Plant, and Equipment and infrastructure of the three mines is negative A$ 130,574,079.[222] The Defendants have not provided any evidence to the contrary. Subtracting A$ 130,574,079 from A$ 77,037,450 results in a negative figure. Therefore, I still agree with Vibrant's ultimate conclusion that the NAV of the Blackgold Group was nil at the time of Acquisition. This entitles Vibrant to the entire Acquisition Price.

Expenses

144 The Defendants have not disputed that Vibrant is entitled to the costs and expenses that it incurred in investigating the irregularities. These costs would not have to be incurred if the Relevant Representations had never been made (and the Acquisition never entered into). Furthermore, these costs are not subject to any rule of remoteness (see *Wishing Star* at [22]−[23]). I use the invoices that were set out in Mr Khua's evidence, which were not challenged:[223]

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220 23 BA at 47, para 3.5.14.

221 Transcript 29 August 2024 at 12:25−13:12; 15:1−16:25.

222 23 BA at 47, para 3.5.14 and accompanying table.

223 1 BA at 48.

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(a) Legal fees of $415,567.05 for advice from Duane Morris & Selvam LLP ("Duane Morris") regarding the Irregularities.

(b) Legal fees of RMB 259,207.70 for advice from Zhong Hao Law Firm ("Zhong Hao") regarding the Irregularities.

(c) Cost of the Special Audit amounting to US$ 832,101.87, due to Ernst & Young.

(d) Travel and related expenses amounting to $24,031.74.

The amounts listed (a) and (d) are lower than the amounts stated in the submissions, as they are based on the invoices exhibited in the evidence. The fees listed at (a) and (b) were for the purpose of obtaining advice on the financial irregularities at the Blackgold Group and ensuring compliance with the SGX's queries and directions rather than for the purpose of any impending litigation.[224]

Interest

145 Vibrant prayed for pre-judgment interest in the SOC, and the defendants did not dispute this aspect of their liability, nor offered any reason for me to depart from the default simple interest rate of 5.33% per annum, as prescribed by O 17 r 5(1)(*b*) of Rules of Court 2021. There is therefore no reason, in this case, to depart from the general principle that unsuccessful defendants who have kept the plaintiff out of money to which it is entitled, should be liable on the basis that said defendants have had use of the money: see the Court of Appeal decision of *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [137].

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[224] 1 BA at 46–48, AEIC of Eric Khua at paras 76(c)−(d) and 77(a).

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146 Vibrant has pleaded that the loss arising from the payment of the Acquisition Price arose at the time of the Acquisition.[225] I therefore award interest on the Acquisition Price from the date of the Acquisition. For the other heads of loss, I use the date of the latest invoice referable to that head of loss. As a result, in respect of all the sums above, I award:

(a) For the Acquisition price, A$ 37,635,863 with simple interest of 5.33% starting from 13 July 2017.

(b) For legal fees to Duane Morris in respect of the Irregularities, S$ 415,567.05 with simple interest of 5.33% starting from 21 August 2019.

(c) For legal fees to Zhong Hao in respect of the Irregularities, RMB 259,207.70 with simple interest of 5.33% starting from 15 January 2019.

(d) For the cost of the Special Audit, US$ 1,098,208.05 with simple interest of 5.33% starting from 18 January 2019.

(e) For the cost of travel, S$ 25,021.43 with simple interest of 5.33% starting from 28 September 2018.

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225 Set Down Bundle at p 89, para 54(a).

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Conclusion

147 In conclusion, I find that the Defendants are liable to Vibrant in the tort of deceit. I award Vibrant the sums set out at [146] above, for which the Defendants are severally and jointly liable.

148 If parties are unable to agree on costs, they are to file submissions on costs within 21 days of today. If any party does not consent to costs being decided without a further oral hearing, that party must indicate accordingly in the costs submissions filed.

Valerie Thean
Judge of the High Court

Chan Kah Keen Melvin, Chew Xizhi Stephanie and Terence Yeo
(TSMP Law Corporation) for the claimant;
Lim Chee San (TanLim Partnership) for the first defendant;
Cham Shan Jie Mark, Lim Jing Kai Joshua and Matthew Tan Jun Ye
(Aquinas Law Alliance LLP) for the second defendant;
Gary Leonard Low and Ong Hui Wen (Drew & Napier LLC) for the
third defendant (watching brief).

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Annex 1: Summary of findings on pleaded representations

The following paragraphs reflect paragraphs pleaded in the Statement of Claim. Representations that have been struck through denote representations that fall outside of the category of "Crucial Representations". The following superscript descriptions explain the deletion in each case:

(1): The representation is not a representation of fact.

(2): The representation is not attributable to either Mr Tong or Mr Peng.

(3): The representation is not proven to be false.

(4): The representation was made by Mr Tong alone.

It follows that the definition of "Blackgold Financial Documents" at para 21(f) of the Statement of Claim is modified to the extent set out above.

List of Representations

25 The Coal Trading Representations:

(a) In the Audited Financial Reports, that the Blackgold Group's coal trading business:

(i) achieved sales of approximately 3,200,000 tonnes of coal and revenue of AUD291,686,000 in the year ended on 31 October 2014;

(ii) achieved sales of approximately 3,900,000 tonnes of coal and revenue of AUD378,900,000 in the year ended on 31 October 2015;

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(iii) achieved sales of approximately 3,700,000 tonnes of coal and revenue of AUD313,439,000 in the year ended on 31 October 2016; and

(iv) contributed to 86.8%, 90.3% and 89.5% of the Blackgold Group's total revenue in the years ended on 31 October 2014, 31 October 2015 and 31 October 2016 respectively.

(b) In the Blackgold Group's Management Accounts, that Heijin contributed to a significant portion of the Blackgold Group's coal trading business and revenue, including, *inter alia*:

(i) 83.8% of the Blackgold Group's revenue in the half year ended on 30 April 2016; and

(ii) 81.2% of the Blackgold Group's revenue in the year ended on 31 October 2015.

(c) ~~In the Top Customers List, that the 2 largest customers which accounted for approximately 86.5% of the total revenue generated by the Blackgold Group's 10 largest customers, were Heijin's customers.~~(2)

(d) ~~In conversations and/or meetings between the Plaintiff's Finance Team and key members of Blackgold Australia's management (which included the Defendants) during the Chongqing Trip (including the 22 September Meeting), that at the material time~~:

(i) ~~The Chinese coal market was developing steadily and that there was potential that coal prices would rise further;~~(1) and

(ii) ~~The Blackgold Group had development plans to procure new and important customers for its coal trading business, including Fengjie Huadian Power Plant.~~(1)

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26 The Mining Representations:

(a) ~~In the Corporate Presentation, that at the material time~~:

(i) ~~The Blackgold Group's coal mining assets were "*strategically located with logistical advantages and long mine lives*";~~(3)

(ii) ~~Caotang's mine had a mine life of a further 15 years with total coal reserves of 22,200,000 tonnes;~~(3)

(iii) ~~Caotang had produced 1,199,465 tonnes, 757,512 tonnes and 895,190 tonnes of coal in the years ended on 31 October 2013, 31 October 2014 and 31 October 2015 respectively;~~(4)

(iv) ~~Caotang had generated AUD34.6 million, AUD31.3 million and AUD50.6 million in mining sales in the years ended on 31 October 2013, 31 October 2014 and 31 October 2015 respectively;~~(4)

(v) ~~Heiwan's mine had a mine life of a further 7 years with total coal reserves of 3,600,000 tonnes;~~(3)

(vi) ~~Heiwan had produced 157,585 tonnes, 147,034 tonnes and 299,273 tonnes of coal in the years ended on 31 October 2013, 31 October 2014 and 31 October 2015 respectively;~~(4)

(vii) ~~Heiwan had generated AUD14.4 million, AUD13.2 million and AUD23.2 million in mining sales in the years ended on 31 October 2013, 31 October 2014 and 31 October 2015 respectively;~~(4)

(viii) ~~There was strong potential for growth in the coal mining revenue of Caotang and Heiwan as there was a new power plant being built by China Huadian Corporation "*which is very close to*~~

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~~[the Blackgold Group's] *mines… 8km away from Caotang mine and 35km away from Heiwan mine*" that "*should start operation sometime in October 2016*". When in full operation, this power plant would create additional demand for coal and potentially increase revenue for Caotang and Heiwan, as there would be an "annual coal demand [of] about 3 million tonnes, for coal… which is similar to [Caotang's and Heiwan's] coal qualities";~~[1] and

~~(ix) Baolong's mine had a further mine life of 31 years with total reserves of 55,200,000 tonnes.~~[3]

(b) In the audited financial report of Blackgold Australia for the year ended on 31 October 2016, that the Caotang and Heiwan mines produced approximately 861,124 tonnes of coal and mining sales revenue amounted to AUD5,916,000.

(c) In conversations and/or meetings between the Plaintiff's Finance Team and key members of the Blackgold Australia management (including the Defendants) during the Chongqing Trip (including the 22 September Meeting), that at the material time:

(i) The Caotang and Heiwan mines were actively producing coal, the mining permits for these mines had been renewed, appropriate and adequate safety measures were in place, and there would not be any issue with the continued operation of the mines and renewal of the mining permits.

(ii) The Baolong mine had been designed to achieve an annual output of 1,800,000 tonnes of raw coal, almost RMB30 million had been invested in the mine, and production conditions to achieve an annual output of 150,000 tonnes of coal had been achieved;

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(iii) ~~The Baolong mine would commence operations when coal market conditions improved~~;(1) and

(iv) ~~The Chinese coal market was developing steadily, coal prices would continue to rise, and the Blackgold Group would utilise the geographical advantages of Chongqing to expand its scale of operations and production capacity~~.(1)

(d) Further, the Defendants, by their silence, omitted to subsequently correct and/or clarify any of the Mining Representations with the Plaintiff on or before the time of the Acquisition.

27 The Shipping Transportation Representations:

(a) In the Audited Financial Reports, that the Blackgold Group's "*shipping transportation*" business had achieved revenue of AUD14,181,000, AUD10,717,000 and AUD8,709,000 in the years ended on 31 October 2014, 31 October 2015 and 31 October 2016 respectively.

(b) ~~In the Shipping Business Plan, that, *inter alia,* Blackgold Shipping at the material time~~:

(i) ~~was a well-known and award-winning logistics company in Chongqing, and one of the key shipping transportation companies along the Yangtze river~~;(2)

(ii) ~~was mainly engaged in transportation along the Yangtze river involving foreign trade, inter-provincial cargo transportation and freight forwarding~~;(2)

(iii) ~~was equipped to carry important cargo, such as generators for the Three Gorges Dam~~;(2)

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(iv) ~~had established 8 places of business along the Yangtze river to form a complete logistics and transportation network system~~;[(2)] and

(v) ~~had in place plans to create a one-stop business model of shipping, wharfs and logistics, and to transform itself into a leading enterprise for shipping along the Yangtze river~~.[(1)]

(c) In conversations and/or meetings between the Plaintiff's Finance Team and key members of the Blackgold Australia management (including the Defendants) during the Chongqing Trip (including the 22 September Meeting), that at the material time:

(i) Blackgold Shipping's business was primarily for the transportation of goods to customers along the Yangtze river; and

(ii) ~~The Blackgold Group would develop its shipping transportation business by increasing its fleet of ships and its capacity, and to create a one-stop business model of shipping, wharfs and logistics~~.[(1)]

28 The Receivables Representations:

(a) In the Blackgold Financial Documents, including but not limited to the ageing reports of the respective Blackgold Group entities for the half year ended on 30 April 2016, that there were no significant aged debts due and owing to the Blackgold Group.

(b) In the audited financial report of Blackgold Australia for the financial year ended on 31 October 2016, that in respect of trade receivables that were past due, "*no impairment allowance is necessary in respect of*

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these receivables. They are companies with good collection track records and no recent history of default".

(c) At the 22 September Meeting, that the Blackgold Group's finance departments had in place a system of monthly checks and follow-ups with each customer from whom there were outstanding receivables to ensure recoverability, and that the Blackgold Group faced no issues with collection of its receivables.

29 The Overall Value Representations:

~~(a) At the Initial Discussions, that the Blackgold Group ran profitable business operations, had significant growth potential owing to its growing and/or expanding businesses, was worth significantly more than the Acquisition Price and represented a good investment.~~ (2)

(b) In the Blackgold Financial Documents, which contained the key markers and/or indicators of the Blackgold Group's overall value and potential for acquisition, including (but not limited to) the following financial information relating to the assets and business operations of the Blackgold Group, that:

(i) the Blackgold Group had generated total revenues of AUD270,340,000 AUD336,082,000, AUD419,401,000 and AUD350,288,000 in the years ended on 31 October 2013, 31 October 2014, 31 October 2015 and 31 October 2016 respectively;

(ii) the Blackgold Group had made gross profits of AUD76,724,000, AUD42,877,000, AUD32,348,000 and AUD25,033,000 in the years ended on 31 October 2013, 31

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October 2014, 31 October 2015 and 31 October 2016 respectively;

(iii) the Blackgold Group had non-current assets amounting to AUD227,739,000, AUD255,167,000, AUD316,399,000, and AUD355,283,000 as at 31 October 2013, 31 October 2014, 31 October 2015 and 31 October 2016 respectively; and

(iv) the Blackgold Group had net assets amounting to AUD184,229,000, AUD202,019,000, AUD271,725,000, and AUD198,614,000 as at 31 October 2013, 31 October 2014, 31 October 2015 and 31 October 2016 respectively.

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Annex 2: Expenses incurred in investigating the Irregularities

Invoices from Duane Morris

Invoice No	Reference in documents	Amount (S$)
2445171	2 BA 443	53,954.59
2450877	2 BA 449	19,322.42
2460023	2 BA 453	81,433.71
2472274	2 BA 462	52,912.57
2484244	2 BA 465	47,298.98
2495445	2 BA 478	32,046.50
2499392	2 BA 485	16,933.61
2514791	2 BA 490	19,920.19
2516146	2 BA 496	4,061.72
2534234	2 BA 501	23,093.22
2550584	2 BA 506	26,472.23
2559129	2 BA 514	31,095.54
2573013	2 BA 522	7,021.77
Total		**415,567.05**

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Invoices for travel expenses

S/N of receipt or claim form	Expense claimed	Reference in documents	Amount (S$)
UOB434568	Taxi fare and Hotel JW Marriot Chongqing (8, 12−14 Sept 2018)	2 BA 546	378.18
UOB434568	Flight to Chongqing	2 BA 548	521.33
Invoice No 11313	Flight to Chongqing by Mr Yong (23 Aug 2018)	2 BA 552, 553	1,390
Invoice No 11312	Flight to Chongqing by Mr Sim (24 Aug 2018)	2 BA 552, 554	1,490
Invoice No 11314	Flight to Chongqing by Mr Denny (EY's Special Auditor, 26 Aug 2018)	2 BA 552, 555	1,390
INV267590	Flight to Chongqing by Mr Yong (17 July 2018)	2 BA 556, 557	1,190
INV267850	Additional cost for Mr Yong's flight due to schedule change (27 July 2018)	2 BA 556, 561	300

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INV267695	Flight to Chongqing by Mr Chua, Mr Kow and Ms Tan (20 July 2018)	2 BA 556, 558	5,670
INV267696	Urgent visa for Mr Kow (20 July 2018)	2 BA 556, 559	290
INV267687	Flight to Chongqing by Mr Sim (18 July 2018)	2 BA 556, 560	1,390
INV267856	Additional cost for Mr Sim's flight due to schedule change (23 July 2018)	2 BA 556, 562	148
INV267848	Flight to Chongqing by Ms Cheah and Ms Yeo (29 July 2018)	2 BA 556, 564	2,380
INV267938	Additional cost for Ms Cheah and Ms Yeo's flights due to schedule change (29 July 2018)	2 BA 556, 563	400
Invoice No 11378	Flight to Chongqing by Mr Sim (4 Sept 2018)	2 BA 565, 566	1,890
Invoice No 11389	Flight to Chongqing by Mr	2 BA 565, 567	1,390

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	Denny (9 Sept 2018)		
Invoice No 11393	Flight to Chongqing by Mr Sim (12 Sept 2018)	2 BA 565, 568	1,190
Invoice No 11446	Flight to Chongqing by Mr Denny (28 Sept 2018)	2 BA 565, 569	147
Booking No 7099787434	Flight to Chongqing by Mr Chua (4 Sept 2018)	2 BA 573	670.12
DBS300469	Flight to Chongqing by Ms Tan and Mr Kow (29 Aug 2018)	2 BA 575	2,796.80
Total			**25,021.43**

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