FEDERAL COURT OF AUSTRALIA

Australian Securities and Investment Commission v Gallop International Group Pty Ltd [2019] FCA 1514

File number:	SAD 300 of 2017
Judge:	**CHARLESWORTH J**
Date of judgment:	16 September 2019
Catchwords:	**CORPORATIONS** –allegations that two companies contravened s 911A and s 1041H of the *Corporations Act 2001* (Cth) and s 12DA and s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) – whether the companies conducted a business in this jurisdiction without holding an Australian Financial Services Licence – where financial services business promoted on two websites accessible in this jurisdiction – where websites remained accessible following the cancellation of each company's licence – whether conduct of uploading accessible conduct to each website was attributable to both companies – whether representations accessible on website were false or misleading in contravention of s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) – whether continued conduct of financial services business by first defendant constituted misleading or deceptive conduct in contravention of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) and s 1041H of the *Corporations Act 2001* (Cth) – contraventions established against first defendant – no contraventions established against second defendant **CORPORATIONS** – whether third defendant aided, abetted, counselled, procured or was otherwise knowingly concerned in the first defendants' contraventions of s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) – nature and extent of involvement – assessment of pecuniary penalty **CORPORATIONS** – whether second and fourth defendants should be wound up on just and equitable grounds where no contraventions established against them

CORPORATIONS – whether third defendant should be disqualified from managing corporations – whether third defendant should be permanently restrained from involvement in a financial services business in this jurisdiction

EVIDENCE – where defendants fail to appear at trial – where court satisfied the defendants are aware of the proceedings the orders sought against them – consideration of the inferences that may be drawn from the defendants' failure to adduce evidence in respect of matters within their knowledge

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth) ss 5, 12AC, 12BA, 12BB, 12DA, 12DB, 12GBA, 12GD, 12GH, 12GJ, 12GLD, 19, 77

Corporations Act 2001 (Cth) ss 9, 79, 206E, 461, 462, 464, 465A, 761A, 763A, 763B, 766A, 766C, 769B, 911A, 911D, 912A, 912D, 913B, 915B, 1041H, 1317QD, 1324

Crimes Act 1914 (Cth) s 4AA

Evidence Act 1995 (Cth) s 140

Federal Court of Australia Act 1976 (Cth) ss 21, 23

Trade Practices Act 1974 (Cth) s 86, Pt VI

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth) Schs 1, 2

Federal Court (Corporations) Rules 2000 (Cth) r 5.11

Cases cited:

ASIC v Adler & 4 Ors [2002] NSWSC 483

Australian Competition and Consumer Commission v Cement Australia Pty Ltd (2017) 258 FCR 312

Australian Competition and Consumer Commission v H.J. Heinz Company Australia Limited (No 2) [2018] FCA 1286

Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2) [2016] FCA 698

Australian Competition and Consumer Commission v MSY Technology Pty Ltd (2012) 201 FCR 378

Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181; (2016) 340 ALR 25

Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238

Australian Competition and Consumer Commission v Yazaki Corporation (2018) 262 FCR 243

Australian Securities and Investments Commission v ABC Fund Managers Ltd [2001] VSC 383; (2001) 39 ACSR 443

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (2015) 235 FCR 181

Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2) [2013] FCA 234; (2013) 93 ASCR 189

Australian Securities and Investments Commission v Channic Pty Ltd (No 5) [2017] FCA 363

Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of GE Capital Finance Australia [2014] FCA 701

Australian Securities and Investments Commission v Hellicar (2012) 247 CLR 345

Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd [2014] FCA 1387; (2014) 103 ACSR 453

Australian Securities Commission v Donovan [1998] FCA 986; (1998) 28 ACSR 583

Australian Securities Commission v Rohani and Others [1998] FCA 1432; 29 ACSR 106

Baird v Lees (1924) SC 83

Briginshaw v Briginshaw (1938) 60 CLR 336

Director of the Fair Work Building Industry Inspectorate v Robinson (2016) 241 FCR 338

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421

Jones v Dunkel (1959) 101 CLR 298

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361

Loch v John Blackwood Ltd (1924) AC 783

RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd (1993) 41 FCR 164

Re Netsor Pty Ltd and the Companies Act (1981) 6 ACLR 114

Re Tivoli Freeholds Ltd (1972) VR 445

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20

The Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482

Thompson v Riley McKay Pty Ltd (No 2) [1980] FCA 24; (1980) 29 ALR 267

Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) (1993) 41 FCR 89

Trade Practices Commission v CSR Limited [1990] FCA 762

	Heydon JD, *Cross on Evidence* (11th ed, LexisNexis Butterworths, 2017)
Date of hearing:	10 September 2018
Date of last submissions:	
Registry:	South Australia
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	345
Counsel for the Plaintiff:	Ms K Clarke
Counsel for the Defendants:	The Defendants did not appear

ORDERS

SAD 300 of 2017

IN THE MATTER OF GALLOP INTERNATIONAL GROUP PTY LTD (ACN 147 664 551)

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**GALLOP INTERNATIONAL GROUP PTY LTD (IN LIQUIDATION)** First Defendant
	GALLOP ASSET MANAGEMENT PTY LTD (ACN 136 696 743) Second Defendant
	MING-CHIEN WANG (and another named in the Schedule) Third Defendant

JUDGE:	**CHARLESWORTH J**
DATE OF ORDER:	**16 SEPTEMBER 2019**

1. The originating application, as amended, be allowed in part.
2. On or before 18 September 2019, the plaintiff is to serve these orders and the reasons for judgment on the defendants.
3. The plaintiff has liberty to vary the date in paragraph 2, such liberty exercisable by email correspondence to associate.charlesworthj@fedcourt.gov.au.
4. For the purposes of the order in paragraph 2, service on the third defendant may be made by email to wmg671201@gmail.com and kuyiwen@outlook.com.
5. On or before 25 September 2019 the plaintiff is to file an affidavit attesting to its compliance with the order in paragraph 3.
6. The final form of relief to be granted in the action be determined on the papers as a separate question.
7. The parties have liberty to file and serve minutes of order giving effect to the reasons for judgment delivered today, such liberty to be exercised on or before 25 September 2019.

8. In the event that no party exercises the liberty in paragraph 7, orders in terms proposed in Schedule A to the reasons for judgment will be made and entered on 26 September 2019 without a further hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

CHARLESWORTH J:

1 In this action the Australian Securities and Investments Commission (ASIC) alleges that the first and second defendants contravened the ***Corporations Act*** *2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in relation to the conduct of a financial services business. ASIC alleges that the third defendant is liable as an accessory to those contraventions. It is alleged that the first to third defendants intended to use the fourth defendant as a corporate vehicle for the continuation of the financial services business and the commission of further contraventions of the Corporations Act and the ASIC Act.

SUMMARY OF OUTCOME

2 The relief sought by ASIC is set out in its Amended Originating Process dated 11 May 2018 (Amended OA). The relevant parts of the Amended OA are extracted or summarised under the headings that appear from [128] and following.

3 For the reasons given below, I am not satisfied that the second defendant contravened the ASIC Act or the Corporations Act in the period and in the manner alleged by ASIC. That is because I have determined that the relevant acts and omissions constituting the contraventions are attributable to the first defendant and not to the second. It follows from that finding that the third defendant was not involved in any contravention by the second defendant.

4 I am nonetheless satisfied that orders should be made for the imposition of a pecuniary penalty in the amount of $3 million against the third defendant in respect of his involvement in the first defendant's contraventions. ASIC's application for orders disqualifying the first defendant from managing corporations and restraining him from involvement in any financial services business should be allowed. I am satisfied that it is just and equitable that the second and fourth defendants be wound up.

5 These reasons are indexed as follows:

THE APPLICABLE LAW

6 The allegations of contraventions against the first to third defendants relate to a confined period of a little over five months in 2017. Accordingly, all of the conduct forming the subject matter of the allegations is alleged to have occurred prior to the date on which amendments made by Sch 1 and Sch 2 of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (Amending Act) came into operation. References in these reasons to the Corporations Act and the ASIC Act are to be understood as references to those statutes as in force at the time that the contraventions occurred.

THE DEFENDANTS

7 On 2 November 2017, a solicitor filed and served a Notice of Acting on behalf of the first to third defendants. The solicitor filed a Notice of Ceasing to Act on 16 May 2018, in advance of the substantive hearing on 10 September 2018.

8 On 22 June 2018, this Court made an order for the winding up of the first defendant, Gallop International Group Pty Ltd (GIG). The liquidator of GIG does not oppose the orders sought by ASIC and has otherwise adduced no evidence.

9 At the substantive hearing, there was no appearance by or on behalf of the second defendant, Gallop Asset Management Pty Ltd (GAM). Nor was there any appearance by or on behalf of the third defendant, Mr Ming-Chien Wang (also known as "Ken").

10 On ASIC's application, **Stumac** Pty Ltd was joined as the fourth defendant on 28 March 2018. At that time Stumac had, as its sole director, Mr Kevin O'Doherty. A solicitor filed a Notice of Acting on behalf of Stumac on 6 December 2017. The solicitor made submissions opposing the joinder before ceasing to act on 18 May 2018.

11 Mr O'Doherty resigned as sole director of Stumac effective 1 August 2018. Stumac did not appear at the substantive hearing on 10 September 2018.

12 ASIC filed **Supplementary Written Submissions** on 28 September 2018 and judgment was reserved on 1 October 2018.

13 I am satisfied that each of the defendants is aware of ASIC's application and determine the application on the evidence in the defendants' absence.

APPROACH TO THE EVIDENCE

14 The following evidence has been read:

(1) three affidavits of Ms Kathy-Anne Prosser, an authorised delegate of ASIC, affirmed on 11 May 2018 (first Prosser affidavit), 23 July 2018 and 29 August 2018;

(2) two affidavits of Mr Stuart Forbes Upham MacKenzie affirmed 8 May 2018 and 21 June 2018;

(3) an affidavit of Ching Huang (Albert) Lai sworn on 10 May 2018;

(4) an affidavit of Chiao Fei (Jovi) Chen affirmed on 24 May 2018;

(5) two affidavits of Ms Tegan Loanni Collins affirmed on 19 July 2018 and 5 September 2018;

(6) an affidavit of Mr Michael Hassett affirmed on 25 July 2018;

(7) an affidavit of Mr O'Doherty affirmed on 24 August 2018;

(8) eleven certificates of translation (marked as exhibits P1 to P11); and

(9) five transcripts of compulsory examinations conducted under s 19 of the ASIC Act (marked as exhibits P12 to P16), admitted in evidence in accordance with s 77(a)(ii) and (b) of the ASIC Act in respect of the following examinees:

    (a) Ms Sau Li Lily Kot (also known as Lily)

    (b) Mr Fan Zhuo (also known as Van);

    (c) Mr O'Doherty;

    (d) Ms Melody Gao; and

    (e) Ms Sophie Gerber.

15 Also before the Court are two affidavits affirmed by Mr Cameron Alexander Lockett on 25 October 2017 and 26 October 2017. Those affidavits were read on ASIC's applications for

interlocutory relief. Mr Lockett's affidavits have been read for the purpose of determining the application for final relief, to the limited extent that they are cross-referred in the other affidavits upon which ASIC relies.

16 The unchallenged evidentiary material before the Court exceeds 2,500 pages. Except where it is otherwise apparent, the evidence of the deponents should be understood as having been accepted. Where the affidavits depose to inferences that may be drawn from the documentary evidence, those depositions have been read as in the nature of submissions. The Court draws its own inferences from the documents. With some exceptions, those inferences are the same as those invited by ASIC.

17 The Court has had particular regard to the evidence annexed and referred to in the three affidavits of Ms Prosser and in written submissions prepared by counsel appearing for ASIC. The Court's factual findings are based in large part (although not exclusively) on those materials. As the evidence has been considered as a whole, it is not practical to recite every item of evidence bearing on each of the Court's discrete findings.

Standard of proof

18 The Court must find ASIC's case proven if it is satisfied that the case has been established on the balance of probabilities. Without limiting the matters the Court may take into account in deciding whether it is so satisfied, the Court is to take into account the nature of the cause of action and any defence, the nature of the subject matter of the proceeding and the gravity of the matters alleged: *Evidence Act 1995* (Cth), s 140(1). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336.

19 Mr Wang is a person entitled to maintain a claim of privilege against exposure to penalty in respect of his alleged involvement in contraventions of s 12DB(1)(e) of the ASIC Act. I have had particular regard to the nature of the relief sought against him and the consequences of the orders sought against him when assessing the evidence.

20 That no defendant adduced evidence or made submissions in opposition to ASIC's substantive application alters neither the burden nor the standard of proof. It does, however, allow the Court to draw inferences, where appropriate, that any evidence that might have been adduced by the defendants would not have assisted them: ***Jones v Dunkel*** (1959) 101 CLR 298 at 308, 312 and 320 – 321. The principle stated in *Jones v Dunkel* does not otherwise operate to fill gaps in ASIC's case, nor does it operate to "convert conjecture and suspicion into inference":

see generally Heydon JD, *Cross on Evidence* (11th ed, LexisNexis Butterworths, 2017) at [1215].

21 The Court's factual findings are now set out between [23] – [124] below. That narrative will be supplemented with further findings in the course of determining ASIC's claim for relief from [128] and following.

22 It is convenient to begin with an examination of each of the defendants and the relationships between them.

GAM

23 GAM is an Australian proprietary company limited by shares. It has undergone the following changes to its name:

(1) One Asset Management Limited between 21 April 2009 and 4 March 2013;

(2) One Asset Management Pty Ltd between 5 March 2013 and 13 October 2014;

(3) ACN 136 696 743 Pty Ltd from 13 October 2014 to 11 November 2014;

(4) First Capital Management Pty Ltd for one day on 12 November 2014;

(5) Onestar Asset Management Pty Ltd from 13 November 2014 to 23 November 2015;

(6) Gallop Asset Management Pty Ltd between 24 November 2015 and 5 May 2016;

(7) Hung Ding Financial Management Pty Ltd between 6 May 2016 and 6 July 2017; and

(8) Gallop Asset Management Pty Ltd from 7 July 2017 to at least 5 September 2018.

24 GAM's registered office and principal place of business is situated at Suite 4102, 225 George Street in Sydney.

25 Between 24 November 2015 and 26 January 2017 GAM had as a director Ms Julia Tsai, a family friend of Mr Wang. From 10 January 2017 GAM had additional directors, Mr Timothy Gerber and Ping-Tse Su. Mr Gerber ceased holding office as director and secretary of the company on 25 September 2017, shortly before ASIC commenced this action. At the time of the hearing, GAM's sole director was Ping-Tse Su. Mr Wang is not, and has never been, a director of GAM.

26 Between 24 November 2015 and 9 January 2017, GAM's sole shareholder was Advanced Financial Consultants Corp (AFC), a company with an address originally in Taiwan and later in the Seychelles. GAM's sole shareholder from 10 January 2017 has been **Crowd Smart**

International Co Ltd, a company registered in Belize. It is alleged by ASIC that Crowd Smart has associations with Mr Wang. However, the precise nature of that association has not been explained, nor is it apparent on the material before me.

27 On 7 October 2009, GAM (then named One Asset Management Limited) was granted an Australian Financial Services Licence (AFSL) numbered 336880 pursuant to s 913B of the Corporations Act. That same AFSL was later varied and reissued in the name of GAM, effective 12 January 2016 and again reissued upon the change of the company name to Hung Ding Financial Management Pty Ltd. I will refer to it as the **GAM AFSL**.

28 Among other things, the GAM AFSL authorised GAM to carry on a financial services business to provide general financial product advice for specified classes of financial products, including derivatives, foreign exchange contracts, interests in certain managed investment schemes and securities. The GAM AFSL also authorised GAM to deal in financial products by issuing, applying for, acquiring, varying or disposing of certain classes of financial products, to acquire, vary or dispose of certain classes of products on behalf of another person and to provide and operate custodial or depository services other than investor directed portfolio services. The GAM AFSL authorised GAM to service wholesale clients only.

29 At GAM's request, ASIC cancelled the GAM AFSL effective 31 March 2017 pursuant to s 915B of the Corporations Act. In a letter dated 27 January 2017, GAM, through its representative, stated that the company (at that time named Hung Ding Financial Management Pty Ltd) had ceased its financial services business in December 2016 and that it did not intend to operate as a financial services provider in the future.

GIG

30 GIG is an Australian proprietary company limited by shares. It was formerly named **Weather Pro Pty Ltd** and **Weather Pro Exchange** Pty Ltd. It assumed its current name on 4 May 2016. It has the same registered office and principal place of business as that identified for GAM.

31 Ms Tsai and Mr Wang are co-directors of GIG. From 18 December 2012, GIG (then named Weather Pro) held an AFSL numbered 419155, issued under s 913B of the Corporations Act. That same AFSL was reissued upon the change of the company's name to GIG, effective 17 October 2016. I will refer to it as the **GIG AFSL**.

32 The GIG AFSL authorised GIG to provide a similar range of services to those authorised to be conducted by GAM, except that the GIG AFSL authorised the provision of financial services to both wholesale and retail clients.

33 Prior to April 2016, GIG (then named Weather Pro Exchange) had, as its sole shareholder, Hung Ding Financial Management Company Limited, a company registered in the Seychelles (Hung Ding Seychelles). The sole shareholder of Hung Ding Seychelles was and remains Mr Wang.

34 In April 2016, Mr Wang acquired all of the shares in Weather Pro Exchange. His appointment as director commenced at the same time. Until 11 January 2017, the other director was Mr Zhou. The change of name from Weather Pro Exchange to GIG took effect from 4 May 2016.

35 In a letter to ASIC dated 20 May 2016, GIG, through a representative, provided ASIC with information about GIG's AFSL and its business operations in support of an application to vary the licence conditions relating to "key persons". The letter named Mr Zhuo as the person who would play an "active role" in the management of the business, assisted by GIG's Responsible Managers. The letter went on to say this about the role of Mr Wang within the business:

> (e) Mr Ming-Chien Wang ('**Mr Wang**') will provide financial services under Gallop's AFSL. Although Mr Wang is currently residing in Taiwan, he travels to Australia once a month to attend to his responsibilities as Director of Gallop. Mr Wang is and will continue to be in communication with Mr Zhuo and the Responsible Managers on a daily basis. His role in the business is as an executive director and he is available by telephone and email seven (7) days a week to attend these duties.
>
> Mr Wang has in excess of eight (8) years of experience in the financial services industry. Mr Wang has in excess of five (5) years of experience in roles as General Manager and Director, performing the following tasks:
>
> - Overall supervision of company operation, client relationship management and customer services;
> - Overall supervision of the development and implementation of compliance framework and policies; and
> - Liaising with external service providers, attending regular compliance meetings and reviewing compliance reports to ensure compliance with relevant legislative requirements;
> - Responsible for the preparation and review of legal documents;
> - Training staff members;
> - Dealing with client complaints and responding within appropriate timeframes;

- Liaising with external accountants and auditors to ensure the business remain solvent, manage the cash flow meet all legislative capital requirements.

36 GIG's AFSL was cancelled by a decision of ASIC effective 24 May 2017 on the basis that GIG had contravened multiple provisions of the Corporations Act. The decision record contains findings to the effect that GIG had repeatedly failed to comply with the conditions of its licence and with its obligations under financial services laws, particularly laws in relation to the lodgement of financial statements, audit reports, breach reports and notification of changes of control.

STUMAC

37 The fourth defendant, Stumac, is an Australian proprietary company limited by shares. It was registered on 18 April 2016. From that date until 19 July 2017 it had, as its sole director and shareholder, Mr Stuart MacKenzie. The company was established by Mr MacKenzie as a vehicle by which he might work as an independent finance broker. To that end, Mr MacKenzie caused Stumac to lodge an application with ASIC for an ASFL. He also caused Stumac to open an account with the Commonwealth Bank of Australia (CBA) in the company's name.

38 Stumac was issued with an AFSL numbered 487731 on 1 September 2016 (the Stumac AFSL). Among other things, the Stumac AFSL authorised it to conduct a financial services business to provide advice and to deal in products including derivatives, foreign exchange contracts and securities to wholesale clients only. Mr MacKenzie was the sole responsible manager for the purposes of the Stumac AFSL.

39 In the period of time in which the shares in Stumac were owned by Mr MacKenzie, Stumac did not operate any financial services business under the Stumac AFSL, as Mr MacKenzie (properly) wanted to ensure that the company's organisational processes were in place before providing financial services to any person.

40 In September 2016, Mr MacKenzie gained employment elsewhere. The conditions of Mr MacKenzie's employment required him to sell his interest in Stumac. He approached a solicitor in a financial services law firm who identified potential purchasers for him.

41 In July 2017, Mr MacKenzie entered into an agreement with a company named **Stumac Team Creation** Limited, a company incorporated in Hong Kong and formerly named Huge Team Creation Limited. Pursuant to that agreement, Mr MacKenzie issued further shares in Stumac and sold all of the shares in the company to Stumac Team Creation.

42 At the time that it acquired its shares in Stumac, Stumac Team Creation had, as its director, Ms Yi-Wen Kuo (also known as Yvonne). Ms Kuo was, in the relevant period, Mr Wang's wife. At the time of the hearing in this matter she was the sole shareholder of Stumac Team Creation.

43 Ms Kou's directorship ended on 5 July 2017. She resumed again as a director on 15 September 2017. Ms Tsai was a director of Stumac Team Creation between 7 July 2017 and 18 September 2017. Mr Wang became a director from 18 September 2017. He was, accordingly, a director of Stumac Team Creation at the time that this Court made orders joining Stumac as a defendant to the proceedings and restraining certain activities in relation to the company.

44 The terms of the share sale agreement provided that Stumac's AFSL remained the "asset" of Stumac. By the same agreement, Mr MacKenzie agreed to enter into an agreement pursuant to which he would act as Stumac's Responsible Manager for an initial term of six months. The person identified in the agreement as the contact person for Stumac Team Creation was Mr Wang. Mr MacKenzie remained in the role as Responsible Manager until his resignation on 28 November 2017. He has not had any involvement with Stumac since his resignation. There is nothing in the evidence to suggest that Mr MacKenzie had any knowledge of or involvement in any of the wrongdoing alleged against the defendants in this proceeding and ASIC makes no such allegiant against him.

45 Upon completion of (and subject to the terms of) the share sale agreement of 19 July 2017, Mr MacKenzie resigned as a director of the company and Mr O'Doherty was appointed. Mr O'Doherty became a director when asked by Mr Raman Bhalla to hold that office for a fee of $500 per quarter. Mr Bhalla is a person having links to Mr Wang. Those links are described at [202] to [211] of the first Prosser affidavit. They need not be detailed here.

46 Upon his appointment Mr O'Doherty made no enquiries as to why the company was established and what its future trading intentions were. Aside from his steps taken in relation to these proceedings, Mr O'Doherty's activities as a director were limited to the opening of a bank account and the lodging of draft audit accounts with ASIC in late 2017. Mr O'Doherty received those reports from an accountancy firm, signed them and lodged them apparently without informing himself of their contents.

47 Mr O'Doherty is described by ASIC as a "director for hire". That is an apt description, given his very limited knowledge about the proponents of the company and its affairs. Mr O'Doherty

did not know that the company's shareholder was Stumac. Nor was he aware that Stumac was the holder of an AFSL, nor that Mr MacKenzie was the Responsible Manager in relation to it. It appears that Mr O'Doherty never cared to obtain publicly available information in relation to such matters, notwithstanding that he held office as the company's sole director. As will be seen, Mr O'Doherty did not concern himself with the transactions occurring on a bank account that he established in the company's name. He claims that he was not aware that Stumac had an operational website.

48 Mr O'Doherty corresponded with persons named "Yvonne", "Ken", "Fan", "Ms Du" and/or "Mr Xu" primarily about the payment of his fees. The names of those persons correspond with the names or pseudonyms of persons mentioned earlier in these reasons including Ms Yi-Wen Kuo, Mr Wang and Mr Zhou.

49 As mentioned earlier in these reasons, Mr O'Doherty resigned as director of Stumac on 1 August 2018.

50 Prior to his resignation Mr O'Doherty received an email from the address kuoyiwen@outlook.com. The name of that address and the content of the email supports the inference that it was sent by Mr Wang's wife, Yi-wen Kuo. The email states (without modification):

> 'Hi,
>
> We are just informed by ASIC that the STUMAC PTY.LTD might get inquiry as well, because of Ken, who is the stakeholder of GOLLAP and STUMAC.
>
> According to this, we would like to confirm the situation with you first, which is the STUMAC will be operated under the regulation even though Ken is one of the stockholder.
>
> Please be sure that you haven't been informed anything related about GALLOP, so that you don't know nothing, if they ask.
>
> Thank you very much for your cooperation.' (Sic)

51 The email constitutes a direction to Mr Doherty that he keep himself ignorant of the company's affairs, including its dealings with ASIC. It is reasonable to conclude that Mr O'Doherty faithfully followed that instruction and, as a consequence, was unable to provide information to ASIC that a director of a company incorporated in Australia should ordinarily be expected to provide.

BUSINESS ACTIVITIES

Websites

52 In January 2016, after the GAM AFSL was issued in GAM's name, customers who had previously invested with the company under its former name or names were informed by email of the company's change of name and directed to a website utilising the domain name gamfx.com. The email (as sent to a customer in Chinese and here translated to English) was expressed as follows:

GAL.0025.0004.0006

GAM ANNOUNCEMENT

To all our loving and supportive consultants and customer partners:

1. Due to market expansion requirement, in order to provide a higher speed, safer and more stable platform so as to provide better services to our extensive customers, the original company (Onestar Asset Management Pty Ltd) will bring in a new operational management team, as of today the previous company's name has been officially changed to Gallop Asset Management Pty Ltd.

2. In accordance with the regulations of ASIC, during the transfer of the management right and the official commencement of the new company bank account, all account withdrawals will be temporarily suspended, currently the new account has gone through registration and is being reviewed, once the account passes the review the company will immediately process cash withdrawal matters, the company would like to express sincere apologies for the long waiting and inconveniences caused to our customer partners during the review period.

3. The GAM internet website will be officially online on 15 January 2016. The link to the website is: www.gamfx.com. At the time there will be a brand new premium website for all of you.

4. For the original OA account, please download the new MT4 program on the day of 15 January 2016, input in the original account passport then you will be able to log in the new GAM platform, all relevant customer rights remain unchanged.

5. The cash bonus system will be officially online on 1 January 2016, the link to the website is: invest.gamfx.com

6. The customer service email address for GAM is service@gamfx.com and has already been in use officially, if any consultant or customer partner has any question please contact us by email, we will shrive our best to serve all of you.

Looking forward to the support and encouragement from our old and new friends, hope in the new year, with the new management concept we will lead the way and become the pioneer of the market, thank you all!

GAM FX

53 As this announcement indicates, the financial services business conducted by GAM from January 2016 was the continuation of a business previously operated by the same company under its former name and under the same AFSL.

54 The results of a domain name search conducted by ASIC on 16 October 2017 indicate that the domain "gamfx.com" was created in December 2015 and that GAM was and remains the registrant for that domain. According to the search results, the website had the title "Gallop International Management Pty Ltd". Despite its investigations, ASIC has been unable to identify any Australian (or overseas) company bearing that name.

55 I find that from as early as January 2016 and until 9 November 2017, an active website utilising the domain name gamfx.com was accessible in Australia and overseas and was published in English, Chinese and "simple Chinese". For convenience, I will refer to that website **as the GAM website**. Content accessible on the GAM website was captured by ASIC on 13 July 2016 and in October 2017. The question of whether it was GAM that uploaded (or caused to be uploaded) readable content to the website at critical times will be considered later in these reasons.

56 On 9 May 2016, the GAM AFSL was reissued in the name Hung Ding Financial Management Pty Ltd to reflect the company's change of name.

57 As at 12 May 2016 (that is, shortly after the re-issue of an AFSL in the name of GIG and GAM's name change to Hung Ding), the following announcement was made by way of a message to customers on the "back office" section of the GAM website:

> Dear (customer)
>
> Gallop International Group Pty Ltd from Australia upholds the attitude of honesty and credibility, dedicates itself to providing its customers with the best financial services and products and, in accordance with the strict rules of ASIC, protects the rights of its investment customers in its practice, expands its business items in the future and provides more investment options, in order to respond to market demands.
>
> To better protect the rights of the customers, the Australian head company has changed its name to Gallop International Group Ltd., and increased business items and supervisory items at the Australian Investment & Securities Commission, with no impact on the services for and the rights and interests of the original existing customers with GALLOP Asset Management Pty Ltd. We feel sorry for any inconvenience caused in the process of this change.
>
> If you have any questions, please visit our FAQ page or contact our customer support team via online chat or email.
>
> Thank you again for choosing GALLOP. We look forward to providing you with better services!

58 The evidence before the Court does not include any extracts from the "FAQ page" referred to in this announcement as it existed at the time of the announcement in May 2016. On the material before me it is unclear what the "original customers" of GAM were told in relation to any legal relationship then existing between them and GAM as a consequence of this announcement.

59 In October 2017, ASIC became aware of an active website utilising the domain name gallopfx.com. The results of a domain name search conducted on 11 October 2017 show that GIG was the registrant for that domain name. I find that from at least May 2016, an active website utilised that domain name. I will refer to that website as the **GIG website**. It, too, was accessible in Australia and overseas and was published in English, Chinese and simple Chinese. The only extracts from the GIG website in evidence are those captured by ASIC on 11 October 2017, 13 October 2017 and 19 October 2017. There is also evidence of "pop up" messages appearing on the GIG website on 16 October 2017, 18 October 2017 and 10 November 2017.

60 The content of the websites in their Chinese and simplified Chinese versions is not materially different from the content of the English language version of the respective sites. Subject to what is said below, as at October 2017, the GAM and GIG websites were otherwise in all relevant respects identical. They share the same graphics, images and formatting and contain the same representations.

61 Both the GAM website and the GIG website facilitated access to a trading platform known as Meta Trader 4 (MT4), which enabled customers to trade on their own account in foreign exchange, precious metals and contracts for difference.

62 As at October 2017, the English language versions of the GAM website and the GIG website contained the following statements:

> GALLOP INTERNATIONAL GROUP PTY LTD (GALLOP). This site is owned by GALLOP and designed in accordance with laws and regulations in Australia. The product and services described herein may not be applicable to all countries.
>
> Customer funds will be deposited in a designated trust account in accordance with Australian regulatory requirements. Funds in this account can only be used for customer transactions and will not be used for other purposes for any reason. Gallop International Group Pty Ltd segregates customer funds and strictly prohibits mixing the customer assets and the assets of Gallop International Group Pty Ltd.

63 The Chinese and simplified Chinese versions of each website contained similar statements, as follows:

> GALLOP INTERNATIONAL GROUP PTY LTD is authorized to engage itself in the business of financial services in Australia to the extent specified in its financial service license. This website is owned by Gallop International Group and has been prepared in accordance with the laws and regulations of Australia. …
>
> In accordance with the regulatory requirements of Australia, funds from the customer will be deposited into a designated trust account, from which such funds may not be used for any other purposes than for transactions by the customer. The Gallop International Group account will segregate customer funds and strictly prohibit any mixing of customer assets with assets of Gallop International Group.

64 Also as at October 2017, both the GIG website and the GAM website encouraged members of the public to "easily start [your] train of wealth" by making deposits of a minimum $USD100 into a bank account described as follows:

> Beneficiary bank: Commonwealth Bank, Australia
>
> BSB: 062-005
>
> Beneficiary name: Gallop International Group Pty Ltd
>
> Beneficiary Account number: 1129 5564

65 I will refer to that account as the **GIG Deposit Account**.

66 At the earlier date of 13 July 2016, the GAM website also referred to the GIG Deposit Account, together with a second account described as follows:

> Beneficiary bank: Commonwealth Bank, Australia
>
> BSB: 062-005
>
> Beneficiary name: Gallop International Group Pty Ltd
>
> Beneficiary Account number: 1129 5513

67 I will refer to that account as the **Second GIG Deposit Account**.

68 At the earlier date of 13 July 2016, the GAM website contained the following statement:

> GALLOP INTERNATIONAL GROUP PTY LTD Gallop Finance Group (GALLOP) (ACN: 147 664 551) is regulated by Australian Securities and Investments Commission (ASIC) and holds an Australian financial services licence (licence No.: 419155), which has been approved to conduct financial services business within the requirements of financial services licence in Australia. This website is owned by Gallop Finance Group and prepared in accordance with the laws and regulations of Australia. The products and services described here may not be suitable for all countries.

69 This earlier capture of the GAM website shows that the business promoted and conducted by the website was one being carried on by GIG at that time. The GIG AFSL is referred to under the heading "Regulatory Mechanism", GIG's membership number with the Financial

Ombudsman Service (FOS) is identified, as are GIG's Australian Business Number and its Australian Company Number. The terms of trade are expressed as terms between the investor and GIG and the privacy policy published on the website also relates to the rights and obligations of GIG *vis a vis* its customers.

70 The Court can identify only one reference to the company name "Gallop Asset Management Pty Ltd" on the GAM website. It appears as a heading on one page of the site as at 13 July 2016. By October 2017, however, that reference was gone, as was the reference to the Second GIG Deposit Account.

Time of representations

71 ASIC invites the Court to find that the representations appearing on the GAM website and the GIG website as captured by ASIC in October 2017 were accessible from as early as 18 December 2016 and 7 March 2017 respectively. Reliance is placed on the domain name searches obtained on 11 October 2017 and 16 October 2017 respectively. The search results for the GIG website domain name contains an entry "Last modified: 07-Mar-2017 03:02:19 UTC". The search results for the GAM website domain name contains an entry: "Updated date: 2016-12-18T05:29:08A".

72 In my view, these search results do not, of themselves, prove the date upon which the readable content of the respective website was last modified. Considered in their proper context, the entries are better understood as referring to the date upon which the details contained in the domain name search results most recently changed. The search results for the GAM domain, for example, indicates that the domain name was first created on 16 December 2015 and that the expiration date was 17 December 2016. The "update" occurring on 18 December 2016 in my view may be fairly understood as reflecting the renewal of the registration on that day, so that it did not expire. In relation to the GIG website, I do not accept the proposition that, as at October 2017, the content of the website had not been modified since 7 March 2017. Other evidence suggests that new content was posted to the GIG website after 7 March 2017 (see [77] below) and, for that matter, the GAM website after 18 December 2016 (see [73] below). The "Last modified" entry in the domain name search results in my view may refer to any number of modifications to the registration details for the domain name, but ought not to be regarded as an indication of when readable content of any active website using the domain name was last uploaded. It will be necessary to return to the question of when the representations first

appeared on the websites for the purposes of determining the question of GIG and GAM's liability.

73 A screen shot of the Chinese version of the GAM website shows that a message was sent to consultants via the website on 2 June 2017, that is, one week after the cancellation of the GIG AFSL. As translated, the message reads:

> Dear consultants,
>
> Thank you for your support and care for GALLOP, and thanks to the Australian Securities & Investment Commission for their corrections and guidance on the administrative procedures of GALLOP. The Company has appealed to the ASIC and has maintained active communication with it, and has promised to make internal improvements to their administrative efficiency, and submit financial and audit reports within the prescribed period.
>
> During the interim GALLOP will suspend any acceptance and solicitation of new customers, and will uphold the principle of honesty and credibility, and work hard to safeguard their goodwill and the rights and interests of the customers! We feel sorry for any inconvenience caused to the consultants. The Company has been cautious and conscientious in providing quality services for the customers, and will definitely use all its heart and efforts to safeguard the financial security of all its investors, and we would most appreciate it if the consultants could continue to give us a helping hand in this difficult time to create a win-win situation!
>
> When the Company purchased its business license from the last securities firm, that securities firm was actually in an unsound operating status, often failing to submit audited statements to the ASIC in a timely fashion. When the license was changed hands, all the responsible managers were replaced, causing doubts and concerns to the ASIC, who believed that this was not quite safe and prudent for the investors.
>
> All of these old accounts were attributed by the ASIC to GALLOP who is the new license holder. After the two public hearings on 14 August 2015 and 14 December 2016, unfortunately we were still recently ordered to make improvements. During the interim ASIC decided that GALLOP can file an appeal, but temporarily cannot solicit new funds externally. The operation and security of the original funds of existing investors will not be affected. We feel shocked about and regret the result of the examination. In addition to making a prompt and responsive announcement on our official website, we wish to use this letter to advise the consultants of the determination of our operation team to do all we can to safeguard GALLOP, a platform where we work hard and grow together! At present we are reviewing in-depth our mistakes in the operating procedures of our internal administration, and will hire professional consultants to familiarize themselves with the relevant review regulations and mechanisms of ASIC, and submit the various information for examination in a punctual manner.
>
> Let us work more closely with each other, and use this frustration as the motive power for us to adjust our pace and start again! Let us go for it! We thank the consultants for your support and trust. Thank you!
>
> Respectfully submitted by Ken on 1 June 2017.

74 The evidence does not explain how ASIC obtained the screen shot of this message. Like the message appearing in the previous May, it appears on the "back office" section of the website. The website captures of October 2017 do not include any "back office" pages of this kind. It is reasonable to infer, and I so find, that messages sent to customers or consultants via the "back office" pages of the website were accessible only to customers or consultants holding accounts enabling them to sign into the site to access their accounts by a "log in" feature on each home page.

75 In the circumstances I have described I consider it likely that the message extracted at [73] above was made not only to users of the GAM website but also to users of the GIG website having log in access. I infer that this message was not otherwise accessible to members of the public who accessed the websites.

76 Notwithstanding the above message, following the cancellation of the GAM AFSL in March 2017 and the GIG AFSL in May 2017, the GAM website and the GIG website remained active and accessible to the public until about 9 November 2017, about two weeks after this Court made orders with injunctions restraining their publication and use. Members of the public who accessed the websites in that period would not have been informed that the GIG AFSL had been cancelled.

77 On 19 October 2017, a pop up message appeared on the GIG website concerning the effect of an election in Japan on investors' accounts. The message read:

> FROM 20 October 2017, trading in "JPY" currencies will be temporarily increased. Customers are recommended to have sufficient funds in their trading accounts to avoid loss greater than their account fund during trading.

78 This message confirms the continued provision of a foreign exchange trading platform by GIG notwithstanding the cancellation of the GIG AFSL and notwithstanding any "back office" message to customers about GIG's dealings with ASIC.

79 From around 9 November 2017 when the Court made its interlocutory orders, the GIG website displayed the following message:

> Due to notification from ASIC, the Australian Supervisory Authority, the group's home domain will be formally closed on 10 November 2017. To protect the original customer's rights, a back-office link will be sent to customer's mailbox, Thank you for your support and understanding.

80 The material before the Court does not include the "back-office link" sent to customers' mailboxes.

81 A website with the url www.stumacfx.com was created on 11 August 2017. When accessed from an IP address located in Australia, users were automatically redirected to the url www.stumacforex.com. The domain name for that website is registered to Stumac's sole shareholder, "Stumac Team Creation". The website www.stumacfx.com refers to Stumac as a "global financial services company".

82 As at November 2017, the website instructed investors to deposit funds into an HSBC bank account ending with the digits 3838 in the name of "Shenzhen Unite Auto Resources". I will refer to it as the **Shenzen Unite Account**. The owner of that account is a company incorporated in Hong Kong named Shenzhen Unite Auto Resources Tech Limited. Ms Kuo (the wife of Mr Wang) has been the sole director of that company from 10 November 2017.

Presentations

83 The Court has before it an undated PowerPoint presentation bearing GAM's name and apparently promoting a financial services business conducted by GAM. As it is undated, I am not satisfied that this PowerPoint presentation was given at any time after the GAM AFSL was cancelled or, for that matter, at any time after GIG commenced the operation of the business under its AFSL.

84 In August 2016, a PowerPoint presentation was given to investment brokers in Taiwan. It bears GIG's name in the footer of each slide. There is no evidence to support a finding that this presentation was given in Australia or elsewhere at any time after GIG's AFSL was cancelled.

85 The presentations contain representations about the conduct and regulation of the business, including: "Low risk – 100% protected principal", "Government legal supervision – Australian Financial Market Regulatory Bureau", "Segregated Trust Account ... USD denominated", "low threshold – only USD10,000 to open an account", "monthly dividends", "Fast Return ... ", "Short Term – No binding constraints can withdraw at any time after 1 month, flexible use of funds", "Annual bonus around 8.4%, monthly bonus around 0.7%", "government legal supervision", "segregated trust account", "funds and bonuses are safe and reliable", "Funds safety is subject to ASIC supervision", "Steady investment – the investment target is FX trading relation to exchange rates of the current world-wide commonly used currencies …" and "High protection – The Australian Securities and Investments Commission (ASIC) protects clients' funds up to USD 2 Million (NTD 60 Million)".

Investment certificates

86 The PowerPoint presentations suggest that, in addition to providing access to the MT4 trading platform, customers were offered three separate types of investment, promoted by the names "Bonus Plan", "Principal Guaranteed Fiduciary Fund" (otherwise know as "Fortune Project") and "Gallop Gift Money Project".

87 Clients who invested in the "Bonus Plan" were provided with an investment certificate. In evidence are investment certificates issued by GAM on 14 January 2016, 1 April 2016 and 17 April 2016, that is, prior to the reissue of the GIG AFSL in its name and the announcement about GIG referred to [57] of these reasons.

88 Also in evidence are certificates issued by GIG bearing dates between 31 August 2016 and 18 April 2017, all of which predate the cancellation of the GIG AFSL.

Investors

Investors introduced by Mr Chen

89 Mr Chiao Fei Chen is a financial adviser based in Taiwan. In August 2016, Mr Chen attended a PowerPoint presentation in Taipei in which the services of GIG were promoted. The PowerPoint slides referred to at that presentation referred to GIG, not GAM. The presentation was given by a person named Yi-Hung Lai who was introduced as a lead agent. Yi-Hung Lai became Mr Chen's predominant point of contact.

90 At the presentation, Yi-Hung Lai introduced Mr Chen to Mr Wang as the "big boss". Mr Wang said words to the effect that the owner of the company was Mr Wang's brother, Ming-Zhang Wang.

91 Mr Wang made a series of representations to Mr Chen about the financial products offered by GIG. Shortly after the presentation in August 2016, Mr Chen was provided with the account number for the GIG Deposit Account. He was told to instruct investors to deposit their investment funds into that account. Mr Chen was provided with copies of the PowerPoint presentation which he provided to prospective clients. He instructed clients to deposit funds into the GIG Deposit Account, as he had been told to do.

92 Mr Chen received commission payments for referring clients. He signed up six clients between 1 August 2016 and 1 March 2017 with investment amounts totalling $962,764.00. Investment certificates issued to these investors bore the company name and the Australian Company

Number for GIG. The certificates indicate that the clients were entitled an annual return on investment of 6% or 8.4%, apparently depending on the amount invested. According to Mr Chen, investors were able to withdraw interest monthly from an online account. However in about April or May 2017, Mr Chen received reports from clients that they were unable to withdraw any returns. Through his superior, Mr Chen attempted to contact Mr Wang and his brother Ming-Zhang Wang for an explanation.

93 Mr Chen deposes that he was told by Mr Wang that his brother, Ming-Zhang Wang, was the "real owner of Gallop".

94 In July 2017, Mr Chen and two of his colleagues met with Mr Wang, his brother Ming-Zhang Wang and Dan Fang Du, who he understood to be Ming-Zhang Wang's wife. At the meeting, Ming-Zhang Wang said words to the effect that "there are liquidity issues, and I have assets that I can use to repay clients". Ming-Zhang Wang said that he was the "boss of Gallop" and that the business was "operated" by Mr Wang, his younger brother. These statements are consistent with an earlier statement made by Mr Wang to Mr Chen to the effect that it was Ming-Zhang Wang who was the "real owner of Gallop". Whilst I am satisfied these statements were made, I am not wholly satisfied as to their truth. It will be necessary to return to this aspect of the evidence later in these reasons.

95 In October 2017, Mr Chen and his colleagues communicated with Mr Wang through an intermediary, Mr Mason. Mr Mason provided Mr Chen with documents which Mr Mason said had been provided by Mr Wang and his brother Ming-Zhang Wang. The documents appear to be in the nature of financial records evidencing the financial position of GIG. The documents do not bear titles, dates or signatures. The submissions advanced by ASIC do not identify what forensic use is sought to be made of those documents in these proceedings. In my view, the documents cannot be relied upon as reliable evidence of the true financial position of GIG or as reliable evidence of what might have become of investors' capital.

96 On 28 November 2017, Mr Chen attended a meeting at GIG's office in Taipei. About 30 people attended the meeting, including financial advisers and investors. At the meeting, Mr Wang invited investors to participate in the development of new investment companies so that money could be earned and returned to GIG's clients. Mr Wang said words to the effect that GIG's licence had been "suspended", that its assets would be transferred to a company called Stumac and that Stumac would conduct the same business previously conducted by GIG. Mr Wang said that he wanted clients to invest more capital. When Mr Chen asked whether the

money already invested would be returned to clients, Mr Wang did not answer the question. Mr Wang said "we should all work hard together to sort out the matter".

Mr Lai

97 Mr Lai Chain Huang (Mr Lai) is an investor. He first met Mr Wang in Taiwan in 2014 through a mutual acquaintance. At that meeting, Mr Wang said that he acted for "Avondale".

98 Between January 2015 and March 2016 Mr Lai made a series of investments totalling USD$150,000 in financial profits offered by Avondale. Contracts issued in respect of these investors name Avondale Financial Consultants Co. Ltd as the "Account Trading Agent". The contracts contain terms authorising Avondale to trade on Mr Lai's behalf in foreign exchange, contracts for difference and precious metals. In return he was promised a guaranteed profit of 2% per month for a one year term.

99 In August 2016, Mr Wang told Mr Lai that he had "bought a new company called Gallop". He sent a social media message to Mr Lai stating that he was "moving to Gallop and combining the Avondale and Gallop money". At Mr Wang's suggestion, the funds Mr Lai had invested in Avondale were transferred, via an account held in Mr Wang's name, into an account held by GIG. Thereafter, Mr Lai's online account appeared under the name "Gallop" and Mr Lai received regular emails from the email address using GIG's domain name, support@gallopfx.com.au. Mr Lai accessed the GIG website for forex trading using the MT4 platform and for withdrawing interest earned on his investments.

100 In April or May 2017 Mr Lai attempted to make a withdrawal from his investment account. After waiting for two to three months to receive his funds, Mr Lai sent a message to the GIG email address but received no response.

101 On 16 June 2017 Mr Lai received a message from Mr Wang to the effect that the bank had "frozen" the account and that he was working to resolve the issue. Accompanying the message was a photograph of a letter from HSBC to "Hung Ding Financial Management Company Limited" in relation to a bank account. The letter states that following a review of the banking relationship, HSBC was no longer able to provide the company banking services, and that the company was required to close the account within 30 days of the date of the letter. The date of the letter cannot be seen in the photograph.

102 In September 2017, Mr Lai and other investors had a meeting with Mr Wang in Taipei. Mr Wang said words to the effect that ASIC had cancelled GIG's licence and "frozen all of the

funds", that investors may get 10% to 20% of their funds returned to them, and that a new HSBC account had been opened. Mr Wang said that Gallop was "disorganised and the account has been frozen because Gallop has not provided the information the Australian government wanted". Mr Wang also said words to the effect that he had "lots of money with the CBA and this means you do not need to worry about your money".

103 Mr Lai last had contact with Mr Wang in October 2017 when he sent a message informing Mr Wang that he needed his money because his wife was pregnant. Mr Lai received no response to his message.

104 In December 2017, another investor provided Mr Lai with a copy of an investor contract which, the investor said, had been provided to him by Mr Wang. The contract was titled "Stumac Team Creation Ltd Foreign Exchange Margin Account Management Contract". I will refer to it as the **Stumac Contract**.

105 The Stumac Contract includes bank details for a CBA account held in Stumac's name. It names ASIC as the regulatory body and Stumac Team Creation Ltd as the plan's trustee. Under the heading "Remarks" the Stumac Contract contains the following statement: "Investors agree to transfer the existing investment funds in Gallop to Stumac after the entry into force of this contract".

106 Mr Lai did not sign any contract of the kind shown to him by the other investor. Later in December 2017, Mr Lai accessed his forex trading account. He took a screen shot of his account showing that the account name depicted on the screen had changed from "Gallop" to "Stumac Team".

Ms Chung

107 On 24 November 2017, ASIC received a complaint from an investor, Chung Yu-Chin a resident of Taiwan. Ms Chung had also made a complaint to the FOS. Among other things, Ms Chung provided ASIC with remittance advice in relation to a deposit of USD$10,050.00 made by her sister Chung Mei-Chu on 8 July 2017, that is, after the GAM AFSL and the GIG AFSL were cancelled. The deposit was made to the GIG Deposit Account. The money invested by Ms Chung and her sister has not been returned.

Complaints

108 Between 24 March 2017 and 11 August 2017, the FOS received 93 complaints about GIG and GAM, relating to 128 investors. Losses alleged by the investors total around $USD7 million. The majority of complainants were residents of Taiwan. Some resided in China and Singapore. None of the complainants resides in Australia.

109 The complainants stated they had been introduced either by Mr Wang or Yi-Hung Lai. The evidence of the complainants is otherwise lacking in detail with respect to their dealings with GAM or GIG as the case may be. The complainants have not given direct evidence as to any particular words or conduct that induced them to invest. More specifically, there is no evidence that any one of the complainants were induced to invest because of any statement they accessed and read on the GAM website or the GIG website.

Employees

Ms Kot

110 Ms Sau Li Lily Kot (also known as Lily) was employed by GIG as a Responsible Manager for the purposes of the business until 13 March 2017, although an application by GIG to have the conditions of the GIG AFSL varied to reflect her appointment as Responsible Manager was never accepted by ASIC.

111 In her s 19 examination, Ms Kot told ASIC that it was her understanding that GAM was "dormant". She had only limited knowledge about GAM, its history or membership. She was not aware of GAM trading from the premises from which she worked and she otherwise had no dealings with the company. She was not contacted by any investor claiming to be a client of GAM.

112 It was Ms Kot's understanding that GAM was a company formerly owned jointly by Mr Wang and a person named Jason, that Jason and Mr Wang had argued and that Mr Wang had acquired GIG because GAM had not undertaken appropriate due diligence and because he wanted a "fresh start".

Mr Zhou

113 In his s 19 examination, Mr Zhou told ASIC that he was aware that GAM was a company in which Mr Wang had an interest before Mr Zhou commenced his duties with GIG. Mr Zhou's understanding was that GAM was going to "ramp down, they don't have any like activity". Mr Zhou said that GAM did not have staff working from the Taiwan office. He recalled being

asked to submit a form to ASIC in relation to GAM's change of address and receiving invoices for the payment of ASIC fees in relation to the company, which he paid on Mr Wang's direction. Mr Zhou was aware that around the time that GIG commenced the operation of the business, funds were transferred into the GIG Deposit Account from GAM. Mr Zhou understood the payments to be explained, at least in part, by clients "switching" their accounts from one entity to another.

114 Mr Zhou said that he had, on Mr Wang's instructions, submitted a form to effect a surrender of the GAM AFSL. Mr Wang told Mr Zhou that the AFSL was surrendered because the company had no business activity and he did not want to pay fees in respect of it. Mr Zhou otherwise had no dealings with investors claiming to be clients or former clients of GAM and he had no knowledge as to the legal or financial mechanism by which clients transferred from GAM to GIG.

115 Mr Zhou told ASIC that following the cancellation of the GIG AFSL he noticed that deposits were still being made to GIG. When questioned on the receipt of deposits, Mr Zhou said:

> Yes, we do notice there are some because we tell Ken that you have to tell, tell those clients that we cannot provide any financial service to them any more so you cannot, you cannot get any more clients, new clients any more so after we told them that, I think that's in late May or in June, I'm not sure, but after probably one or two weeks we monitor the bank account. We still got some money coming in from the client and we tell Ken again this is not acceptable and I think Maggie did talk to Ken directly regarding that issue and Ken said they are trying to inform every IB but they just have some IB that couldn't cover it in time so we told them that it's just not acceptable to receive those money from clients anymore …

116 The initials "IB" in this evidence are references to investment brokers, such as Mr Chen, who had been instructed to direct investors to deposit funds into the GIG Deposit Account.

Consultants

117 From at least May 2016, GIG retained the services of a firm of lawyers and compliance consultants. A principal of the firm was Ms Sophie Gerber. Ms Melody Gao was an employee of the firm. The firm had previously provided compliance and legal services to Weather Pro prior to its acquisition and change of name to GIG.

118 Each of Ms Gerber and Ms Gao participated in examinations pursuant to s 19 of the ASIC Act. Neither professed to have detailed knowledge of the business affairs of GAM. Ms Gao stated that she understood that the owners of GAM had acquired GIG because GAM did not have an AFSL with authorisations covering services that the owners wanted the company to provide.

Although the firm provided legal services to GAM for very limited purposes (particularly the lodgement of forms and the cancellation of the GAM AFSL), its services were principally provided to GIG.

119 Mr Wang participated in a meeting with Ms Gao in May 2016 in which, according to Ms Gao, he "orchestrated what was going on". The meeting related to "compliance services, setting up MT4 platform and client on-boarding systems". These records confirm the commencement of a financial services business by GIG in about May 2016 with Mr Wang as its organising force.

120 Ms Gerber otherwise confirmed that Ms Kot and Mr Zhou carried out instructions from Mr Wang "around the maintenance of the [GIG] AFSL". Ms Gao's evidence was to the same effect. The firm assisted GIG to apply to ASIC for a "key person" variation to the GIG AFSL so as to change the persons who would be responsible for the company's regulatory compliance. That is the context in which the letter of May 2016 extracted at [35] of these reasons was sent.

121 Ms Gerber's firm gave Mr Wang advice about the regulatory framework in Australia. The firm also gave presentations about legal compliance to investors who attended the firm's premises as part of a tour organised by Mr Wang.

122 The original owner of Stumac, Mr McKenzie also engaged the firm for the purposes of finding a buyer for Stumac.

123 Following the cancellation of the GIG AFSL, Mr Zhou and Ms Kot ceased employment with the company. They nonetheless continued to have dealings with the company through a consultancy firm named LK Consultants. Under that arrangement, Mr Wang continued to give instructions to Mr Zhou in Mr Zhou's capacity as an independent consultant. In his s 19 examination, Mr Zhou confirmed that LK Consultants organised "local director services" for Stumac and that he acted on Mr Wang's instructions for that purpose. Mr Zhou said that he was discouraged from dealing directly with Mr O'Doherty and instead communicated with an intermediary Mr Raman Bhalla, the person who had originally arranged for Mr O'Doherty's appointment as Stumac's sole director. Mr Bhalla's firm invoiced LK Consultants for director services and LK Consultants, in turn, invoiced Stumac.

124 Mr Zhou confirmed that it was Mr Wang who instructed him to arrange for a bank account to be opened in Stumac's name. He said that Mr Wang travelled to Australia around that time and met with him and Mr O'Doherty at a branch of the CBA for that purpose.

125 Additional factual findings will be made in the course of considering ASIC's claim for relief, to which I now turn.

THE CLAIM FOR RELIEF

126 The claimed relief is set out at [1] to [10] of the Amended OA. The factual and legal basis for the relief is set out in ASIC's **Concise Statement** filed on 11 May 2018, **Written Submissions** filed on 27 August 2018 and Supplementary Written Submissions filed on 28 September 2018.

127 It is convenient to commence with the allegation that GIG and GAM contravened s 911A of the Corporations Act.

CONDUCT OF AN UNLICENSED BUSINESS

Corporations Act, s 911A

128 ASIC seeks declarations in the following terms:

> (1) Pursuant to s 21 of the FCA Act, declarations that [GAM] and [GIG] have, since 31 March 2017 and 24 May 2017 respectively, until 9 November 2017, contravened:
>
> (a) Section 911A of the Corporations Act by offering, facilitating and receiving monies for investment in financial products, namely trading in foreign exchange, precious metals, derivatives and contracts for difference, and thereby carrying on a financial services business and/or providing a financial service in this jurisdiction without holding an Australian Financial Services Licence (AFSL) or otherwise being authorised by an AFSL holder business in circumstances where a licence was required;

129 As can be seen, the declaratory relief sought against GAM and GIG is identical, except that the declarations reflect the respective dates upon which the GAM AFSL and the GIG AFSL were cancelled.

130 Each of the corporate entities is alleged to have contravened s 911A as a primary contravener. Accordingly, to discharge its onus of proof it is necessary for ASIC to establish that the elements of each contravention are fulfilled in relation to each entity.

131 Subsection 911A(1) of the Corporations Act provides:

> (1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

132 Subsection 911A(2) sets out exceptions to the requirement in s 911A(1). To the extent that GIG and GAM bear any evidentiary burden in relation to the existence of any such exception,

the burden is not discharged. Proceeding from the footing that GIG and GAM bear no such evidentiary burden, I am satisfied to the requisite standard that none of the exceptions applies. That inference may be readily drawn from GIG's conduct in applying for the AFSL, its conduct in applying for its variation and the extent to which it promoted its business by reference to the fact that it held, and complied with, its AFSL. In the absence of evidence from either GIG or GAM as to whether any one of the exceptions applies, I may infer that any evidence they might have adduced on the question would not have assisted them.

133 Before leaving this topic it should be observed that s 1317QD of the Corporations Act, as inserted by the Amending Act, casts an evidentiary burden upon the defendant in a case such as the present in respect of an exception to the prohibition in s 911A(1). Those provisions have no direct application to the case before me.

134 Whether or not s 911A has been contravened otherwise depends upon the application of a number of statutory definitions that may operate in any number of combinations and permutations.

135 Section 766A(1) of the Corporations Act relevantly provides:

> (1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a ***financial service*** if they:
>
> …
>
> (b) deal in a financial product (see section 766C); or

136 Section 766C(1) of the Corporations Act relevantly defines the conduct of "dealing" in the following terms:

> (1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:
>
> (a) applying for or acquiring a financial product;
>
> …
>
> (2) Arranging for a person to engage in conduct referred to in subsection (1) is also ***dealing*** in a financial product, unless the actions concerned amount to providing financial product advice.

137 Arranging for a person to engage in conduct referred to in s 766C(1) is also "dealing" in a financial product, unless the actions concerned amount to providing financial product advice: Corporations Act, s 766C(2).

138 A "financial product" is defined in s 763A to include a facility through which, or through the acquisition of which, a person makes a financial investment. Section 763B provides that a person makes a financial investment if:

> (a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

139 A financial services business is a business of providing financial services: Corporations Act, s 761A.

140 Section 911D provides that a financial services business is taken to be carried on in this jurisdiction if the person engages in conduct that is intended to induce people in this jurisdiction to use the financial services the business provides (or is likely to have that effect) whether or not the conduct is intended, or likely, to have that effect in other places as well.

141 These provisions reside in Ch 7 of the Corporations Act to which s 769B applies. It provides, in part:

> **769B People are generally responsible for the conduct of their agents, employees etc.**
>
> (1) Subject to subsections (7) and (8), conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body, within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also by the body corporate.
>
> (2) Conduct engaged in by a person (for example, the giving of money or property) in relation to:

(a) a director, employee or agent of a body corporate, acting within the scope of their actual or apparent authority; or

(b) any other person acting at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also in relation to the body corporate.

(3) If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (1)(b) is taken to be an agent of the body corporate concerned.

…

(10) In this section:

(a) a reference to a proceeding ***under*** this Chapter includes a reference to:

(i) a prosecution for an offence based on a provision of this Chapter; and

(ii) a proceeding under a provision of Part 9.4B that relates to a provision of this Chapter; and

(iii) any other proceeding under any other provision of Chapter 9 that relates to a provision of this Chapter; and

(b) a reference to ***conduct*** is a reference to an act, an omission to perform an act, or a state of affairs; and

(c) a reference to the ***state of mind*** of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

The allegation against GIG

142 Having regard to the content of the GIG website, I am satisfied that the human actors who caused material to be made accessible to the public on that website are persons who were either directors, employees or agents of GIG *and* acting on GIG's behalf within the meaning of s 769B(1) of the Corporations Act. I am satisfied that the exceptions in s 769B(7) and (8) do not apply to that conduct. Accordingly, the conduct is attributable to GIG. I make the same findings in relation to all marketing activities relating to GIG and in relation to the receipt of money into accounts held in GIG's name and all other indicia of the carrying on of a business by GIG to which I have referred.

143 I find that between 24 May 2017 and 9 November 2017, GIG carried on a financial services business in this jurisdiction without holding an AFSL covering the financial services in question by:

(1) publishing, on the GIG website, material that was intended to induce people in this jurisdiction to use financial services provided by GIG, namely trading in foreign exchange, precious metals, derivatives and contracts for difference and investments into other investment products including the Bonus Plan;

(2) providing, by the GIG website, a platform facilitating investments by users of the websites in the financial services provided by GIG;

(3) arranging for investors to acquire or dispose of financial products through the MT4 trading platform made available on the GIG website; and

(4) receiving more than $4 million from investors into the GIG Deposit Account in connection with the provision of the financial services promoted on the GIG website (as to which see [208] below).

144 I am further satisfied that GIG also used the GAM website in the fashion I have summarised for the purposes of carrying on a financial services business after the cancellation of the GIG AFSL. More specifically, I find that on and after 24 May 2017, material published on the GAM website facilitated the provision of financial services offered by GIG. The bank account referred to on the website was held in the name of GIG and, as discussed below, the representations on the website about the financial services in question are readily understood as referring to financial products provided by GIG.

145 For the purposes of s 911D of the Corporations Act, I find that in the course of carrying on the financial services business, GIG engaged in conduct (namely the publication of content on the GIG website *and* the GAM website) that was intended to induce people in this jurisdiction to use the financial services that GIG provided or that was likely to have that effect.

146 The continuation of the business by GIG after the cancellation of the GIG AFSL is evidenced by the continued accessibility of the GIG website in Australia, the pop up message to investors about Japanese foreign currency referred to at [77] of these reasons and the circumstance that deposits were made into the GIG Deposit Account in that period. I am satisfied that deposits made after 24 May 2017 are consistent with investor activity. The evidence of Mr Zhou supports the conclusion that investors continued to make deposits into accounts held in GIG's

name after the GIG AFSL was cancelled. The "back office message" sent to consultants was not sufficient in its terms to advise members of the public that GIG's AFSL had been cancelled and that it was not entitled to deal in any financial products.

147 I find that GIG continued to operate the business including for the purpose of maintaining its existing client base and transferring those clients to a new entity. Acquisition of the new entity, Stumac, was not complete until 19 July 2017. It was not until about September 2017 that overtures were made to investors to transfer their business to Stumac. In the meantime, GIG had made no unqualified statement to its existing customers to the effect that it had no entitlement to hold or manage investments on their behalf. GIG did not offer to return investors' capital funds to them, nor did it respond adequately, or at all, to customers' complaints.

148 In relation to the investor Mr Lai, Mr Wang did not disclose that the GIG AFSL had been cancelled until September 2017. Mr Wang's explanation to Mr Lai to the effect that his investments could not be accessed because ASIC had "frozen" GIG's funds was false. ASIC did not "freeze" any one of GIG's accounts. Activity on certain CBA accounts were frozen by an order of this Court made on 27 October 2017. As at September 2017, the true state of affairs was that more than $24 million had been transferred from the GIG Deposit Account into accounts held in the name "Hung Ding Financial Management Company" or "Hung Ding Financial Management Co". Following those and other withdrawals, only $442.40 remained in the GIG Deposit Account (see [209] below).

149 My finding that GIG contravened s 911A of the Corporation Act does not depend upon a finding that investors continued to deposit funds with GIG nor on a finding that any investor did so because of the content of the GIG website in any event. It is sufficient to find that after the cancellation of the GIG AFSL the two websites continued to promote financial services provided by GIG and that the conduct of publishing (or omitting to remove) that promotional content was *likely* to have the effect of inducing people in this jurisdiction to use those services within the meaning of s 911D.

150 The "back office" message delivered to consultants does not detract me from these conclusions.

151 I have found that the "registrant organisation" for the domain name of the GAM website was GAM. However, it does not follow that the persons responsible for uploading content to that website were persons acting in the capacity of officers, employees or agents of GAM. To have

the status of a registrant of a domain name is one thing. To publish (or cause to be published) content to an active website utilising the domain name is another.

152 The evidence supports an inference (and I so find) that persons acting on behalf of GAM permitted GIG to make use of the domain name of the GAM website. However, I am not satisfied that persons acting on GAM's behalf caused or controlled the publication of material on the GAM website in the course of or for the purpose of GAM carrying on a financial services business at the relevant time. The distinct conduct of uploading accessible content to the GAM website was attributable to human actors in their capacities as officers, employees or agents of GIG acting on GIG's behalf in the conduct of a financial services business carried on by GIG, specifically between 24 May 2017 (the day that cancellation of the GIG AFSL took effect) until 9 November 2017 when the GAM website was de-activated.

153 To summarise, in addition to the findings I have made above in relation to the GIG website, I find that GIG engaged in conduct fulfilling the elements of a contravention of s 911A of the Corporations Act (incorporating the definition in s 911D) by its conduct of publishing material on the GAM website in the course of its continued conduct of a financial services business after the cancellation of the GIG AFSL.

154 The following facts and circumstances support that conclusion:

(1) references on the GAM website to "Gallop" were expressly defined on the website to refer to GIG;

(2) the website referred to the GIG AFSL by its number without reference to the GAM AFSL;

(3) the GAM website invited customers to invest money with or through GIG;

(4) the GAM website directed customers to deposit funds into accounts held in the name of GIG;

(5) the announcement made to GAM's customers upon the issuing of the GIG AFSL in May 2016 informed customers (albeit in an ambiguous fashion) of a change in the conduct of the business and introduced the customers to GIG;

(6) for the reasons elaborated on below, I infer that the financial services business previously carried on by GAM was transferred to GIG from about May 2016 such that by 25 March 2017 GAM no longer carried on a financial services business (whether concurrently with GIG or otherwise);

(7) to the extent that the transition of the business from GAM to GIG was gradual, the evidence does not support a finding that GAM continued to operate a financial services business at any time after December 2016.

Declaratory relief

155 As in force in relation to this proceeding, the Corporations Act contains no provision expressly empowering the Court to make a declaration of a contravention of s 911A or any other provision upon which ASIC relies.

156 In ***RAIA Insurance*** *Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164 the Full Court held that the Court had jurisdiction under s 21 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) to grant a declaration of contravention of Pt VI of the then-named *Trade Practices Act 1974* (Cth) (TP Act) notwithstanding that the TP Act did not expressly confer any such declaratory power. Beaumont and Spender JJ (Davis J agreeing) rejected a submission to the effect that the TP Act erected an exclusive code of relief for contravention of its terms. Their Honours referred to s 86 of the TP Act which conferred jurisdiction on the Court in any matter arising under the TP Act in respect of which a civil proceeding had been instituted under Pt VI. Their Honours also referred to s 23 of the FCA Act which provides that this Court "has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, ... as the Court thinks appropriate". See also *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89.

157 Before making a declaration under s 21 of the FCA Act, the Court should be satisfied that the question before it is real and not theoretical, that the applicant has a real interest in raising the question and that there is a proper contradictor: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 – 8 (Gibbs J).

158 I consider GIG to be a proper contradictor notwithstanding that it is in liquidation and notwithstanding that the liquidator has made no submissions on behalf of the company to oppose the orders: *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 [16] – [17]. ASIC has been put to proof in respect of the allegations made against all of the defendants. The allegations depend upon events that have in fact occurred and that are not merely feared or hypothesised. The application is brought by ASIC as the authority having responsibility for enforcing the provisions of the Corporations Act relating to the provision of financial services.

159 I consider it appropriate to make a declaration in substantively the same terms sought in [1(a)] of the Amended OA in relation to GIG's contravention of s 911A of the Corporations Act between 24 May 2017 and 9 November 2017.

The allegation against GAM

160 Consistent with what I have said above, for the purposes of s 911D of the Corporations Act, I am satisfied that the GAM website promoted a financial services business to persons situated in this jurisdiction following the cancellation of the GAM AFSL on 31 March 2017. However, I have found that the financial services business promoted on the website was a financial services business carried on by GIG. I am not satisfied that the conduct of uploading content to the GAM website should be attributed to GAM and I am not satisfied that the website was intended to or likely to induce persons to use financial services provided by GAM whether in this jurisdiction or otherwise.

161 The findings I have made at [151] – [154] are relevant to my assessment of GAM's liability. To those findings I add the following:

(1) the evidence does not disclose any investment certificate being issued by GAM at any time later than 17 April 2016;

(2) the GAM AFSL was cancelled by ASIC in response a request made by GAM (then named Hung Ding Financial Management Pty Ltd) by letter dated 27 January 2017 on the basis that any business carried on by GAM had ceased operating in December 2016;

(3) the assertion by GAM that its business operations had ceased appears to have been accepted by ASIC which suggests that ASIC itself formed the view that the business promoted on the GAM website was not a business conducted by GAM;

(4) bank statements for a deposit account held in the name of GAM (the **GAM Deposit Account**) show that there was a reduced number of deposits in the months leading up to its request to surrender its licence, such that from about November 2016 no deposits consistent with investor activity were made into that account;

(5) there were no deposits made into the GAM Deposit Account at all following the cancellation of the GAM AFSL on 31 March 2017;

(6) there are no dated PowerPoint presentations or other marketing material in evidence that might support a finding that GAM was providing financial products or services whether through the GAM website or otherwise after the cancellation of its AFSL;

(7) the evidence of Mr Chen (which I accept) is to the effect that from about August 2016 presentations in relation to the business referred to GIG as the operator of the business and that Mr Wang at that time was instructing brokers to cause investor funds to be deposited in the GIG Deposit Account;

(8) although GAM's place of business and registered office is the same as GIG's, the evidence of Ms Kot and Mr Zhou (which I accept) is that they had limited knowledge about the GAM, that GAM did not have staff employed at the premises and GAM did not trade from the premises;

(9) according to Ms Kot and Mr Zhou, at the time of their engagement by GIG, GAM was "dormant" (Ms Kot) and its business was "ramped down" (Mr Zhou);

(10) neither Ms Kot nor Mr Zhou claimed to be employees of GAM and neither had any dealings with investors claiming to be clients of GAM; and

(11) neither Ms Gerber nor Ms Gao understood GAM to be an entity conducting any financial services business as a going concern whether pursuant to the GAM AFSL or otherwise.

162 The evidence of complaints made by FOS or ASIC does little to inform the question of whether GAM operated a financial services business after the cancellation of the GAM AFSL.

163 These circumstances are consistent with the allegations in the Concise Statement and in the Written Submissions that the "Gallop business was originally operated by GAM" (Concise Statement [4], Written Submissions [12]), that Mr Wang arranged to "transfer the Gallop business and its clients" to GIG and that GIG was a "new iteration" of GAM (Concise Statement [4]; Written Submissions [12], [15], [16]). The findings also accord with statements in ASIC's affidavit evidence to the effect that the business was "rolled over" or "transferred" from GAM to GIG: affidavit of Kathy Ann Prosser sworn 11 May 2018, [63], [64].

164 The Court was not taken to evidence explaining which entity held the licence for the MT4 trading software or otherwise evidencing a sub-licence in respect of that software being granted by either entity to the other. The availability of the trading platform on the GAM website does not detract from my conclusion that GAM did not carry on a financial services business in this jurisdiction at the relevant time. The weight of the evidence supports a finding that the platform was made available and maintained on the GAM website by persons acting in the capacity of employees, officers and agents of GIG and on GIG's behalf. To the extent that those persons might also have been employees or officers of GAM (which is unclear), I am not satisfied that

they acted on behalf of GAM within the meaning of s 769B of the Corporations Act in relation to the MT4 platform in any event.

165 I am satisfied that GAM permitted the use of the url for the GAM website to facilitate GIG's conduct of a financial services business after 31 March 2017. However, GAM's conduct in doing so is insufficient to found a contravention of s 911A of the Corporations Act as a primary contravener. The Court has not been invited to find that GAM aided and abetted or was otherwise involved in GIG's contravention of s 911A of the Corporations Act and so I will not consider that question.

166 ASIC's application for a declaration against GAM in the terms sought at [1(a)] of the Amended OA should be refused.

MISREPRESENTATIONS

ASIC Act, s 12DB(1)(e)

167 Section 12DB(1)(e) of the ASIC Act provides:

> **False or misleading representations**
>
> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> ...
>
> (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits.

168 The phrase "trade or commerce" is defined in s 12BA of the ASIC Act to mean trade or commerce within Australia or between Australia and places outside of Australia.

169 Section 12DB(1)(e) is contained in Div 2 of Pt 2 of the ASIC Act. Section 12AC and s 12GH are contained in the same Division. They relevantly provide:

> **12AC Division extends to some conduct outside Australia**
>
> (1) This Division extends to the engaging in conduct outside Australia by:
>
> (a) bodies corporate incorporated or carrying on business within Australia;
>
> …
>
> **12GH Conduct by directors, employees or agents**
>
> (1) If, in a proceeding under this Subdivision in respect of conduct engaged in by a body corporate, being conduct in relation to which the Division applies, it is

necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, employee or agent of the body corporate, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of this Division, to have been engaged in also by the body corporate.

…

The allegations

170 ASIC alleges contraventions of s 12DB(1)(e) by GAM between 31 March 2017 and 9 November 2017 and by GIG between 24 May 2017 and 9 November 2017: Amended OA, [1(b)] and [1(c)]. The substantive allegation against each entity is the same, namely that GAM and GIG, in the respective periods, contravened:

(b) s 12DB(1)(e) of the ASIC Act by causing to be published on the internet and communicated to the public the following statements, made in trade or commerce in relation to financial services, that were misleading or deceptive or likely to mislead or deceive:

(i) Gallop International Group is authorised to engage in the business of financial services in Australia to the extent specified in its financial services licence;

(ii) the website is owned by Gallop and designed in accordance with laws and regulations in Australia,

which represented that each of the First and Second Defendants were approved to provide financial services in Australia when in fact they did not have such approval.

(c) s 12DB(1)(e) of the ASIC Act by causing to be published on the internet and communicated to the public statements, made in trade or commerce in relation to financial services, that were misleading or deceptive or likely to mislead or deceive, conveying that:

(i) investors' funds would be kept secure by being deposited in a designated trust account in accordance with Australian regulatory requirements,

(ii) investors' funds would not be used for purposes other than customer transactions for any reason, and not mixed with the assets of the First or Second Defendants,

> being representations regarding a purported benefit of the financial services offered by the First and Second Defendants, when in fact customer funds were transferred to offshore accounts held by entities associated with the First and Second Defendants, and by the Third Defendant, for purposes unrelated to the investment.

The case against GAM

171 For reasons given earlier, I am not satisfied that the conduct of uploading readable content to the GAM website is attributable to GAM, whether pursuant to s 12GH(2) of the ASIC Act or otherwise. Viewed in the context of the evidence as a whole, I do not consider GAM's status as the registrant of the domain name for the GAM website to be sufficient to support a finding that GAM was the entity that "made" the representations in issue. The content of the representations tends against such a finding.

172 The statement referred to in [1(b)(ii)] of the Amended OA is extracted earlier in these reasons. It bears repeating:

> English websites:
>
> GALLOP INTERNATIONAL GROUP PTY LTD (GALLOP). This site is owned by GALLOP and designed in accordance with laws and regulations in Australia. The product and services described herein may not be applicable to all countries.
>
> Chinese websites:
>
> GALLOP INTERNATIONAL GROUP PTY LTD is authorized to engage itself in the business of financial services in Australia to the extent specified in its financial service license. This website is owned by Gallop International Group and has been prepared in accordance with the laws and regulations of Australia. …

173 Although the statement on the English website refers to "GALLOP", the word is clearly used as an abbreviation for GIG and not GAM.

174 The statement from which the representations alleged in [1(c)(ii)] of the Amended OA are repeated here:

> English websites:
>
> Customer funds will be deposited in a designated trust account in accordance with Australian regulatory requirements. Funds in this account can only be used for customer transactions and will not be used for other purposes for any reason. Gallop International Group Pty Ltd segregates customer funds and strictly prohibits mixing the customer assets and the assets of Gallop International Group Pty Ltd.
>
> Chinese websites:
>
> In accordance with the regulatory requirements of Australia, funds from the customer will be deposited into a designated trust account, from which such funds may not be used for any other purposes than for transactions by the customer. The Gallop

> International Group account will segregate customer funds and strictly prohibit any mixing of customer assets with assets of Gallop International Group.

175 This statement did not appear on the Chinese version of the GAM website.

176 The statement did not, on its terms, relate to funds held by GAM nor did the statement convey any representation about any financial services business conducted by GAM. The statement represented that investors' funds would not be used for purposes other than customer transactions and not mixed with the assets of GIG. There is no mention of GAM.

177 As GAM did not "make" any representation, an essential element of the alleged contravention of s 12DB(1)(e) of the ASIC Act by that entity is not proven.

178 ASIC's application for declarations against GAM in terms of [1(b)] and [1(c)] of the Amended OA should be refused.

The case against GIG

179 The contraventions alleged against GIG are confined to the period between 24 May 2017 and 9 November 2017.

180 I am satisfied that the representations in question were accessible on both the GAM website and the GIG website in that period. That inference may be drawn from the proven content of the websites as at October 2017 together with the earlier content of the GAM website captured on 13 July 2016. The two websites were clearly intended to be presented in identical terms and both related to a financial services business that continued, without interruption from the time that the GIG AFSL was issued in GIG's name until the deactivation of the websites.

181 A difference between the GAM website as captured on 13 July 2016 and the GIG and GAM websites as captured in October 2017 is that the website as earlier captured invited investors to deposit funds into either the GIG Deposit Account or the Second GIG Deposit Account, whereas the websites as later captured give instructions to deposit funds into the GIG Deposit Account only. The significance of that difference will be discussed shortly.

182 I am satisfied that the domain name registrations remained active over the relevant time. The address for the GIG website in particular was made available to customers in other promotional material and otherwise in communications to investors (Mr Lai) and investment brokers (Mr Chen). I conclude that the content of the GIG website and the GAM website as at 24 May 2017 was not materially different from content captured by ASIC in October 2017 and that the

relevant content remained relevantly the same until both were deactivated on or around 9 November 2017.

183 I have found that the conduct of uploading the statements to the GIG website and the GAM website is conduct that is attributable to GIG by the operation of s 12GH of the ASIC Act.

184 GIG is a body corporate incorporated in Australia. Accordingly, s 12DB(1)(e) of the ASIC Act extends to GIG's conduct outside of Australia in accordance with s 12AC(1)(a). It therefore matters not whether the websites were created, edited or otherwise accessible in places outside of this jurisdiction.

185 As Counsel for ASIC correctly submitted, proof of a contravention of s 12DB(1)(e) requires proof that the representation in question was received by one or more individuals, although it is not necessary to prove the identity of each recipient. It is sufficient to prove that the representation was communicated to the public or a section of it: *Thompson v Riley McKay Pty Ltd (No 2)* [1980] FCA 24; (1980) 29 ALR 267. In *Australian Competition and Consumer Commission v* ***Hillside*** *(Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 Beach J said (at [12]):

> …. The act of placing information on a website that is yet to be accessed by downloading does not involve the making of a representation. An uncommunicated statement is relevantly no representation. In reality, the representation is made when the website is viewed by a person through downloading the relevant page.

186 It is reasonable to infer (and I so find) that each of the representations was accessed in the relevant sense by one or more individuals after the date that the GIG AFSL was cancelled.

187 If it is necessary to find that the representations were conveyed (in the relevant sense) in this jurisdiction, I am satisfied that they were. For the purposes of the application for declaratory relief against GIG it is not necessary to make a finding as to the number of times the representations were accessed and read. That question will be considered in the course of determining the application for relief against Mr Wang.

188 It remains to consider whether the representations were false or misleading.

The representation alleged in [1(b)]

189 The statement referred to in [1(b)(i)] of the Amended OA appeared in close proximity to the statement referred to in [1(b)(ii)]. As to their meaning, the latter statement adds little of substance to the former.

190 I consider there to be a single representation conveyed by the statements. The representation is to the effect that the financial services business promoted by and carried on by GIG had the necessary legal authorisations to operate under and in accordance with Australian law. For the purposes of s 12DB(1)(e) of the ASIC Act, it was a representation made in connection with the promotion of the supply or use of financial services. By that representation, GIG promoted its financial services as having approvals or benefits that the services did not have.

191 In arriving at that conclusion I have not overlooked the back office message to consultants extracted and discussed at [73] above advising that the operation of the business had been "suspended". The message contained a link, which I infer is a hyperlink to another website, the destination of which is unknown to the Court. I am satisfied that the GIG website and the GAM website remained accessible to members of the public notwithstanding the content of the back office message addressed to those consultants who were able to log in and view the back office message.

192 The websites were not deactivated and so continued to promote the provision of financial services by GIG being services that GIG was not authorised to provide in the relevant period. In all of the circumstances, and especially having regard to the evidence of Mr Lai and Mr Chen and the acquisition of Stumac, I infer that the link sent to customers in the back office message was not provided for the purpose of returning investors' funds or facilitating the immediate cessation of the business, but for the purpose of retaining the custom of investors and facilitating their transfer, in due course, from GIG to Stumac.

193 I am satisfied that GIG contravened s 12DB(1)(e) of the ASIC Act in respect of the representation referred to at [1(b)] of the Amended OA. Having regard to the principles stated earlier in these reasons, it is appropriate to grant declaratory relief in terms reflecting the Court's findings.

The representation alleged in [1c]

194 The statements in [1(c)] of the Amended OA appeared together on the same page of the GIG website. Together, they conveyed a representation that the financial services provided by GIG had characteristics or benefits concerning the manner in which funds invested with GIG would be preserved and applied.

195 In considering whether that representation was false in the period between 24 May 2017 and 9 November 2017 it is necessary to identify the particular funds to which the representation should be understood to refer.

196 In my view, the representation should be understood to refer to the manner in which GIG would preserve and maintain those funds invested by its customers. As at 24 May 2017, users of the GAM website and the GIG website were directed to start their investments (or at least certain kinds of investments) by depositing funds into the GIG Deposit Account. At an earlier time the GAM website also gave instructions to deposit funds to the Second GIG Deposit Account. It is ASIC's case that deposits made to the GIG Deposit Account and the Second GIG Deposit Account, as evidenced by the bank statements for those accounts, should be understood as deposits predominantly made by investors. I accept that aspect of ASIC's case insofar as it relates to the GIG Deposit Account in the period prior to 24 May 2017.

197 Proof of the falsity of the representation depends upon proof that funds in the relevant accounts were in fact maintained or applied other than in accordance with the assurances made in the representation. The focus of that enquiry is the period after 24 May 2017. That is not to say that evidence of transactions occurring prior to that date are irrelevant. I consider it permissible and necessary to have regard to prior transactions to ascertain whether or not, as at 24 May 2017, there was a designated trust account in existence to which investors funds could be deposited and also to identify whether there is any pattern of transactions that might shed some light on the purposes for which withdrawals from the accounts were made in the period of the alleged contraventions.

198 Before turning to the evidence, an issue arises as to whether the representations in [1(c)] of the Amended OA are in the nature of representations with respect to a future matter. If the representations are to be interpreted in that way, as I consider they should be, then s 12BB applies. It provides:

> **12BB Misleading representations with respect to future matters**
>
> (1) If:
>
> (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
>
> (b) the person does not have reasonable grounds for making the representation;
>
> the representation is taken, for the purposes of Subdivision D (sections 12DA to 12DN), to be ***misleading***.

> (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:
>
> (a) a party to the proceeding; or
>
> (b) any other person;
>
> the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.
>
> (3) To avoid doubt, subsection (2) does not:
>
> (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
>
> (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
>
> (4) Subsection (1) does not by implication limit the meaning of a reference in this Division to:
>
> (a) a misleading representation; or
>
> (b) a representation that is misleading in a material particular; or
>
> (c) conduct that is misleading or is likely or liable to mislead;
>
> and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

199 No evidence has been adduced to establish that GIG had reasonable grounds for making the representations as to the manner in which investor funds would be preserved and applied in the future. Accordingly, s 12BB operates so that GIG is taken to have had no reasonable grounds for making the representation and the representation is to be taken to be misleading for that reason alone. In my view, ASIC's claim for relief should be allowed on that basis.

200 However, ASIC did not present its case in a fashion that depended upon the operation of s 12BB of the ASIC Act. Instead it invited the Court to find that the representations were false because investors' funds were not in fact maintained or applied in accordance with the representations. On the assumed footing that s 12BB does not apply, I am satisfied that ASIC's case is established on the evidence and I will now proceed to explain how that is so.

201 It should be emphasised that the financial products in which GIG dealt were not investments in the nature of bank term deposits. The evidence does not support a finding that the terms of the investment required that the capital sum invested by each investor remain in the account to which they were originally deposited. Accordingly, I would not conclude that the representation was false merely because funds were withdrawn from the GIG Deposit Account

or (or to the extent that it is relevant) the Second GIG Deposit Account. More than mere withdrawal of funds must be shown.

202 Moreover, the representations on the websites did not convey to customers that the "designated trust account" was the same account as that to which their deposits were originally made.

203 I am nonetheless satisfied that, contrary to the representation, GIG did not preserve the funds deposited by investors "in a designated trust account" at all. I find that the deposits were, contrary to the representation, mixed with the assets of GIG and its related entities. Those two findings together support an inference that the funds were used for purposes unrelated to customer transactions. These conclusions are supported by the evidence of transactions on the accounts, considered in the context of other facts and circumstances identified below.

Transactions on the GIG Deposit Account

204 The authorised signatories on the GIG Deposit Account are Mr Wang and Ms Tsai.

205 As at 1 May 2016, the account had a nil balance. There were no relevant transactions on the account after 27 September 2017. On 26 October 2017, the Court made orders restraining any further transactions on the account. On 6 March 2019, the order was varied to enable the liquidator of GIG to access the account for the purposes of the winding up of GIG.

206 Between 1 May 2016 and 26 September 2017 deposits into the GIG Deposit Account totalled $40,769,556.00. Of that sum, $1,930,000.00 was deposited by way of transfer from the GAM Deposit Account in three separate transactions in May 2016. Those transfers are consistent with the continued conduct by GIG from about May 2016 of a business that had previously been carried on by GAM. The terms and conditions upon which funds originally invested with GAM were transferred to GIG are unclear. Also unclear are the terms and conditions on which investors may have originally deposited funds with GAM at the time that it conducted the business in question. In my view, no weight should be placed on the receipt of the transferred funds by GIG in determining whether the representation in question was false.

207 Between 1 May 2016 and 26 September 2017, withdrawals against the GIG Deposit Account totalled $40,769,114.00, leaving a balance of $442.40. The outgoing payments over that period comprised payments to accounts held in the name "Hung Ding Financial Man" or "Hung Ding Financial Management Co" totalling $24,386,769.00, payments to the Shenzen Unite Account totalling $1,802,743.29 and payments to other persons totalling $14,579,602.00. The evidence does not establish whether the beneficiary of the accounts held in the name "Hung Ding

Financial Man" or "Hung Ding Financial Management Co" was GAM (as otherwise named) or Hung Din Seychelles. There are no bank statements in evidence in respect of either of those accounts.

208 As at 24 May 2017, the balance of the GIG Deposit Account was $36,020.00. From and including 25 May 2017 to 26 September 2017, deposits totalling $4,111,395.00 were made to that account. ASIC submits that these payments were deposited by investors. That submission should be accepted in light of the continuing operation and content of the GIG website and the GAM website over that period, the evidence of Mr Zhou and the regularity and amounts of the deposits.

209 The outgoing payments over the same period totalled $4,146,973.00 comprising payments to the account held in the name "Hung Ding Financial Management Co" totalling at least $960,000, payments to the Shenzhen Unite Account totalling $1,802,743.29 and payments to other persons totalling $1,456,230.

210 The payments to accounts held in the name of Hung Ding were authorised by Mr Zhou. His evidence (which I accept) is that he acted on the instructions of Mr Wang in relation to the fund transfers or otherwise on instructions from an accounts department in Taipei which he understood to act under Mr Wang's direction. As has been mentioned, the accounts department was managed by Mr Wang's wife, Ms Kou.

211 Most of these sizeable withdrawals were directed to entities that are related to GIG in the corporate sense or that otherwise have connections with Mr Wang, his family or associates. The movement of money out of the account does not disclose the existence of a system by which investors' funds was held in a designated trust account and not used for purposes other than the clients' investment. The bank statements tend to show that investors' funds were used for purposes other than their investments, but in my view they are not determinative of the issue.

Relevance of the Second GIG Deposit Account

212 For present purposes, I place no weight on activity in the Second GIG Deposit Account. As I have emphasised, ASIC's allegation against GIG is framed in way that alleges falsity of a representation made between 24 May 2017 and 9 November 2017. On the material before me, I am not satisfied that users of the GAM website or the GIG website were directed to deposit funds into the Second GIG Deposit Account on and from 24 May 2017. I am not satisfied that

the instruction to deposit funds into the Second GIG Deposit Account remained accessible on the GAM website on or after 24 May 2017.

213 Accordingly, proof that funds were withdrawn from the Second GIG Deposit Account in my view would not furnish proof that the particular representation in question was false in the relevant period. To the extent that investors were directed to deposit funds into the Second GIG Deposit Account by means other than the GAM website, those means have not been identified by ASIC and it is unclear how any such investor could have understood the representation on the website on and from 24 May 2017 to have applied to such deposits. My examination of the bank statements for the Second GIG Deposit Account has not revealed a pattern of deposits into that account consistent with investor activity at any time after 24 May 2017 in any event.

GAM Deposit Account

214 For similar reasons, I do not consider transactions on the GAM Deposit Account to be informative of the question of whether the representation made on the GAM website and the GIG website was false in the specific period to which ASIC's claim for relief at [1(c)] of the Amended OA relates. As already explained, the representation in question was not about GAM, nor should the representation be understood as applying to funds that might previously have been received by GAM at an earlier time. From as early as 13 July 2016, the GAM website was not directing investors to transfer funds into the GAM Deposit Account. Whilst it is possible that some deposits into the GAM Deposit Account prior to August 2016 might be explained by investor activity, I am not prepared to draw that inference, especially in the absence of evidence that investors were (whether by the websites or otherwise) directed at that time to deposit their investment money into that account.

215 In any event, there were no deposits made into the GAM Deposit Account following the cancellation of the GAM AFSL or the GIG AFSL. As at 14 March 2017, most of the funds had been withdrawn from the account. Accordingly, I will not have regard to transactions on the GAM Deposit Account in determining whether the representation referred to at [1(c)] of the Amended OA (being a representation about GIG) was false or misleading in the limited period to which the allegation relates.

Client trust accounts

216 Mr Zhuo is the sole signatory of the following bank accounts:

(1) an AUD account in the name "Gallop International Group Pty Ltd OBO Pai-Cheng - trust account" and a USD account in the name "Gallop International Group Pty Ltd Pai-Cheng";

(2) an AUD account in the name "Gallop International Group Pty Ltd OBO Pen-Yi Wang" and a USD account in the name of "Gallop International Group Pty Ltd OBO Pen-Yi Wang"; and

(3) an AUD account in the name of "Gallop International Group Pty Ltd OBO Shih-Nan Liao and Ming-Mei Yuan" and a USD account in the name of "Gallop International Group Pty Ltd OBO Shih-Nan Liao and Ming-Mei Yuan".

217 On the basis of the evidence of Mr Zhou I find that these accounts were established at the direction of Mr Wang for the purpose of receiving money deposited by the three named investors. The account names and the abbreviation "OBO" suggest that at least three of the accounts were established for the purpose of holding funds transferred by those particular investors on trust. This evidence suggests that the representation about holding funds in a designated trust account was not false in relation to the three investors concerned.

218 This evidence is significant in the sense that it highlights the absence of any such accounts held for any customer other than the three who were the subject of specific instructions to Mr Zhou from Mr Wang. Mr Zhou claimed that he was not aware of the creation of any trust accounts for customers other than those to which I have referred and I accept his evidence in that regard. If designated trust accounts had been established for the benefit of all investors, it is unlikely that Mr Zhou would be ignorant of them. Considered together with the evidence as a whole, this circumstance supports an inference that no such trust account or accounts existed in respect of any of GIG's customers with the exception of the three accounts referred to at [216] above.

Other accounts

219 Mr Zhuo was a signatory with Mr Giang Hao of the following additional bank accounts:

(1) Account number 06 2000 1661 3454 (USO) in the name of "Gallop International Group Pty Ltd 080 Avondale Consultant Limited – Client Trust Account"; and

(2) Account number 06 2000 1661 3473 in the name of "Gallop International Group Pty Ltd 080 Avondale Consultant Limited".

220 There are no bank statements in evidence for the first of these accounts. The name of that account might suggest that there existed an account established for the purpose of holding

clients' funds on trust. However, the evidence does not suggest that funds deposited by investors into the GIG Deposit Account were ever transferred directly or indirectly to that account. Statements for the second named account for the period 1 July 2017 to 31 December 2017 show a nil balance, nil credits and nil debits.

Other evidence

221 I am satisfied that a large number of investors have lost the whole of their capital invested and that they have been unsuccessful in obtaining a satisfactory explanation from GIG as to those losses.

222 Mr Wang told Mr Lai that he could expect to receive between 10% and 20% of his money back. Importantly, Mr Wang did not say that the losses were explained by risks inherent in the investments themselves. He gave no explanation for the lost capital.

223 If the loss of investors' funds was explained by a failure of investments made by GIG on their behalf, that is, by the transpiration of risks inherent in the investments themselves, it would be reasonable to expect that explanation to have been given in a forthright response to the investors' queries and complaints. Moreover, if the investors' funds had been held in a designated trust account, it would be reasonable to expect GIG to respond to investor queries by disclosing accounting records that might explain why their funds had not been and could not be returned. No such explanations were given. Instead, investor concerns and complaints were initially not responded to, and then later in 2017, investors were invited to acquire financial products and services from Stumac.

224 It is also relevant that GIG did not take positive action to deactivate the GIG website or the GAM website for more than five months after the GIG AFSL was cancelled and even then did not act until the Court made orders requiring their deactivation. There is evidence that at least one investor (the sister of Ms Chung) who deposited funds into the GIG Deposit Account on 8 June 2017 has not had the funds returned notwithstanding her complaints to the FOS and to ASIC. GIG's conduct in receiving those funds and not returning them to the investor evidences, at the very least, a lack of regard for the fate of the investor's funds and either an unwillingness or inability to account for them. The conduct is inconsistent with the existence of a designated trust account and a system by which investor funds were used solely for customer transactions.

225 In drawing conclusions about the falsity of the representations I have had regard to possible explanations for the frequency, timing and amounts of the withdrawals from the GIG Deposit Account. These include the possibility that the funds were transferred to related entities of GIG so that they could then be applied to investment activities for the ultimate benefit of GIG's clients. A further possibility, more relevant to the confined period of the alleged contravention, is that the funds were withdrawn from the GIG Deposit Account preventing investors from accessing them so as to facilitate the transfer of their investments to a new entity, whether within this jurisdiction or elsewhere. The existence of these possibilities does not alter the findings I have made in accordance with the civil standard of proof. The pattern of activity on the accounts (or more precisely the lack of any discernible pattern), viewed in the context of the evidence as a whole, supports an inference that investors' funds were neither preserved nor applied in the manner represented. It is more likely than not that the funds were misapplied, so explaining the magnitude of unexplained losses.

The significance of GIG's non-appearance

226 I am satisfied that those standing behind GIG are aware of these proceedings. Informing that conclusion is my satisfaction that the natural persons standing behind the company are the same natural persons standing behind Stumac. Stumac participated in the proceedings to resist its joinder as a party and instructed solicitors for that purpose. I find that the directing mind and will of Stumac at that time was Mr Wang and that Stumac's appearance through a solicitor was arranged by Mr Wang and not Mr O'Doherty. That conclusion is supported by the email to Mr O'Doherty instructing him to remain ignorant of Stumac's affairs should ASIC make enquiries of him.

227 GIG in any event was served with the Amended OA at its registered place of business and so can be taken to know about the allegations against it. It is possible that GIG's failure to adduce evidence is explained in part by the fact that it was placed into liquidation after these proceedings commenced. I also take into account the circumstance that the GAM website and the GIG website were deactivated in response to the Court's orders and not otherwise.

228 I am satisfied that the Court's interlocutory orders came to the attention of Mr Wang, as did the Amended OA and the evidentiary affidavit material upon which ASIC relies. Prior to GIG going into liquidation the directors of the company did not file a defence and there is nothing to suggest that any officer of the company has urged or assisted the company's liquidator to resist the orders sought by ASIC.

229 The question of whether withdrawals were made from the GIG Deposit Account to facilitate the holding of customers' funds on trust or for purposes relating to the investments is a question upon which the directors of GIG and those who previously controlled the company might reasonably be expected to shed some light, whether or not the company is in liquidation. As I said at the outset of these reasons, GIG's failure to call evidence does not affect the burden or standard of proof. However, in the absence of evidence weighing against the inference, the Court is able to make the above findings with more confidence: *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 (Heydon, Crennan and Bell JJ) at [63].

Falsity

230 I find that GIG caused or permitted investors' funds to be transferred from the GIG Deposit Account for purposes unrelated to the investments and that GIG did not hold investors' funds in a designated trust account. Accordingly, the financial products and services provided by GIG did not have the benefits and characteristics represented on the GAM website and the GIG website in the relevant period. The establishment of individual trust accounts for three investors should be understood as an exception to that finding. The existence of those accounts does not detract from the finding of contravention in relation to all other funds deposited into the GIG Deposit Account.

231 The allegation against GIG at [1(c)] of the Amended OA is established.

Declaratory relief

232 Section 12GJ(1) of the ASIC Act is cast in substantively the same terms as the former s 86 of the TP Act considered in *RAIA Insurance*. It provides a source of power to grant the declaratory relief sought by ASIC in relation to GIG's contravention of any provision contained in Div 2 of Pt 2 of the ASIC Act, including s 12DB(1)(e). To the extent that it is necessary to identify an additional or alternate source of power, it may be found in s 21 and s 23 of the FCA Act.

233 For the reasons given above in relation to GIG's contravention of s 911A of the Corporations Act, I consider it appropriate to grant declaratory relief against GIG in substantively the same terms sought at [1(b)] and [1(c)] of the Amended OA with some adjustment to accommodate the Court's findings on the evidence.

MISLEADING AND DECEPTIVE CONDUCT

Corporations Act, s 1041H; ASIC Act, s 12DA

234 ASIC seeks declarations to the effect that GIG and GAM contravened s 1041H of the Corporations Act and s 12DA of the ASIC Act by:

(1) continuing after the cancellation of their respective AFSLs to:

(a) operate their websites and offer financial services;

(b) receive funds which were paid by investors on the understanding that they were investing in the financial products and/or financial services offered by GIG and GAM; and

(c) represent that they were licenced to provide financial services; and

(2) by omission, in failing to inform investors and the wider public that their respective AFSLs had been cancelled.

The case against GAM

235 For reasons explained earlier, I am not satisfied that GAM carried on a financial services business after the cancellation of the GAM AFSL. Nor am I satisfied that it was the entity that controlled the content uploaded to the GAM website.

236 In light of the circumstance that no deposits were made to the GAM Deposit Account after 24 March 2017, I am not satisfied that GAM received funds paid by investors on the understanding that they were investing in financial products and/or services offered by GAM after that time.

237 The evidence does not establish that GAM made any representation to the effect that it was licenced to provide financial services after 31 March 2017. I have found that the representations upon which ASIC relies concern a business conducted by GIG, not GAM.

238 Even if the evidence established that GAM did not inform investors and the wider public that the GAM AFSL had been cancelled, I do not consider such an omission would constitute misleading and deceptive conduct. That is because I am not satisfied that in the relevant period GAM in fact carried on a financial service business or otherwise held itself out as an entity that was entitled to do so.

239 The allegation that GAM contravened s 12DA of the ASIC Act and s 1041H of the Corporations Act is not established.

The case against GIG

240 Section 12DA(1) of the ASIC Act provides:

> (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

241 Section 1041H(1) of the Corporations Act provides:

> (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive.

242 Section 1041H(1) of the Corporations Act is in substantively the same terms as s 12DA of the ASIC Act, although for the purposes of the Corporations Act it is not necessary for ASIC to establish that the impugned conduct occurred in trade or commerce.

243 To "engage in conduct" is as to do an act or omit to perform an act: Corporations Act, s 9.

244 Section 1041H(2) of the Corporations Act provides a non-exhaustive list of types of conduct regarded as being in relation to a financial product, and relevantly includes dealing in a financial product: see ss 763A, 763B, 766A(1)(b) and 766C(1)(a).

245 Consistent with my earlier findings, I am satisfied that GIG, following the cancellation of the GIG AFSL, in trade or commerce:

(1) continued to operate the GAM website and the GIG website;

(2) by those websites, continued to offer financial services in this jurisdiction;

(3) received funds paid by investors on the understanding that they were investing in financial products and/or services offered by GIG, as evidenced by the continued receipt of deposits into the GIG Deposit Account;

(4) represented, by the websites, that it was licenced to provide financial services in this jurisdiction; and

(5) did not inform the wider public that the GIG AFSL had been cancelled.

246 These acts or omissions are clearly "in relation to financial services". Section 12DA of the ASIC Act extends to GIG's conduct outside of this jurisdiction by the operation of s 12AC.

247 For the purposes of s 1041H of the Corporations Act the conduct occurred "in this jurisdiction".

248 The conduct was misleading and deceptive both because GIG expressly and falsely represented that it was licensed and because GIG failed to inform users of the GIG website and the GAM website that the GIG AFSL had been cancelled.

249 It follows from these findings that GIG contravened s 12DA of the ASIC Act in the manner alleged at [1(d)] of the Amended OA.

Declaratory relief

250 It is appropriate to make a declaration of contravention substantively in the form sought by ASIC at [1(d)] of the Amended OA, again with some alteration to reflect the Court's findings.

INVOLVEMENT OF MR WANG

251 ASIC seeks declarations pursuant to s 21 of the FCA Act that Mr Wang "was directly or indirectly knowingly concerned in, alternatively aided, abetted, counselled or procured" each of GIG and GAM's contraventions of s 911A and s 1041H of the Corporations Act and s 12DA and s 12DB(1)(e) of the ASIC Act: Amended OA, [2].

252 The phrase "involved in a contravention", when used in the ASIC Act, bears the same meaning as in the Corporations Act: ASIC Act, s 5(2)(b); Corporations Act, s 9. The phrase is defined in s 79 of the Corporations Act as follows:

> **79 Involvement in contraventions**
>
> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.

Alleged involvement in contraventions by GAM

253 For the reasons already given, I am not satisfied that GAM contravened s 911A or s 1041H of the Corporations Act, nor am I satisfied that GAM contravened s 12DA or s 12 DB(1)(e) of the ASIC Act. As no primary contravention by GAM has been established, there is no factual or legal basis for a finding that Mr Wang was involved in any contravention by that company.

Alleged involvement in contraventions by GIG

254 The legal principles are summarised at [124] of ASIC's written submissions which I gratefully reproduce here:

> A person will be knowingly concerned in a contravention if that person was an intentional participant in the contravention, with knowledge of the essential elements constituting the contravention at the time of the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670 (***Yorke***); *ActiveSuper* [398] and [405]; *Australian Investors Forum Pty Ltd (No 2)* [2005] NSWSC 267 at [113]-[118]. To be an intentional participant, the defendant must have done something or omitted to do something that implicates or involves the person: *Ashbury v Reid* [1961] WAR 49; *ActiveSuper* at [407]. Actual knowledge of the essential elements constituting the contravention is required: *Young Investments Group Pty Ltd v Mann* [2012] FCAFC 107 at [11] (***Young***); *ActiveSuper* at [399]. Imputed or constructive knowledge is insufficient: *Young* at [11]; *ActiveSuper* at [399]. It is not necessary, however, that the person know that the essential elements amount to a contravention: *Yorke* at 667; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* [1999] FCA 116 at [186]; *Medical Benefits Funds of Australia Ltd v Cassidy* [2003] FCAFC 289 at [8]-[13]; *ActiveSuper* at [398].

255 Proof of Mr Wang's knowledge of the essential elements constituting GIG's contravention of s 911A of the Corporations Act requires proof that Mr Wang knew between 24 May 2017 and 9 November 2017 that:

(1) GIG was carrying on a business that dealt in a financial product (s 766A(1)(b)) by acquiring or arranging for a person to acquire (s 766C(1)(a) and (2)) a financial product, being a facility through which, or through the acquisition of which, a person makes a financial investment (s 763A); and

(2) GIG did not hold an AFSL issued under s 913B which covered the provision of the financial services provided.

256 I draw on the findings set out earlier in these reasons in relation to GIG's contraventions. It is convenient to repeat some of those findings as they relate to the role of Mr Wang in the contraventions. Additional findings may be made based on the evidence of Ms Kot, Mr Zhou and Mr Chen and on further material referred to in the affidavits of Ms Prosser.

257 I find that:

(1) Mr Wang was GIG's "big boss" (Ms Kot) or "ultimate boss" (Mr Zhou), working principally (but not exclusively) from the Taiwan office;

(2) Mr Wang oversaw the activities of two staff members in GIG's Sydney office and 10 staff members in GIG's Taiwan office including by giving day-to-day instructions;

(3) Mr Wang was in regular contact with Ms Kot and Mr Zhou by telephone and through social media by which he gave day-to-day instructions;

(4) Mr Wang was a signatory to at least 13 bank accounts and sent regular instructions from the Taiwan office to Mr Zhou in relation to withdrawals, including from the GIG Deposit Account;

(5) on at least one occasion Mr Wang attended at GIG's Sydney office for the purpose of giving a presentation about the financial services business;

(6) the presentations made or jointly made by Mr Wang referred to the GIG website and were replete with statements about GIG's compliance with Australian regulatory regimes;

(7) Mr Wang attended the Sydney office around the time that the GIG AFSL was in the process of being cancelled by ASIC;

(8) after the GIG AFSL was cancelled, Mr Wang was told by Mr Zhou that money was being deposited by investors into the GIG Deposit Account;

(9) Mr Wang was the person who caused the business to be transferred from GAM to GIG and was instrumental in the arrangements for GIG's customer base to be transferred to Stumac;

(10) the GIG AFSL was cancelled at a time when Stumac had not yet been acquired;

(11) Mr Wang dealt directly with investors at the 28 November 2017 meeting at which he discussed the cancellation of GIG's AFSL, and of his intention to use Stumac as a new vehicle for the continuation of the business;

(12) given his role and involvement in GIG's day-to-day operations, it was within Mr Wang's authority to deactivate the GIG website and the GAM website at any time from 24 May 2017 when the GIG AFSL was cancelled;

(13) the GIG website and the GAM website were deactivated on 9 November 2017 in response to the orders made by this Court and not at an earlier time; and

(14) Mr Wang, as ASIC submitted, was the controlling mind of GIG and the architect of a scheme by which a financial service business was transferred from one entity to another and then to another.

258 Although dated one year prior to the cancellation of the GIG AFSL (and hence the period in which GIG's contraventions are found to have occurred) the letter to ASIC extracted at [35] above supports the inference that personnel employed within the business acted under

Mr Wang's direction in every respect and that Mr Wang was intimately involved in the day-to-day operation of the business conducted by GIG and had ultimate control and authority within the company to direct its activities. The extent of Mr Wang's involvement in GIG's contraventions may be inferred from the nature and extent of his involvement in the financial services business promoted and operated by GIG.

259 Mr Wang did not give evidence as to his knowledge or otherwise as to his state of mind in relation to GIG's contraventions. I am nonetheless able to draw an inference on the material before me that he had knowledge of each of the essential elements of each of GIG's contraventions.

260 I find that Mr Wang knew about the content of the GIG website and the GAM website and that he had the authority as executive director to ensure that the websites were deactivated immediately upon the cancellation of GIG's AFSL. I find that Mr Wang had authority to control the application of funds deposited by investors into the GIG Deposit Account, an authority that he regularly exercised by way of instructions to Mr Zhou. To the extent that investor funds were received after 24 May 2017 and dealt with in a manner other than that represented on the websites, I am satisfied that that conduct was either engaged in or procured by Mr Wang in his role as executive director.

261 In relation to GIG's contraventions of s 911A of the Corporations Act, I find that Mr Wang knew that GIG required an AFSL to conduct a financial services business in this jurisdiction and he knew that the financial services business conducted by GIG was heavily promoted by reference to its purported compliance with that requirement. As at 24 May 2017, Mr Wang knew that the GIG AFSL had been cancelled. Between 24 May 2017 and 9 November 2017, Mr Wang knew that the GAM website and the GIG website continued to promote financial services provided by GIG after the cancellation of the GIG AFSL. I find that Mr Wang gave no directions to shut the websites down because he intended that the website remain accessible to the public. The websites were not in fact shut down until 9 November 2017.

262 In relation to GIG's contraventions of s 12DB(1)(e) of the ASIC Act, in the circumstances described above, I find that Mr Wang knew that the contravening representations were made in trade or commerce, between 24 May 2017 and 9 November 2017, and he knew the facts that rendered the representations false or misleading.

263 In relation to GIG's contravention of s 12DA of the ASIC Act and s 1041H of the Corporations Act, the acts, omissions and states of mind referred to in the previous paragraphs are sufficient to prove Mr Wang's involvement in each of those contraventions.

264 The above inferences may be drawn with more confidence in circumstances where Mr Wang adduced no evidence in relation to matters that would be exclusively within his knowledge: *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at [167]); *Jones v Dunkel*.

Declaratory relief

265 Both the ASIC Act and the Corporations Act contain provisions conferring powers on this Court in relation to persons who are found to have been "involved", in contraventions of those Acts, including provisions upon which ASIC relies for consequential relief against Mr Wang: ASIC Act, s 12GBA(1)(e), s 12GLD(1)(a); Corporations Act s 206E, s 1324(1)(c) and (e).

266 A declaration may be made against Mr Wang notwithstanding that his involvement in GIG's contraventions does not of itself amount to a contravention by him of either statute, as in force at the relevant time: *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 at [421].

267 It is appropriate to make a declaration in the terms sought by ASIC at [2] of the Amended OA, albeit in terms that reflect my conclusion that the only contraventions in which Mr Wong was involved were those committed by GIG.

PENALTY

ASIC Act, s 12GBA

268 ASIC seeks an order that Mr Wang pay a pecuniary penalty in respect of his involvement in GIG and GAM's contraventions of s 12DB(1)(e) of the ASIC Act: s 12GBA of the ASIC Act; Amended OA, [5].

269 Section 12DB(1)(e) is a civil penalty provision to which s 12GBA applies. Section 12GBA relevantly provides:

> **12GBA Pecuniary penalties**
>
> (1) If the Court is satisfied that a person:
>
> (a) has contravened a provision of Subdivision C, D or GC (other than section 12DA); or

> (b) has attempted to contravene such a provision; or
>
> (c) has aided, abetted, counselled or procured a person to contravene such a provision; or
>
> (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision; or
>
> (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
>
> (f) has conspired with others to contravene such a provision;
>
> the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate.
>
> (2) In determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including:
>
> (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
>
> (b) the circumstances in which the act or omission took place; and
>
> (c) whether the person has previously been found by the Court in proceedings under this Subdivision to have engaged in any similar conduct.

270 The question of penalty is to be considered in connection only with Mr Wang's involvement of GIG's contravention of s 12DB(1)(e) of the Act and not in relation to any other contravention.

Principles

271 The Court may impose a pecuniary penalty in addition to a period of disqualification: *Australian Securities Commission v Donovan* [1998] FCA 986; (1998) 28 ACSR 583 at 602.

272 ASIC submitted that pecuniary penalties have a punitive purpose as the name tends to suggest. The differing views expressed on that point were summarised in *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338 at [59] – [64]. The issue was resolved in *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482. The majority (French CJ, Kiefel, Bell, Nettle and Gordon JJ) said (at [55]):

> …whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, is primarily if not wholly protective in promoting the public interest in compliance:
>
> > 'Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the

> Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the *Trade Practices Act*] … The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.'

(footnotes omitted)

273 Their Honours went on to say (at [59]) that "civil penalties are not retributive, but like most other civil remedies essentially deterrent or compensatory and therefore protective".

274 Any penalty imposed under s 12GBA should be a sum that members of the public will recognise as proportionate to the seriousness of the contravention, reserving the maximum penalty for the most serious of cases; *Australian Securities and Investments Commission v GE Capital Finance Australia, in the matter of* ***GE Capital*** *Finance Australia* [2014] FCA 701 at [75]. The quantification of the penalty otherwise requires an evaluative judgment that is not susceptible to scientific or mathematical calculation. What is required is an intuitive or instinctive synthesis of all of the relevant factors: *ASIC v* ***Adler*** *& 4 Ors* [2002] NSWSC 483 at [126], [140] (Santow J); *GE Capital* at [75].

275 As to specific and general deterrence, in *Singtel* ***Optus*** *Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20 the Full Court said (at [63]) that "those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention". Counsel for ASIC properly acknowledged that penalties imposed in other cases, especially under other legislative schemes, can only be of limited analogical value and even then must be treated with caution: *Optus* at [60], citing *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2010) 188 FCR 238 at [215].

276 Section 12GBA(2) requires all of the relevant factors to be taken into account. In relation to a primary contravener, the authorities have recognised the following factors as relevant (see *Adler* at [126] and *Trade Practices Commission v CSR Limited* [1990] FCA 762 (French J) at [42]):

(1) the seriousness of the conduct and the period over which it extended;

(2) whether the conduct was dishonest or deliberate;

(3) whether further contraventions are likely;

(4) the character of the defendant;

(5) whether the defendant intended to deprive persons of funds;

(6) the quantum of any losses;

(7) whether the defendant has shown remorse;

(8) the defendant's conduct in the proceedings;

(9) the capacity of the defendant to pay;

(10) whether the penalty will prejudice the rehabilitation of the defendant;

(11) whether a disqualification order has been made that has significant consequences;

(12) whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the legislation in relation to the contravention;

(13) whether the contravener has engaged in similar conduct in the past;

(14) the financial position of the contravener; and

(15) whether the contravening conduct was systemic, deliberate or covert.

277 These factors apply equally to persons involved in a primary contravention as much as they apply to the primary contravener having proper regard to the nature and degree of involvement of the person against whom a penalty is sought.

Maximum penalty

278 I have found that GIG's contravening conduct commenced on 24 May 2017 and continued until 9 November 2017.

279 Prior to 30 June 2017, the maximum penalty for an individual involved in a single contravention of s 12DB(1)(e) of the ASIC Act was $360,000.00: ASIC Act, s 12GBA(3), item 2; *Crimes Act 1914* (Cth), s 4AA. From 30 June 2017, the maximum penalty increased to $420,000.00.

280 ASIC invites the Court to impose a penalty on Mr Wang having regard to the lower maximum penalty applicable to each contravention prior to 30 June 2017. I will proceed on that basis.

ASIC's submissions

281 ASIC submitted that a penalty in the amount of $5 million should be imposed on Mr Wang. That submission was founded on an allegation that Mr Wang had been involved in the primary contraventions of s 12DB(1)(e) of the ASIC Act alleged against both GAM and GIG. The submissions proceeded from the basis that there were thousands of contraventions of

s 12DB(1)(e) by GAM and GIG, although the precise number could not be ascertained. ASIC submitted that Mr Wang was the controlling mind of both companies and so bore responsibility for the alleged contraventions of each entity. ASIC further submitted that Mr Wang's conduct was dishonest and resulted in investors suffering huge losses. As to dishonesty, it is alleged that Mr Wang has fraudulently misappropriated investor funds for his own personal gain, such that the contravention should be regarded as among the worst possible of cases.

Number of contraventions

282 Section 12GBA contemplates a penalty "in respect of each act or omission" that constitutes a contravention.

283 Subject to what is said below, it is necessary to consider whether GIG's conduct as the primary contravener amounts to a single contravention of s 12DB(1)(e) of the ASIC Act and, whether a penalty should be imposed on the basis that the contraventions arose out of a single course of conduct. As Greenwood J said in *Australian Securities and Investments Commission v* ***Channic Pty Ltd*** *(No 5)* [2017] FCA 363 at [81(11)]:

> As to the 'course of conduct' principle, the principle recognises that where there is an inter-relationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is 'essentially' the *same criminality*. That principle requires careful identification of what is the same criminality. Where two offences arise as a result of the 'same conduct' or 'related conduct', the Court may have regard to the principle as one of the principles guiding the exercise of the sentencing discretion. The principle represents 'a tool of analysis' which a court is not necessarily compelled to use: *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 at [39] and [41], Middleton and Gordon JJ.

284 In *Hillside* at [24] – [25], Beach J expressed the principle as it applied to a power conferred in similar terms as follows (at [25]):

> … the 'course of conduct' principle does not have paramountcy in the process of assessing an appropriate penalty. It cannot of itself operate as a *de facto* limit on the penalty to be imposed for contraventions of the ACL. Further, its application and utility must be tailored to the circumstances. In some cases, the contravening conduct may involve many acts of contravention that affect a very large number of consumers and a large monetary value of commerce, but the conduct might be characterised as involving a single course of conduct. Contrastingly, in other cases, there may be a small number of contraventions, affecting few consumers and having small commercial significance, but the conduct might be characterised as involving several separate courses of conduct. It might be anomalous to apply the concept to the former scenario, yet be precluded from applying it to the latter scenario. The 'course of conduct' principle cannot unduly fetter the proper application of s 224.

285 Beach J's analysis was approved by the Full Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 (*Nurofen*) at [141] (Jagot, Yates and Bromwich JJ) and in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* (2017) 258 FCR 312 at [425] and [426] (Middleton, Beach and Moshinsky JJ) and more recently in *Australian Competition and Consumer Commission v Yazaki Corporation* (2018) 262 FCR 243 at [231] (Allsop CJ, Middleton and Robertson JJ)

286 In *Nurofen*, the Full Court said this of the course of conduct principle in its application to a case involving misrepresentations made on packaging and by way of a website viewed by any number of consumers that could not be meaningfully ascertained (at [157]):

> In this case, the theoretical maximum was in the trillions of dollars (some 5.9 million contraventions at $1.1 million per contravention). By way of example only, even if the appropriate penalty per contravention for each sale was $1, the penalty would approach $6 million. It follows that the assessment of the appropriate range for penalty in the circumstances of this case is best assessed by reference to other factors, as there is no meaningful overall maximum penalty given the very large number of contraventions over such a long period of time. Given this, we consider that, to the extent that the course of conduct principle had any meaningful work to do, the better way to look at it was in terms of each of the four 'types' of packaging, each with its own consumer target audience. This proceeding really involves four types of contravention, with many individual contraventions each over the five years. The webpage contraventions can be viewed as one or two serious courses of conduct. But ultimately this discussion itself serves to demonstrate the limited utility of the course of conduct principle in the circumstances of a case such as the present, and why any such characterisation could not properly have the significance which the primary judge gave to it at [94]-[95] of the penalty reasons.

287 See also *Australian Competition and Consumer Commission v H.J. Heinz Company Australia Limited (No 2)* [2018] FCA 1286 (White J).

288 In case involving representations on a website, this Court has held that a representation is made each time that the relevant content on the website is accessed and viewed by a user of the website: *Hillside* at [12]. On that analysis there may be many thousands of contraventions in a given case of that kind. As the Full Court said in *Nurofen*, the course of conduct principle has limited utility in a case such as the present.

289 Returning to the present case, ASIC submits that where the same misrepresentation was made on each of the English and Chinese versions of the websites, they amount to separate categories of contraventions because a distinct decision and act is required to direct the statements to different audiences.

290 The number of persons who accessed the Chinese and English language versions of the GAM website and the GIG website between 24 May 2017 and 9 November 2017 cannot be ascertained on the material before me. It seems to me that categorising the unascertainable readership into English language speakers and Chinese language speakers does little to assist the Court to identify how many contraventions occurred. The Court simply does not know the number of persons who accessed the website and read the representations in either language.

291 In all of the circumstances, it is nonetheless reasonable to infer that the websites in either language were viewed multiple times.

292 In one sense, if there was an omission to deactivate the websites after the cancellation of the GIG AFSL, that omission might be regarded as a single omission in respect of each website. Similarly, a single deliberate instruction to keep the websites active might be regarded as a single contravening act in respect of each website. On that approach, there may, on the facts of the present case, be said to have been two such acts or omissions in relation to each website referrable to the English language version and the Chinese language version respectively.

293 I have concluded that it is not appropriate to interpret the facts in that way. To do so would be to ignore the evident purpose of the websites, that is, to make each representation to individual prospective customers and so induce each person to act upon each representation and invest in GIG's financial products or services.

294 It is appropriate to approach the present case on the basis that it involves two categories of misrepresentation each accessible to the public in this jurisdiction. The first category of representation is broadly (and falsely) to the effect that GIG was licenced under this jurisdiction to provide the financial services promoted on the websites. The second category of representation involved false reassurances as to the manner in which investors' funds would be preserved and applied. The two categories of representation are related in the sense that the first category tends to render the second category more believable.

295 This case is one in which no meaningful overall maximum penalty can be identified. It is sufficient to conclude that there have been a large number of contraventions by GIG in which Mr Wang was involved. Conservatively speaking, I am satisfied that each category of representation would, in the ordinary course, have been viewed by at least 20 users of the websites. Subject to the application of the totality principle (as to which see [314] below, an aggregated maximum penalty for an individual for the contraventions would exceed $7 million.

296 Having regard to the maximum penalty for a single contravention, the appropriate penalty to be imposed upon Mr Wang is best assessed by reference to other factors such as the seriousness of the contraventions, the extent of Mr Wang's involvement and the mental attitude accompanying his involvement.

Consequence of contraventions

297 Again, it must be emphasised that the only relevant contraventions for the purpose of the present enquiry are GIG's contraventions of s 12DB(1)(e) of the ASIC Act occurring between 24 May 2017 and 9 November 2017. The Court is to consider the consequences of GIG's contraventions of s 12DB(1)(e) within that limited period.

298 ASIC submits the consequences of GIG's contraventions include the losses suffered by investors in the amount of at least $USD23 million, being the total amount lost by those who have made complaints to FOS and ASIC. I do not accept that submission.

299 In finding that GIG contravened s 12DB(1)(e) of the ASIC Act I have taken into account its failure to provide an explanation to investors for the loss of their funds. That failure was relevant to the question of whether or not GIG had systems in place whereby investor funds were preserved in a designated trust fund. The absence of such a system prior to 24 May 2017 bore on the question of whether it was likely that such a system existed between 24 May 2017 and 9 November 2017. I have found that no such system existed in the limited period of GIG's contravention.

300 It does not follow from that finding that the magnitude of losses reported by the investors who complained to the FOS and to ASIC are losses that are attributable to any reliance the investors might have placed on the representations made on the GIG website and the GAM website between 24 May 2017 and 9 November 2017. The summary of the complaints shows that, with only two exceptions, the dates upon which the investors deposited funds either predate the period of GIG's contravention or are not specified. A further exception is the $USD10,050 deposit made in June 2017 by Ms Chung on behalf of her sister.

301 I am, nonetheless, satisfied that some deposits made to the GIG Deposit Account after the cancellation of the GIG AFSL are consistent with investor activity. The sum of those deposits is approximately $4 million. It may be reasonably inferred that some of those deposits were made by investors acting in reliance upon the representations and that the investments have been lost for reasons that include GIG's failure to preserve and maintain investor funds in

accordance with the assurances given in the representations. It is not possible to put a precise figure on the amount of losses that may be directly or indirectly attributable to GIG's contravention of s 12DB(1)(e) in the relevant period, except to say that the losses attributable to GIG's contravention of s 12DB(1)(e) from 24 May 2017 would not exceed $4 million and are likely to be considerably less than that figure.

Nature and effect of the representations

302 It is relevant to consider the degree to which GIG's contravening conduct departed from the standards imposed by the ASIC Act.

303 The first category of representations conveyed to potential investors that GIG was authorised under Australian law to provide the financial products and services promoted on the websites. This representation was clearly intended to lure investors into the belief that the services promoted by GIG were subject to the regulatory regime established under Australian law. The falsity of the representation wholly undermines the protective purpose of the comprehensive regime established under the ASIC Act for the proper regulation of the financial services sector.

304 The falsity of the representation is made all the more serious by the circumstance that GIG's AFSL was cancelled by virtue of its non-compliance with the very protective laws to which the websites referred. The representation persisted for several months following the cancellation of the GIG AFSL.

305 To my mind, the false representations are of the most serious kind, irrespective of whether GIG was ultimately successful in inducing investors to part with their funds in the relevant period and irrespective of the quantum of investors' losses that may have been caused by any such inducement. In short, GIG espoused the benefits of the Australian regulatory laws whilst conducting its business in breach of those very laws.

306 As to Mr Wang's involvement, this is not a case of a natural person having only peripheral involvement in the contravention of a company under the managerial control of others. Rather, Mr Wang was instrumental in the acts and omissions constituting GIG's contraventions of s 12DB(1)(e) of the ASIC Act. He was, as ASIC correctly submitted, the controlling mind of GIG. I have found that it was within Mr Wang's sphere of authority to deactivate the GIG website and the GAM website and yet he did not do so in the period of the contraventions. For the purposes of the imposition of a penalty he should be regarded as being no less culpable than the primary contravener.

Consciousness of wrongdoing

307 It may be readily inferred that the GIG website and the GAM website were not deactivated for reasons related to Mr Wang's intention to transfer the business (including customer funds) to a new entity. Mr Wang used the period following the cancellation of the GIG AFSL to acquire Stumac and to persuade GIG's former clients to transfer their investments to Stumac, as evidenced by the Stumac Contract. I find that Mr Wang was motivated to present the appearance of a continuation of the same business that GIG was prohibited from conducting after the cancellation of its AFSL. To that end, I find, he delayed giving express and unequivocal notice to investors and to users of the websites that GIG was prohibited from providing financial services in this jurisdiction. Mr Wang's dealings with Mr Chen, Mr Lai and other investors are consistent with an intention to keep them in the dark as to the true state of affairs so as to maintain their confidence and transfer their custom to Stumac once its business affairs were in order.

308 In the contravening period, Mr Wang caused GIG to avoid payments to investors, delayed responding to investor complaints and queries and then failed to give any or any adequate explanation for investors' losses other than to describe the situation (curiously) as one in which GIG required more capital. Between 24 May 2017 and September 2017 Mr Wang did not tell GIG's investors that interest payments could not be made because GIG was prohibited from providing financial services or dealing in financial products. It is in these respects that I find that Mr Wang's state of mind was dishonest.

309 Contrary to ASIC's submissions, the evidence does not establish to the requisite standard that Mr Wang was, by his involvement in the particular contraventions, motivated to fraudulently misappropriate investor funds for his own personal benefit. The circumstance that investors have lost their capital and that funds from accounts held in the names of GAM or GIG have been transferred to accounts held in the name of Mr Wang is not, in my view, sufficient to establish to the requisite standard, that Mr Wang's involvement in GIG's contravention of s 12DB(1)(e) was accompanied by a fraudulent state of mind of the kind asserted. I consider there to be an alternative inference available on the evidence, namely that in the contravening period Mr Wang caused funds to be withdrawn from GIG's accounts and held elsewhere with a view to transferring what remained of investors' funds to Stumac's accounts. On the material before me I am unable to make a conclusive finding either way as to whether Mr Wang has fraudulently taken investors funds for his own benefit or for the benefit of persons close to him.

I do not consider it necessary to make a conclusive finding of theft or fraud against Mr Wang for the purposes of determining this action.

310 My conclusion in this regard does not preclude ASIC or any other person from advancing allegations of fraud against Mr Wang in other regulatory contexts and for other purposes. However, for the purposes of assessing penalty, I find that Mr Wang's state of mind is as I have summarised it in the preceding paragraphs: Mr Wang's involvement in GIG's contraventions of s 12DB(1)(e) formed a part of a calculated strategy to acquire and use a different corporate form for the continuation of the same business that he knew GIG could not lawfully operate. He was dishonest in the sense that he knew that the representations accessible on the websites were false and he intended that the representations remain accessible to achieve the commercial ends of transferring customers from GIG to Stumac.

Mr Wang's financial means

311 Mr Wang did not participate in the trial and there is little evidence before the Court bearing on his financial position. It may reasonably be inferred that Mr Wang drew an income from GIG commensurate with the size of the business and the nature of its activities. In a little over 12 months of operation, the business received tens of millions of dollars in investor funds.

312 There is nothing in the evidence to suggest that a penalty in the amount proposed by ASIC (or a lesser penalty) would be oppressive in the relevant sense.

Conclusion on penalty

313 The penalty should be sufficient to deter others who might be minded to make false or misleading statements in contravention of s 12DB(1)(e) of the ASIC Act. The need for general deterrence is particularly strong in cases involving false representations about compliance with Australian financial services laws. Mr Wang's involvement in the contraventions calls for the imposition of a penalty that reflects the importance of compliance with the regulatory regime established by the ASIC Act. In terms of Mr Wang's personal culpability, I view the case as falling within the higher end of the scale.

314 In all of the circumstances I consider it appropriate to impose a pecuniary penalty in the amount of $3 million. The penalty reflects the weight I have afforded the serious nature of those acts and omissions which constituted GIG's multiple contraventions of s 12DB(1)(e) of the ASIC Act and the degree of Mr Wang's involvement, viewed in totality. To be clear, I consider the penalty to be appropriate even if the evidence does not establish whether, and to what

extent, the contraventions caused investors to make losses they may not otherwise have incurred. I am satisfied that the aggregate penalty does not exceed what is regarded as a proper penalty for Mr Wang's involvement in multiple contraventions. The penalty to be imposed, considered overall, is fair and just: *Channic Pty Ltd* at [81].

RESTRAINTS AND DISQUALIFICATION

315 By [3] and [4] of the Amended OA, ASIC seeks:

> 3. An order pursuant to s 1324(1)(c) and (e) of the Act or alternatively s 12GD(1)(c) and (e) of the ASIC Act that the Third Defendant be permanently restrained, or for a period determined appropriate by the Court, whether by himself, his servants, agents and employees or otherwise, from:
>
> (a) carrying on a financial services business;
>
> (b) carrying on a business related to, concerning or directed to financial products or financial services within the meaning of s 761A of the Act;
>
> (c) dealing in financial products within the meaning of s 761A of the Act; or
>
> (d) in any way holding himself out as doing, or being in any way involved in, the matters referred to in sub-paragraphs (a) to (c).
>
> 4. Pursuant to s 206E of the Act or alternatively s 12GLD of the ASIC Act, an order that the Third Defendant be disqualified from managing a corporation for a period of 10 years or such other period that the Court considers appropriate.

316 The powers conferred by s 1324 of the Corporations Act and s 12GD of the ASIC Act are expressed in similar terms. They provide:

> **1324 Injunctions**
>
> (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> …
>
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
>
> …
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
>
> …
>
> the Court may, on the application of ASIC … grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

12GD Injunctions

(1) If, on the application of … ASIC or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of a provision of this Division; or

…

(c) aiding, abetting, counselling or procuring a person to contravene such a provision; or

…

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

…

the Court may grant an injunction in such terms as the Court determines to be appropriate.

317 Both powers are enlivened on the facts in present case, the Court being satisfied that Mr Wang has engaged in conduct that constitutes (at least) aiding and abetting a person to contravene the Corporations Act or a provision of Div 2 of Pt 2 of the ASIC Act or being knowingly concerned in such contraventions.

318 As a matter of construction, it seems to me that the particular conduct that may be restrained by an order under s 1324 of the Corporations Act is the same conduct that the person in question has engaged in, is engaging in or is proposing to engage in. It is not necessary to express a concluded view on that question as there exists, in s 12GD of the ASIC Act, a source of power to grant an injunction on such terms as the Court determines to be appropriate. Whatever be the limits on the power under s 1324 of the Corporations Act, s 12GD clearly empowers the Court to restrain conduct that would not otherwise constitute a contravention or involvement in a contravention.

319 In exercising the discretion under s 12GD the Court may take into account not only the conduct that has enlivened the power to make the order, but all other conduct relevant to Court's assessment of whether the order sought in the proceeding is "appropriate". Accordingly, in exercising the discretion under s 12GD I will take into account all of the facts and circumstances discussed thus far, including the circumstance that declarations are to be made as to Mr Wang's involvement in GIG's contraventions of s 911A and s 1041H of the Corporations Act, and s 12DA and s 12DB(1)(e) of the ASIC Act. I am mindful that, to a large

extent, my findings in relation to the contraventions (and Mr Wang's involvement in them) are founded on the same acts and omissions.

320 Section 206E of the Corporations Act and s 12GLD of the ASIC Act each empower the Court to disqualify a person from managing a corporation. They respectively provide:

> **206E Court power of disqualification—repeated contraventions of Act**
>
> (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
>
> (a) the person:
>
> (i) has at least twice been an officer of a body corporate that has contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or
>
> (ii) has at least twice contravened this Act or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* while they were an officer of a body corporate; or
>
> (iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (1A) For the purposes of subsection (1), a person is an ***officer*** of an Aboriginal and Torres Strait Islander corporation if the person is an officer of that corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate.
>
> (3) To avoid doubt, the reference in paragraph (2)(a) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

> **12GLD Order disqualifying a person from managing corporations**
>
> (1) On application by ASIC, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) the Court is satisfied that the person has committed, has attempted to commit or has been involved in a contravention of a provision of Subdivision C or D (other than section 12DA); and

(b) the Court is satisfied that the disqualification is justified.

321 Orders under these provisions have a protective purpose.

322 As Gordon J said in *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103 ACSR 453, in determining whether and, if so, for what period financial services disqualification orders are to be made, it is appropriate to have regard to the same factors bearing on the question of whether a person should be disqualified from managing corporations. In *Adler* at [56] Santow J identified those factors that had justified varying periods of disqualification as follows:

> …
>
> (xiii) Factors which lead to the imposition of the longest periods of disqualification (that is, disqualifications of 25 years or more) were:
>
> - Large financial losses
> - High propensity that defendants may engage in similar activities or conduct
> - Activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy
> - Lack of contrition or remorse
> - Disregard for law and compliance with corporate regulations
> - Dishonesty and intent to defraud
> - Previous convictions and contraventions for similar activities.
>
> …
>
> (xiv) In cases in which the period of disqualification ranged from 7 years to 12 years, the factors evident and which lead to the conclusion that these cases were serious though not 'worst cases', included:
>
> - Serious incompetence and irresponsibility
> - Substantial loss
> - Defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty
> - Continued, knowing and wilful contraventions of the law and disregard for legal obligations
> - Lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform.
>
> …
>
> (xv) The factors leading to the shortest disqualification, that is, disqualifications for up to 3 years were:

- Although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated
- The defendants had no immediate or discernible future intention to hold a position as manager of a company
- In *Donovan's* case, the respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings.

(citations omitted).

323 It is convenient to consider the two proposed forms of restraint together. When proceeding in that way, I bear in mind that an order restraining Mr Wang from managing any corporation will, by its nature, prohibit Mr Wang from managing corporations that carry on all forms of business in this jurisdiction, whether related to the provision of financial services or not. The Court should be satisfied that such an order is "justified" having regard to the protective purpose of the power.

Consideration

324 It is relevant that GIG has not wholly cooperated with ASIC's investigation, particularly by failing to produce records in response to a compulsive notice issued under the ASIC Act. That omission may be explained either by a defiant attitude on GIG's part or by a failure of GIG to maintain proper records of the kind that were sought. In either case, the responsibility for the default may be attributed to Mr Wang as the company's executive director.

325 It is also relevant that the investors who have participated in the business have suffered very significant losses for which no explanation has been given. As I have said, if the losses were caused wholly by risks inherent in the investments themselves, it is reasonable to expect such an explanation to have been forthcoming.

326 In light of the findings set out elsewhere in these reasons, I consider Mr Wang to be a person who has the potential to do great harm to consumers in this jurisdiction by his involvement in financial services businesses, particularly by his use of a different corporate entity (Stumac) to continue the operation of the business following of the cancellation of the GIG AFSL and the installation of Mr O'Doherty as a director who would do his bidding.

327 In all of the circumstances it is reasonable to infer (and I so find) that the email sent to Mr O'Doherty and extracted at [50] of these reasons was sent either on Mr Wang's instructions or with his knowledge. The email establishes that it was Mr Wang's intention to conceal from

ASIC the extent of his control of the business to be conducted by Stumac following its acquisition in July 2017. In the present case, ASIC has devoted considerable resources into an investigation into GIG and the cancellation of its AFSL, only to be confronted with the same business enterprise arising from the ashes, controlled by the same proponent under a new corporate veil, and in all likelihood with some of GIG's former customers on its records. There is, I find, a high likelihood that Mr Wang will continue to "transfer" financial services businesses from one corporate form to another should the requirements of regulation prove too burdensome.

328 Mr Wang has not adduced any evidence and there is accordingly nothing to suggest that he has gained insight into the seriousness of the conduct alleged and proven against him. If he is not restrained I consider there to be a very high likelihood that Mr Wang will continue to operate businesses in Australia and that he will do so with little or no regard for the requirements of Australian regulatory laws or the interests of consumers.

Duration of restraints

329 In all of the circumstances, I consider that an order restraining Mr Wang from the management of corporations for a period of 10 years is justified.

330 The order sought pursuant to s 12GLD of the ASIC Act would operate to permanently restrain Mr Wang from involvement in a financial services business in this jurisdiction. Having regard to the protective purpose of s 12GLD, I am satisfied that the restraint should be permanent. In reaching that conclusion I have remained mindful that it is not unlawful to acquire a financial services business including (and necessarily) by acquiring an AFSL as a business "asset". However, the present case is one in which Mr Wang has acquired interests in two corporations each holding an AFSL and has then sought to exercise ultimate control of the operations of each company in a manner that demonstrates the utmost disregard for Australia's financial services laws. His conduct in installing Mr O'Doherty as a director of Stumac and giving instructions to him either directly or through Mr Zhou exemplifies that conduct. Mr Wang was, I find, motivated to conceal the fact and extent of his control of Stumac so as to avoid the scrutiny of ASIC in respect of its business affairs. At the same time, Mr Wang has shown a propensity to market financial services by representing the services to be compliant with Australia's financial services laws, knowing that the services are not compliant. There is nothing before the Court to suggest that Mr Wang has any insight into the seriousness of his conduct and nothing to suggest that he is remorseful in respect of it. There is of course a

possibility that Mr Wang's fitness and propriety may change in the future, however, the existence of that possibility does not dissuade me from the view that a permanent restraint is appropriate. The protective purpose of s 12GLD is best served by a permanent restraint.

331 The order should be expressed in terms that prohibit Mr Wang's involvement in any capacity whatsoever, whether as officer, employee, agent, consultant, contractor or otherwise. Expressing the order in those terms will prevent Mr Wang from exercising influence and control over other persons (including company directors) who might be minded, for whatever reason, to act upon his instructions.

WINDING UP

332 ASIC seeks orders pursuant to s 461(1)(k) of the Corporations Act for the winding up of GAM and Stumac on just and equitable grounds: Amended OA, [7].

333 The affidavits of Ms Collins demonstrates that the procedural preconditions for making the orders are satisfied: Corporations Act, ss 462(2), 464 and 465A(1).

334 The discretion to make the orders must be exercised judicially and in a manner that is capable of examination and justification: *Baird v Lees* (1924) SC 83; *Re Tivoli Freeholds Ltd* (1972) VR 445; *Loch v John Blackwood Ltd* (1924) AC 783. In a case such as the present, the test is that stated by Powell J in *Re Netsor Pty Ltd and the Companies Act* (1981) 6 ACLR 114 at 119 (applied by Beaumont J in *Australian Securities Commission v Rohani and Others* [1998] FCA 1432; 29 ACSR 106, namely:

> I accept that the words 'just and equitable' where appearing in s 222(1)(h) of the Act are words of the widest import, as also do I accept that the words are not to be confined by the creation of categories within which a case must be brought in order that it be held to be 'just and equitable' that a company be wound up (*Ebrahimi v Westbourne Galleries Ltd, supra*); but, this notwithstanding, it seems to me that the facts or conduct which make it, in any case, 'just and equitable' that a company be wound up must be facts or conduct which have a direct and immediate relationship to, or bearing upon, the management or administration of the affairs of the subject company or the conduct of its business. If authority for this view be needed, it is to be found in the advice of the Judicial Committee - delivered by Lord Shaw of Dumferline - in *Loch v John Blackwood Ltd* [1924] AC 783, 788 where his Lordship says:-
>
> > 'It is undoubtedly true that at the foundation of applications for winding-up on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on lack of probity

> in the conduct of the company's affairs, then the former is justified by the latter and it is under the statute just and equitable that the company be wound up.'

335 In *Australian Securities and Investments Commission v ABC Fund Managers Ltd* [2001] VSC 383; (2001) 39 ACSR 443 at [119], Warren J (as her Honour then was) identified three "general fundamental principles" guiding the exercise of the direction:

> … First, there needs to be a lack of confidence in the conduct and management of the affairs of the company … Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company.

336 Gordon J expanded on these principles in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* [2013] FCA 234; (2013) 93 ASCR 189 as follows:

> 21 In relation to the first, a lack of confidence may arise where, 'after examining the entire conduct of the affairs of the company' the court cannot have confidence in 'the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company': *Galanopoulos v Moustafa* [2010] VSC 380 at [32]; see also *Australian Securities Commission v AS Nominees Limited* (1995) 62 FCR 504 at 532-3 133 ALR 1 at 61–2; 18 ACSR 459 at 518–19 (*AS Nominees*); *ABC Fund Managers* at [117]-[118]; *Australian Securities and Investments Commission v International Unity Insurance Pty Ltd* (2004) 22 ACLC 1416; [2004] FCA 1059 at [135]–[139] (*International Unity Insurance*).
>
> 22 There is thus a significant overlap between the matters relevant to the just and equitable ground and the matters which weigh in favour of the exercise of the court's discretion to appoint a provisional liquidator. For example, matters which indicate 'the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company' might also demonstrate that 'the company's affairs have been conducted in a manner without regard to legal requirements or accepted principles of corporate management'.
>
> 23 In relation to the second, a risk to the public interest may take several forms. For example, a winding-up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public: *International Unity Insurance* at [138]; see also *Australian Securities and Investments Commission v Finchley Central Funds Management Ltd* [2009] FCA 1110 at [3]. Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law: *Kingsley Brown Properties* at [96]; see also *AS Nominees* at FCR 527; ALR 56–7; ACSR 513–14;*Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 ; [2001] WASC 27 at [75]–[77]. Again, there is an overlap between matters which would pose a risk to the public interest for the purpose of s 461(1)(k) and which are relevant to the appointment of a provisional liquidator.
>
> 24 In relation to the third, it has been said that 'a stronger case might be required where the company was prosperous, or at least solvent': *Kingsley Brown Properties* at [96]. Solvency, however, is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act: *ABC Fund Managers* at [124]-[130].

337 In exercising the discretion it is important to bear in mind that ASIC makes no allegation that Stumac has breached the law and that the allegations of contravention made against GAM have not been established on the evidence in this proceeding. Notwithstanding those matters, I am satisfied that it is just and equitable that both companies be wound up.

338 In my judgment, if the companies are not wound up, there is an unacceptable risk that they would remain under Mr Wang's de facto control, notwithstanding that orders will be made in this proceeding to disqualify him from managing the affairs of any company and notwithstanding that orders will be made to restrain him from participating in the conduct of a financial services business in this jurisdiction.

339 There is no evidence before the Court to establish whether either company is prosperous, let alone solvent. The financial position of the companies is within the knowledge of those who control them. Neither company has appeared in the proceeding to oppose the orders sought on the basis that the orders would affect any intended future business activities or otherwise prejudice the commercial interests of the companies' creditors, shareholders or other stakeholders.

340 In addition, having regard to the banking records as a whole, I find that there is extensive and unexplained intermingling of funds between bank accounts held by GIG and bank accounts held by other companies associated with Mr Wang both within and outside Australia. To the extent that there may be an alternative and innocent reason for the confusing array of transfers, the reasons have not been disclosed to the Court.

341 The appointment of liquidators to the companies will facilitate the proper investigation of the affairs of all of the companies associated with the business formerly operated by GAM, then operated by GIG and intended to be operated by Stumac. Whilst my reasons for judgment in this matter do not include findings of theft of investors' funds, the appointment of liquidators to the companies (being the same liquidator appointed to GIG), will facilitate examinations or investigations that may yield evidence of fraudulent conduct of that kind. The Court's findings as to Mr Wang's state of mind in this action are, of course, confined to the particular issues in the case before it. Judgment in this action does not preclude the commencement of other litigation for the ultimate benefit of the companies' creditors.

342 The winding up orders against GAM and Stumac will advance ASIC's objectives as the corporate regulator in securing compliance with both the Corporations Act and the ASIC Act

and to protect prospective investors from dealing with any company in which Mr Wang may have direct or indirect involvement.

343 Mr Martin David Lewis has consented to act as liquidator of GAM and Stumac. It is appropriate that he be appointed. It is also appropriate to order that ASIC's costs incidental to the wind up applications be paid from the assets of the respective companies in amounts to be fixed by a Registrar of the Court.

ORDERS

344 The effect of these reasons is that ASIC's application should be allowed in part.

345 I consider it appropriate to afford the parties an opportunity to be heard on the final form of orders, including as to costs, the form of declaratory relief and the discharge of interlocutory orders. That will be done by granting the parties liberty to file and serve minutes of order giving effect to these reasons for judgment if they are so advised. In the event that the liberty is not exercised by any party, orders in the terms proposed by the Court and forming Schedule A to these reasons will be made on 26 September 2019 and will operate from that day. The orders made on ASIC's applications for interlocutory relief, as varied, will remain in force until final orders are made in the action.

I certify that the preceding three hundred and forty-five (345) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth.

Associate:

Dated: 16 September 2019

SCHEDULE A

THE COURT NOTES THAT

1. In these orders the following terms and phrases bear the meanings defined in the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth): financial service, financial service business, Australian Financial Service Licence, financial product.

THE COURT DECLARES THAT:

1. Between 24 May 2017 and 9 November 2017, the first defendant contravened s 911A of the *Corporations Act 2001* (Cth) by carrying on a financial services business in this jurisdiction without holding an Australian Financial Services Licence covering the financial services provided. The first defendant caused the business to be promoted on two websites accessible to the public in this jurisdiction, which conduct was intended to induce people in this jurisdiction to use the financial services provided by it, or was otherwise likely to have that effect.

2. Between 24 May 2017 and 9 November 2017, the first defendant contravened s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) by causing statements to be published on two websites accessible to the public in this jurisdiction to the effect that the first defendant was authorised under Australian law to provide financial services in Australia when it was not so authorised, and so represented that the financial services had approvals or benefits they did not have.

3. Between 24 May 2017 and 9 November 2017, the first defendant contravened s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) by causing statements to be published on two websites accessible to the public in this jurisdiction to the effect that investors' funds would be kept secure by being deposited in a designated trust account in accordance with Australian regulatory requirements and not mixed with the assets of the first defendant, which statements falsely represented that the financial services provided by the first defendant had benefits they did not have.

4. Between 24 May 2017 and 9 November 2017 the first defendant contravened s 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) by engaging in the following conduct after the cancellation of its Australian Financial Services Licence, which conduct was misleading or deceptive or liable to mislead or deceive:

    (a) promoting its financial products and services on two websites accessible in this jurisdiction;

    (b) representing, by the websites, that it was licenced to provide the financial products and services;

    (c) receiving funds which were paid by investors on the understanding that they were investing in the financial products and/or financial services offered by the first defendant; and

    (d) failing to inform investors and the wider public that its Australian Financial Services Licence had been cancelled.

5. The third defendant was directly or indirectly knowingly concerned in each of the first defendant's contraventions referred to in paragraphs 1 to 4.

THE COURT ORDERS THAT:

1. The plaintiff's application for declarations against the second defendant in terms of paragraph 1 of the Amended Originating Application dated 11 May 2018 is dismissed.

2. The plaintiff's application for a declaration against the third defendant in terms of paragraph 2 of the Amended Originating Application dated 11 May 2018 is dismissed insofar as the application is founded upon alleged contraventions of second defendant of s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth).

3. The third defendant be permanently restrained, whether by himself, his servants, agents or employees, from, in this jurisdiction:

   (a) carrying on a financial services business;

   (b) carrying on a business related to, concerning or directed to financial products or financial services;

   (c) dealing in financial products;

   (d) in any way holding himself out as authorised to do, or being in any way involved in, the matters referred to in sub-paras (a) to (c);

   (e) holding office in, or being employed by, or acting in the capacity of a contractor or consultant for any entity engaged in any of the activities referred to in sub-paras (a) to (c).

4. The third defendant is disqualified from managing a corporation for a period of 10 years from the date of this order.

5. The third defendant is to pay to the Commonwealth a pecuniary penalty in respect of his involvement in the first defendant's contraventions of s 12DB(1)(e) of the *Australian Securities and Investments Commission Act 2001* (Cth) in the amount of $3 million.

6. The second defendant and the fourth defendant each be wound up pursuant to s 461(1)(k) and s 464 of the *Corporations Act 2001* (Cth).

7. Mr Martin David Lewis be appointed liquidator of the second and fourth defendants with all relevant statutory powers given to liquidators under the *Corporations Act 2001* (Cth).

8. The requirements of r 5.11(3) of the *Federal Court (Corporations) Rules 2000* (Cth) be dispensed with.

9. The plaintiff's costs of the winding up applications in relation to the second and fourth defendants are to be paid from the assets of administration of the second and fourth defendants respectively.

10. Subject to the order in paragraph 9, the first and third defendants are jointly and severally liable to pay the plaintiff's costs of and incidental to the proceedings in an amount to be fixed by the Registrar.

11. Upon the entering of these orders, all orders made on ASIC's applications for interlocutory relief shall, by this order, be discharged.

SCHEDULE OF PARTIES

SAD 300 of 2017

Defendants

Fourth Defendant: STUMAC PTY LTD (ACN 611 910 822)