IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 52

Civil Appeal No 153 of 2018

Between

(1) Ricardo Leiman
(2) Rothschild Trust Guernsey Limited

… *Appellants*

And

(1) Noble Resources Ltd
(2) Noble Group Ltd

… *Respondents*

In the matter of Suit No 393 of 2012

Between

(1) Ricardo Leiman
(2) Rothschild Trust Guernsey Limited

… *Plaintiffs*

And

(1) Noble Resources Ltd
(2) Noble Group Ltd

… *Defendants*

JUDGMENT

[Contract] — [Contractual terms] — [Implied terms]
[Contract] — [Contractual terms] — [Rules of construction]
[Damages] — [Liquidated damages or penalty]
[Employment Law] — [Employees' duties] — [Good faith and fidelity]
[Employment Law] — [Employers' duties]
[Tort] — [Conspiracy]
[Tort] — [Inducement of breach of contract]
[Tort] — [Unlawful interference]

Leiman, Ricardo and another
v
Noble Resources Ltd and another

[2020] SGCA 52

Court of Appeal — Civil Appeal No 153 of 2018
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Steven Chong JA and Belinda Ang Saw Ean J
20 January 2020

28 May 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This appeal arises out of Suit No 393 of 2012 ("Suit 393"), an action commenced by Mr Ricardo Leiman ("Mr Leiman") and Rothschild Trust Guernsey Limited ("Rothschild Trust") against Mr Leiman's former employer, Noble Resources Ltd ("NRL"), and its parent company, Noble Group Ltd ("NGL"). Suit 393 primarily concerned Mr Leiman's post-resignation entitlements under an agreement that he entered into with NRL to deal with the terms of his departure from the Noble group of companies ("Noble"). The appellants claimed, among other things, that the respondents wrongfully denied Mr Leiman his entitlements under the agreement, based on a determination by NGL's Remuneration and Options Committee ("R&O Committee") that he had

acted to Noble's detriment. The appellants challenged both the substance of that determination and the process by which it had been made.

2 The High Court judge ("the Judge") who heard the matter dismissed the appellants' claims: see *Leiman, Ricardo and another v Noble Resources Ltd and another* [2018] SGHC 166 (the "Judgment"). He reviewed the R&O Committee's exercise of its discretion not to award Mr Leiman his entitlements and found that this discretion had been correctly exercised because Mr Leiman had breached his contractual non-competition and confidentiality obligations. He also rejected the appellants' argument that Mr Leiman was entitled to but had not been accorded due process by the Committee. However, notwithstanding his finding that Mr Leiman had breached some of his contractual obligations as well as his duty of fidelity, the Judge dismissed NRL's counterclaim against Mr Leiman because, in his view, there was no basis for NRL to recover the payments it had made to Mr Leiman under the relevant contracts between the parties.

3 This appeal raises issues pertaining to the proper construction of contracts in the context of terms that vest decision-making powers in a contractually designated entity and the extent to which a court may review the exercise of those powers when a decision made by that entity is challenged. We will address these and some other points in this judgment.

The material facts

4 Most of the relevant facts have been set out at [3] to [50] of the Judgment. We therefore recount the facts only to the extent necessary.

The parties

5 The respondents, NRL and NGL, are part of Noble, a global supply chain manager of energy, gas and power products, metals and minerals. The first respondent, NRL, is a Hong Kong incorporated company and a principal subsidiary of the second respondent, NGL, a Bermuda incorporated company listed in Singapore. NGL is currently subject to a winding-up order in Bermuda, and it was not present at the hearing of this appeal.

6 The first appellant, Mr Leiman, is a Dutch national. He was employed by NRL on 31 March 2006 as the Chief Operating Officer of NGL. The terms of his employment are set out in an employment agreement dated 6 December 2005 between him and NRL (the "Employment Agreement"). He was promoted and appointed the Chief Executive Officer ("CEO") of NGL on 1 January 2010, and was also appointed an Executive Director of NGL from 1 April 2009 to 1 December 2011.

7 Mr Leiman was awarded NGL share options and shares and paid discretionary annual bonuses during his employment by Noble. He assigned his shares and share options to the Adelaide Trust, a trust that he established. The second appellant, Rothschild Trust, administers the Adelaide Trust as trustee.

8 Although Mr Leiman was formally employed by NRL, which was the Noble entity that employed Hong Kong-based staff, he was responsible for Noble's global operations. The award of his benefits under the Employment Agreement was, for all practical purposes, determined by NGL's R&O Committee. At the material time from November 2011 to May 2012, the R&O Committee comprised Mr Richard Samuel Elman ("Mr Elman"), Mr Edward Walter Rubin ("Mr Rubin") and Mr Robert Chan Tze Leung ("Mr Chan").

Mr Elman was the Chairman of NGL, and Mr Rubin and Mr Chan were independent directors of NGL at the time. The R&O Committee was also assisted by Mr Jeffrey Mark Alam ("Mr Alam"), NGL's Group General Counsel and a director of NRL, who oversaw the legal affairs of Noble. Mr Leiman also sat on the R&O Committee prior to his resignation.

Background to the dispute

The terms on which NGL shares and share options were granted to Mr Leiman

9 The NGL share options that are the subject of the present appeal were issued to Mr Leiman pursuant to the Noble Group Share Option Scheme 2004 ("the Share Option Rules"). 44,818,182 share options had yet to be exercised at the time Mr Leiman resigned. These share options were assigned to and held by the Adelaide Trust on the following terms:

Number of share options	**Date of grant**	**Date on which share options vested or were to have vested**
3,709,094	19 March 2007	22 December 2007
5,563,636		22 December 2008
5,563,636		22 December 2009
18,545,454		22 December 2010
3,709,090	18 July 2008	22 December 2010
7,727,272	2 April 2009	2 April 2012

10 Under cl 8.3(a) of the Share Option Rules, any unexercised share options held by Mr Leiman would lapse if he ceased to be employed by NRL. Clause 8.3(a) states:

> 8.3 … [A]n Option shall, to the extent unexercised, immediately lapse without any claim against [NGL]:-
>
> > (a) … upon that Grantee … ceasing to be in the full-time employment or in full time [*sic*] executive function … with the relevant Eligible Company [meaning NGL or any of its subsidiaries or associated companies], unless the [R&O] Committee, in its sole discretion, determines otherwise; …

However, as noted earlier, the parties entered into an agreement in anticipation of Mr Leiman's resignation from NRL. We will turn to this shortly to consider its significance in the light of the other agreements that Mr Leiman was party to, and that also made provision for the vesting, divesting or exercise of his employment-related benefits.

11 Mr Leiman was also issued NGL shares pursuant to Noble's Annual Incentive Plan (revised 10 September 2008) ("AIP"). The AIP is an incentive remuneration programme under which common stock is issued to Noble employees, but held by a discretionary trust established by NGL for a stipulated period ("the Restricted Period"), during which time it cannot be transferred or assigned except in the event of the employee's death. Of the shares awarded to Mr Leiman under the AIP, those that are in issue in this appeal consist of: (a) 17,276,013 shares which had already been allotted at the material time, and which Mr Leiman had in turn assigned to the Adelaide Trust; and (b) 5,652,421 shares which were awarded by way of a letter dated 4 May 2011 ("the 4 May 2011 letter"), and whose allotment was pending shareholder approval. The dates on which these shares were awarded to Mr Leiman and the dates on which the trading restrictions on them were to have been lifted are as follows:

(a) In respect of the 17,276,013 shares:

Number of shares	**Date of award**	**Date on which trading restrictions were to have been lifted**
11,098,782	31 March 2009	31 March 2012
1,544,307	15 April 2010	15 April 2012
4,632,924		15 April 2013

(b) In respect of the 5,652,421 shares:

Number of shares	**Date of award**	**Date on which trading restrictions were to have been lifted**
1,413,105	4 May 2011	6 April 2013
4,239,316		6 April 2014

12 Unlike share options issued under the Share Option Rules, which would generally lapse upon the employee concerned ceasing to be in Noble's employment, an employee who had been awarded shares under the AIP would generally retain the right to have them distributed to him after the trading restrictions were lifted, even if this was after he had left Noble. Such an employee would also be able to trade them. The exceptions were if his employment had been terminated for cause, if he had engaged in activity inimical or contrary to NGL's interests, or if he, within six months of his resignation, entered into competition with NGL. The relevant paragraphs of the AIP state:

> If during the Restricted Period an employee ceases to be an employee of the Company [meaning NGL] the following will apply:

> 1. if during the Restricted Period the employee's employment ceases as a result of genuine retirement, ill health, disability or death, the employee shall retain the right to the common stock held for the employee's account by the discretionary trust and [the common stock] shall be distributed to the employee or his/her estate/beneficiaries/legal representatives, as the case may be, in accordance with the terms under which such common stock was issued.
>
> …
>
> 3. during the Restricted Period, the change of status of an employee from that of an employee of the Company to that of a consultant, agent or advisor will not be considered as a cessation of employment for [the] purposes of this AIP, provided such change of status is made with the prior written approval of the Group [CEO].
>
> 4. if during the Restricted [Period] the employee's employment ceases for cause, the common stock held for the employee's account by the discretionary trust shall be forfeited.
>
> 5. if during the Restricted Period, the employee acts [in a way] or engages in activity or conduct which is inimical or contrary to or against the interests of the Company, including without limitation:
>
> > (i) conduct for which criminal or civil penalties are sought against the employee and/or the Company by the Company or third-parties.
> >
> > (ii) violation of the Company's policies.
> >
> > (iii) unauthorized disclosure or misuse of confidential information or material concerning the Company, its activities, employees, plans or business.
> >
> > (iv) any other conduct or act reasonably determined by the [R&O] Committee to be injurious, detrimental or prejudicial to the interests of the Company.
>
> the common stock held for the employee's account by the discretionary trust will be forfeited.
>
> 6. if the employee at any time during the Restricted Period resigns as an employee of the Company and within six (6) months of such resignation directly or

> indirectly takes up or agrees to take up employment [with], or agrees to act or acts as a consultant, agent or advisor to a company, partnership, fund or other entity which is or can reasonably be considered a competitor of the Company, without the prior written approval of the Group [CEO], the common stock shall be forfeited. …

The terms under which the 5,652,421 shares were awarded to Mr Leiman by way of the 4 May 2011 letter were identical to those in the AIP, apart from the fact that references to the "Company" in the AIP were changed to "the Noble Group" in the 4 May 2011 letter.

Mr Leiman's resignation and the parties' entry into the Settlement Agreement

13 Mr Leiman and Mr Elman got into some disagreements sometime in the middle of 2011. Mr Leiman expressed concern that Noble was adopting questionable accounting and corporate governance practices. Mr Elman, on the other hand, had concerns regarding Mr Leiman's integrity and suitability to continue as NGL's CEO, citing some decisions that Mr Leiman had allegedly made capriciously and his failure to comply with Noble's internal protocols.

14 The parties began to plan for Mr Leiman's exit from Noble sometime in late 2011. This was done by e-mail and in the course of some conversations.

15 On 24 or 25 October 2011, Mr Elman informed Mr Alam that he had decided that Mr Leiman should leave Noble and that his resignation would be effective from 1 December 2011. Mr Elman instructed Mr Alam to prepare an agreement on that basis. Although this agreement was, in essence, a separation agreement, it was referred to before us as a "settlement agreement", and for convenience, we adopt the same convention since it signifies the parties' intent to avoid Mr Leiman's exit turning contentious. Mr Alam understood that

Mr Elman intended, through the settlement agreement, to ensure that Mr Leiman would preserve his entitlements under the Employment Agreement that would otherwise be automatically lost upon termination. Mr Leiman also wished to be hired in an advisory capacity for a term of a year until December 2012, and Mr Elman was open to this.

16 Mr Alam and Mr Leiman negotiated the terms of the agreement from around 25 October 2011 until 31 October 2011. Mr Alam sought input from Mr Elman during these negotiations.

17 The agreement was signed by Mr Leiman on 1 November 2011 and by Mr Elman, on NRL's behalf, on 2 November 2011 ("the Settlement Agreement"). It was dated 9 November 2011.

18 On 8 November 2011, Mr Alam sent Mr Leiman a draft of the agreement pursuant to which he would provide advisory services to NRL. Mr Elman, on behalf of NRL, and Mr Leiman subsequently signed this agreement, which too was dated 9 November 2011 ("the Advisory Agreement").

The terms of the Settlement Agreement

19 The Settlement Agreement set out the terms on which Mr Leiman was to resign from NRL. The preamble expressly stated that NRL and Mr Leiman had mutually agreed that his employment would cease on 1 December 2011 ("the Effective Date"). We set out the preamble below for reference:

> This Settlement Agreement … is made and entered into as of 9th November 2011, by and among [NRL] … and [Mr Leiman].
>
> WHEREAS, [Mr Leiman] and [NRL] are party to an Employment Agreement … and [Mr Leiman] has been serving as [CEO];

> WHEREAS, [NRL] and [Mr Leiman] have mutually agreed that [he] will cease to be so employed and to so serve on 1 December, 2011 (the 'Effective Date'); and
>
> NOW, THEREFORE, [NRL] and [Mr Leiman] hereby agree as follows:

20 Under the Settlement Agreement, on the Effective Date, Mr Leiman would resign from his employment with NRL and from all the other positions that he held as an officer or member of Noble's board (cl 1). NRL would pay him his base salary through the Effective Date and for six months thereafter (cl 2), and would allow him severance payments and benefits (cl 3). Provision was also made for:

(a) Mr Leiman's continued non-competition obligations (cl 4);

(b) NRL's assumption of responsibility for all obligations under the lease of Mr Leiman's apartment in Hong Kong after the termination of the Advisory Agreement (cl 5);

(c) NRL's payment of Mr Leiman's relocation expenses after the termination of the Advisory Agreement (cl 6);

(d) Mr Leiman's retention of his existing mobile phone number until 1 December 2012 (cl 7);

(e) NRL's payment of medical and dental plans for Mr Leiman and his family until 1 December 2012 (cl 8);

(f) the grant of secretarial support for Mr Leiman while the Advisory Agreement remained in force (cl 9);

(g) an entire agreement clause (cl 10);

(h) the non-assignability of the Settlement Agreement (cl 11); and

(i) choice of law (Singapore law) and jurisdiction (non-exclusive jurisdiction of the Singapore courts) (cl 12).

21 We highlight cl 3 of the Settlement Agreement, which set out the terms of Mr Leiman's post-resignation entitlements. The proper interpretation and effect of cl 3, and in particular, cll 3(a), 3(c) and 3(d), are in dispute in this appeal. Clause 3 reads:

> 3. Severance Payments and Benefits
>
> (a) Noble [meaning NRL] and [Mr Leiman] shall, on the Effective Date, execute a payment schedule attached hereto as Exhibit A. [Mr Leiman] shall be entitled to receive the payments and benefits provided for in this Section 3 and the schedule but only if he complies with his ongoing non-competition and confidentiality obligations under the provisions of the Employment Agreement and this Settlement Agreement and which shall continue in full force and effect regardless of this termination.
>
> (b) On or before 1st December 2011, [Mr Leiman] shall enter into an advisory agreement ('Advisory Agreement') with the Company under which he will provide such advisory services as the Company shall reasonably request in consideration of remuneration calculated on the basis of US$350,000 per calendar year. …
>
> (c) [Mr Leiman] shall be entitled to exercise the outstanding 7,727,272 options he holds in the Noble Group Limited Share Option Schedule 2004 vesting on 2nd April 2012 as well as all options vested to date but unexercised, in each case provided he does so exercise on or prior to 2nd April 2013 and provided that prior to exercise he has not acted in any way to the detriment of Noble and the [R&O Committee] of Noble shall make a final determination in the event of any dispute.
>
> (d) [Mr Leiman] holds 17,276,013 restricted shares of Noble Group (the 'Restricted Stock'). The Restricted Stock and all accrued dividends shall vest and become free of transfer restrictions in accordance with its term of grant provided [Mr Leiman] does not act in any way to the detriment of Noble and the [R&O Committee] of Noble shall make a final determination in the event of any dispute.

> (e) [Mr Leiman] shall be entitled to be considered for a 2011 discretionary bonus by the Company which (if any) will be payable in April 2012.
>
> [underlining in original omitted]

22 It will be recalled that Mr Leiman had been granted 44,818,182 NGL share options under the Share Option Rules. As we set out in the table at [9] above, 37,090,910 of these share options had vested in him by the time of the Settlement Agreement, while 7,727,272 share options were due to vest in him on 2 April 2012. It is not disputed that all of these share options were covered by cl 3(c), and we refer to them hereafter as the "Share Options".

23 Turning to the NGL shares that had been awarded to Mr Leiman under the AIP, at the time of the Settlement Agreement, some of these shares were held by NGL's discretionary trust and were subject to trading restrictions (see [11] above). Clause 3(d) specifically referenced the 17,276,013 shares which Mr Leiman had assigned to the Adelaide Trust (referred to hereafter as the "Shares"), and was silent as to the 5,652,421 shares which had been awarded to him by way of the 4 May 2011 letter and whose allotment was pending shareholder approval.

24 Clause 4 of the Settlement Agreement extended the non-competition obligations in Mr Leiman's Employment Agreement to the Advisory Agreement. These obligations were to be in place for as long as the Advisory Agreement remained in force, or for nine months from 1 December 2011, whichever was longer.

25 The references in cll 3(a) and 4 of the Settlement Agreement to Mr Leiman's obligations of non-competition and confidentiality under the

Employment Agreement pertain to his obligations under cll 6 and 7 of the Employment Agreement, which are as follows:

> **6. Confidential Information**
>
> At any time after the date of this agreement, including at any time after the termination of this agreement and your employment, you shall not disclose or make accessible to any other person, firm or corporation without the prior written consent of [NRL], any confidential information relating to, or to the business of, [NRL] or a related or affiliate company, nor shall you use or attempt to use any such confidential information in any manner which may cause or be calculated to cause injury or loss to [NRL] or a related or associated company.
>
> As used herein, the term 'confidential information' includes trade secrets and non-public information concerning financial data, technical data, business plans, product and/or services development, client lists, supplier lists, marketing plans and employee lists.
>
> **7. Non-Competition Requirements**
>
> During the term of your employment and in case of termination for a period ending on the date which is six (6) months from the date you receive your final payment as an employee of [NRL], and within the Asia Pacific and Americas Region, you will refrain from:
>
> - directly or indirectly (as a director, officer, employee, independent contractor, advisor or otherwise) engag[ing] in competition with, or own[ing] any interest in, perform[ing] any services for, participat[ing] in or being connected with any business or organization which engages in competition with the business of [NRL] or a related or affiliate company with which you were involved or had supervisory responsibility within the twelve (12) month period immediately preceding your last day as an employee of [NRL],
>
> …

The terms of the Advisory Agreement

26 The Advisory Agreement set out the terms under which NRL would appoint Mr Leiman to provide advisory services relating to commodities supply chain management, and was to take effect on 1 December 2011 (preamble; cl 1).

The Advisory Agreement was to be in force for a minimum term of nine months, renewable upon mutual agreement between NRL and Mr Leiman (cl 7).

27 Clause 3 of the Advisory Agreement imposed the following non-competition obligation on Mr Leiman:

> **3. Competition**
>
> [Mr Leiman] represents to [NRL] that [he] does not have any agreement to provide [advisory services relating to commodities supply chain management] to any other party, firm, or company and will not enter into any such agreement during the term of this Agreement.

The confidentiality obligation under cl 4 of the Advisory Agreement was identical to that under cl 6 of the Employment Agreement (see above at [25]).

The events after the signing of the Settlement Agreement and the Advisory Agreement

28 In accordance with the terms of the Settlement Agreement, Mr Leiman ceased to be the CEO of NGL on 1 December 2011.

29 Unbeknownst to Mr Leiman, Noble had hired a private investigator ("the PI") in November 2011 to monitor his activities. The PI's reports to Noble revealed that Mr Leiman had met with current and former Noble employees between late 2011 and early 2012. The PI also found e-mail printouts in Mr Leiman's garbage bin outside his home in England, disclosing e-mail correspondence with Mr Alexander Vinokurov ("Mr Vinokurov"), the President and CEO of Summa Capital. Summa Capital is part of the Summa group of companies, which is one of Noble's business and strategic partners. In particular, in an e-mail dated 16 February 2012, Mr Leiman told Mr Vinokurov that he had spent two days in Brazil with the CEO and partners of BTG Pactual, a Brazilian financial investment management company. Mr Leiman explained

that BTG Pactual had a strong presence in Brazil and was expanding into Latin America, and was ready to move quickly on his "business plan". He added that he had told BTG Pactual that Summa Capital would be "a great potential partner to build this into the new Glencore". He ended the e-mail by requesting that Mr Vinokurov confirm their meeting plans. It was not disputed that the reference to Glencore related to Glencore plc, a global commodities trading company.

30 On 21 and 22 December 2011, Mr Peter Koenig ("Mr Koenig"), a Senior Trust Manager at Rothschild Trust (Switzerland) Ltd, a company related to Rothschild Trust, informed NGL that Mr Leiman intended to exercise some of his NGL Share Options and to sell the shares obtained from that exercise. Mr Koenig requested the use of what was referred to as the Collins Stewart cashless facility to carry out the simultaneous exercise of the Share Options and sale of the resultant shares, such that Mr Leiman would not have to make a cash payment when carrying out the transaction. Mr Alam testified that Mr Koenig was referring to a cashless facility under which Noble permitted its employees to be "forward[ed] … cash to pay up … shares to get them issued". Mr Alam replied by e-mail on NGL's behalf on 29 December 2011, stating that Mr Leiman could not sell the shares obtained from the proposed exercise of the Share Options as he was a significant employee shareholder, in accordance with a policy that applied to all significant employee shareholders. He also conveyed that "Management" had recommended that Mr Leiman was not to use the Collins Stewart cashless facility or any other similar facility until further notice, as doing so was not in the best interests of Noble or its shareholders. Mr Alam later stated in an e-mail on 1 February 2012 that a separate "share dealing blackout" generally imposed on Noble employees prior to the announcement of

Noble's quarterly results would be lifted on 28 February 2012, after which Mr Leiman would be given approval to sell up to five million shares.

31 In February 2012, Mr Alam, acting on Noble's behalf, engaged Wolfe Associates, a boutique consulting firm, to conduct an investigation into Mr Leiman's dealings with Mr Ferdinando Carlier and Mr Ozeias Silva de Oliveira (collectively, "Messrs Carlier and Ozeias"). Mr Leiman had been involved in hiring them in 2006 to run one of Noble's sugar mills in Brazil. Noble had earlier engaged Wolfe Associates in 2008 to investigate the relationship between Mr Leiman and Messrs Carlier and Ozeias. Although some red flags were raised at the time, it did not appear that any action was taken by Noble.

32 Mr Koenig informed Mr Alam on 23 February 2012 that Rothschild Trust wished to exercise five million of Mr Leiman's Share Options and to sell the shares obtained from such exercise, and requested the use of the Collins Stewart cashless facility to carry out the transaction. On 28 February 2012, Mr Alam e-mailed Mr Leiman to state that this cashless facility was not available for his use. Mr Koenig then e-mailed NGL on 29 February 2012 to state that Rothschild Trust wished to exercise five million of Mr Leiman's Share Options without using this cashless facility. Mr Alam informed the R&O Committee of the e-mail on the same day, and sent the Committee a preliminary report that Wolfe Associates had provided him on 23 February 2012 ("the 2012 Wolfe Report") as well as copies of Mr Leiman's e-mails to Summa Capital that the PI had obtained. The 2012 Wolfe Report set out Wolfe Associates' preliminary findings on, among other things, the alleged fraudulent mismanagement of a company in Brazil by Messrs Carlier and Ozeias and other legal proceedings against them, and Mr Leiman's involvement in their hiring notwithstanding his knowledge of various allegations against them.

The R&O Committee's meetings

33 The R&O Committee convened on 1 March 2012. All three members, Mr Elman, Mr Rubin and Mr Chan, were present. Mr Alam attended part of the meeting. The R&O Committee reviewed the 2012 Wolfe Report and copies of Mr Leiman's e-mails with Summa Capital, and unanimously resolved to refuse to approve the exercise of five million of Mr Leiman's Share Options. Mr Alam informed Rothschild Trust of this decision on the same day.

34 Rothschild Trust protested the R&O Committee's 1 March 2012 decision in a letter dated 7 March 2012. Rothschild Trust subsequently wrote asking for details of the information upon which the decision had been based, but Mr Alam did not provide these details. We discuss the contents of the parties' correspondence in further detail below.

35 The R&O Committee reconvened on 27 March 2012 and reaffirmed its 1 March 2012 decision. On the same day, Mr Alam informed Rothschild Trust, by way of a memorandum attached to an e-mail sent to Mr Koenig, that the Committee's 1 March 2012 decision would stand. Mr Alam explained that Mr Leiman's right to exercise the Share Options was "conditional on [his] not 'acting in any way to the detriment of Noble prior to exercise'". The R&O Committee considered that this condition had not been satisfied as Mr Leiman had breached his non-competition and confidentiality obligations, and had appointed certain persons to run Noble's sugar and ethanol mills in Brazil from 2006 even though they were not qualified to manage the business and might have participated in "fraudulent conduct at a previous employer".

The events following the R&O Committee's decisions

36 On 3 April 2012, Mr Koenig wrote to Mr Alam to inquire if Mr Leiman was entitled to the 11,098,782 Shares and the 7,727,272 Share Options that were to vest on 31 March 2012 and 2 April 2012 respectively (see above at [9] and [11(a)]). Mr Alam replied on 10 April 2012, stating that the R&O Committee had determined that "the conditions for [the] exercise of the [Share O]ptions had not been satisfied" as "Mr. Leiman had acted to the detriment of Noble". These conditions also applied to the vesting of the 11,098,782 Shares that Mr Koenig referred to, which therefore would not be transferred to Rothschild Trust. Further, Mr Leiman would have no entitlement to the Shares and the accrued dividends under cl 3(d) of the Settlement Agreement.

37 Mr Alam sent a further letter to Rothschild Trust on 26 April 2012 clarifying that the R&O Committee also did not approve the vesting of the 5,652,421 shares that had been awarded to Mr Leiman under the AIP by way of the 4 May 2011 letter. This was because the Committee considered that "Mr Leiman ha[d] acted or engaged 'in activity or conduct which [was] inimical or contrary to or against the interests of [Noble]'". On 3 May 2012, Mr Alam e-mailed Mr Leiman to state that the R&O Committee had confirmed that he was not awarded a discretionary bonus for 2011 ("the 2011 Bonus").

Summary of the arguments below

38 Mr Leiman commenced Suit 393 against NRL on 11 May 2012. Rothschild Trust and NGL were later added to the suit.

39 The appellants sought a declaration that the R&O Committee's decisions pertaining to Mr Leiman's benefits were invalid. They argued that the R&O Committee had failed to accord Mr Leiman due process and was not

entitled to rely on his past alleged misconduct to make out its case that he had acted to Noble's detriment for the purposes of cll 3(c) and 3(d) of the Settlement Agreement. The respondents had also not shown what detriment they had suffered. Accordingly, Mr Leiman was entitled to exercise the Share Options, to sell the Shares and be paid dividends accruing from the Shares, and to be considered for and paid the 2011 Bonus.

40 The appellants submitted that while cl 3(d) of the Settlement Agreement expressly mentioned only the 17,276,013 Shares awarded under the AIP that Mr Leiman had assigned to the Adelaide Trust (see [23] above), it was meant to cover *all* the NGL shares that had been awarded to him under the AIP, including the 5,652,421 shares awarded by way of the 4 May 2011 letter (see [11(b)] above). While this suggests that the Settlement Agreement did not reflect the final terms agreed by the parties, we note that no claim was made for rectification. The appellants submitted, in the alternative, that Mr Leiman was entitled to the 5,652,421 shares under the terms of the AIP. Further, NRL was not entitled to rely on cl 3(c) of the Settlement Agreement to forfeit Mr Leiman's vested Share Options as cl 3(c) was a penalty clause.

41 The appellants also prayed for damages against both respondents for conspiracy by unlawful means, wrongful inducement of breach of contract and unlawful interference or causing loss by unlawful means.

42 NRL counterclaimed against Mr Leiman for breach of his duty of good faith and fidelity under an implied term of the Settlement Agreement and the Advisory Agreement. Mr Leiman, it was alleged, had also breached his fiduciary duty to act in good faith by soliciting Noble's employees, engaging in competition with Noble and misusing Noble's confidential information. NRL further submitted that Mr Leiman was subject to an implied term under the

Settlement Agreement and the Advisory Agreement that he would comply with his duties under the Employment Agreement. NRL sought an account from and repayment by Mr Leiman of all the payments he had received under the Settlement Agreement and the Advisory Agreement. It also claimed damages from Mr Leiman in its pleaded case, although it did not ultimately pursue such relief in its closing submissions at the trial.

The decision below

43 The Judge held that the R&O Committee's decisions of 1 and 27 March 2012 were valid. The R&O Committee had not failed to accord Mr Leiman due process. It was not required to inform Mr Leiman of the allegations made against him, or to give him an opportunity to be heard. Mr Leiman would have been aware that no such opportunity would be given because he had himself sat on the R&O Committee for two years. There was also no evidence that the Committee had prejudged the matter or acted arbitrarily, capriciously or in bad faith: Judgment at [116] and [120]–[122].

44 The R&O Committee had exercised its contractual discretion in good faith and rationally. The Committee's findings that Mr Leiman had acted to the detriment of Noble were valid as he had breached his non-competition and confidentiality obligations. Mr Leiman's acts of competition against Noble were evidenced by his e-mail to Summa Capital on 16 February 2012. He had used confidential information that Summa Capital was interested in moving into the commodities sector, which he obtained from Noble's internal e-mail discussions, to craft his pitch to Summa Capital. There was, however, little evidence to support a conclusion that he had breached his non-solicitation obligation: Judgment at [133], [138], [152]–[153], [159] and [162]–[163].

45 Although Mr Leiman had made false representations in relation to Noble's hiring of Messrs Carlier and Ozeias in 2006, Noble subsequently indicated that it did not consider this to be a serious breach. The condition in cl 3(d) of the Settlement Agreement that Mr Leiman "does not act in any way to the detriment of Noble" also did not apply retrospectively to cover detrimental acts prior to the parties' entry into the Settlement Agreement: Judgment at [185] and [187]–[189].

46 Clause 3(c) of the Settlement Agreement stipulated a secondary obligation, but it was not a penalty clause as it conferred on Mr Leiman rights that he would not otherwise have had, on the condition that he not act to the detriment of Noble, as determined by the R&O Committee: Judgment at [211] and [213].

47 The 5,652,421 shares that were not expressly mentioned in cl 3(d) of the Settlement Agreement were not covered by the Settlement Agreement: Judgment at [220]. In any event, given Mr Leiman's improper acts of competition, those shares were validly forfeited pursuant to cl 5 of the AIP, which provided for the forfeiture of shares issued under the AIP if the employee concerned engaged in activity or conduct "inimical or contrary to or against the interests of [Noble]": Judgment at [230]–[231].

48 Under cl 3(e) of the Settlement Agreement, Noble had to consider Mr Leiman's entitlement to the 2011 Bonus in a rational and *bona fide* manner. This had been done. Either Noble's poor performance in 2011 or Mr Leiman's misdeeds was sufficient basis to deny him the 2011 Bonus: Judgment at [254]–[257].

49 As the R&O Committee's decisions were valid, the appellants' claims in conspiracy by unlawful means, wrongful inducement of breach of contract and unlawful interference were dismissed: Judgment at [264]–[265], [268] and [270].

50 As regards NRL's counterclaim, the Settlement Agreement and the Advisory Agreement did not contain an implied term requiring Mr Leiman to comply with his duties under the Employment Agreement: Judgment at [282]. Although Mr Leiman had breached his non-competition and confidentiality obligations as well as his duty of fidelity, NRL was not entitled to recover the payments it had made to him under the Advisory Agreement and the Settlement Agreement: Judgment at [284]. There was also no basis for awarding NRL any damages for Mr Leiman's breaches as NRL did not pursue a claim for such relief in its closing submissions, and there was, in any event, no evidence as to its losses: Judgment at [276]–[277] and [280].

The parties' cases on appeal

The appellants' case

51 The appellants submit that Mr Leiman did not breach his contractual obligations and his duty of fidelity, and had not caused any actual harm or damage to Noble. There was, accordingly, no basis for the R&O Committee to find that he had acted to Noble's detriment and was therefore disentitled from the Share Options and the Shares provided for under cll 3(c) and 3(d) of the Settlement Agreement, and no grounds for the forfeiture under cl 5 of the AIP of his right to the 5,652,421 shares that were not covered by cl 3(d) of the Settlement Agreement. Further, the reference in cll 3(c) and 3(d) to the R&O Committee making a final determination "in the event of any dispute" must mean that Mr Leiman was to be informed of the allegations against him and

given a chance to make representations *before* the Committee decided to forfeit his Share Options and Shares. The appellants contend that regardless of whether or not the R&O Committee's determination that Mr Leiman had acted to Noble's detriment is valid, cl 3(c) is an unenforceable penalty clause in so far as it provides for the forfeiture of vested Share Options.

52 The appellants repeat their submissions below in relation to the 2011 Bonus under cl 3(e) of the Settlement Agreement and their economic tort claims. As the R&O Committee's decisions of 1 and 27 March 2012 are, in their view, invalid, they ask for judgment to be entered for the monetary value of the Share Options, the Shares and the 2011 Bonus, or, alternatively, for interlocutory judgment to be entered, with damages to be assessed.

NRL's case

53 As we mentioned at [5] above, NGL is currently subject to a winding-up order in Bermuda, and it was not present at the hearing of this appeal. The arguments presented on the respondents' side were therefore those of NRL alone. NRL essentially defends the Judge's decision. It also invokes O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) to submit that the Judge's decision may be affirmed on two alternative grounds. First, cl 3(a) of the Settlement Agreement should be construed as conditioning Mr Leiman's entitlement to the benefits set out in cl 3 upon his compliance with the obligations in his Employment Agreement. As Mr Leiman breached those obligations, he is no longer entitled to receive *any* payment or benefit under the Settlement Agreement. Second, the R&O Committee was entitled to take into account Mr Leiman's misconduct in hiring Messrs Carlier and Ozeias to affirm its decision to deny him his benefits under the Settlement Agreement.

The issues to be determined

54 We consider that there are six issues to be addressed in this appeal:

(a) the interpretation of cl 3 of the Settlement Agreement;

(b) whether cl 3(c) of the Settlement Agreement imposed a penalty and is therefore unenforceable for being a penalty clause;

(c) whether the R&O Committee was required under cll 3(c) and 3(d) of the Settlement Agreement to take certain procedural steps before deciding that Mr Leiman had acted to Noble's detriment;

(d) whether Mr Leiman was entitled to the 2011 Bonus under cl 3(e) of the Settlement Agreement and the 5,652,421 shares awarded under the AIP that were not covered by the Settlement Agreement;

(e) whether the Judge erred in dismissing the appellants' economic tort claims; and

(f) the remedies that the appellants are entitled to, if any.

Issue 1: The interpretation of cl 3 of the Settlement Agreement

55 We begin with the parties' submissions on the interpretation of cl 3 of the Settlement Agreement, which has been reproduced above at [21].

The parties' submissions

56 NRL submitted at the hearing that cl 3 of the Settlement Agreement should be read as establishing a "two track" regime that distinguishes between two categories of disputes that are to be decided by separate dispute resolution forums. As its counsel, Mr Davinder Singh SC ("Mr Singh"), explained:

(a) Clause 3(a) provides that Mr Leiman shall be entitled to receive "the payments and benefits provided for in this Section 3 and the schedule [meaning the payment schedule set out in Exhibit A to the Settlement Agreement] … only if he complies with his ongoing non-competition and confidentiality obligations under the provisions of the Employment Agreement and this Settlement Agreement". Whether Mr Leiman had complied with these contractual obligations was a legal question to be decided by the court, and not the R&O Committee. If the court were to determine that Mr Leiman had not complied with either or both of the obligations mentioned in cl 3(a), he would not be entitled to the payments and benefits under cll 3(b)–3(e). These clauses pertained to, respectively, his annual remuneration under the Advisory Agreement, the NGL Share Options that had vested as well as those that had yet to vest in him, the 17,276,013 Shares and the 2011 Bonus.

(b) The "final determination" referred to in cll 3(c) and 3(d) related to the separate non-legal question of whether Mr Leiman had acted in any way to the detriment of Noble. This entailed a wider commercial inquiry that was to be determined by the R&O Committee, a commercial decision-making body comprised of commercial people.

57 Mr Singh contended that although the question of whether Mr Leiman had complied with his contractual obligations of non-competition and confidentiality (which was to be determined by the court) was separate from the question of whether he had acted to Noble's detriment (which was to be determined by the R&O Committee), even if the court were to find that he had complied with his contractual obligations, it was still open to the R&O Committee to determine that he had acted to Noble's detriment by (for instance) engaging in competitive acts, which determination would in turn disentitle him

from the Share Options and the Shares provided for under cll 3(c) and 3(d). In view of this submission by Mr Singh, it appears that on NRL's interpretation of cl 3, there were two independent means by which Mr Leiman could be deprived of his right to the Share Options and the Shares under cll 3(c) and 3(d):

> (a) first, where the *court* found, pursuant to cl 3(a), that he had failed to comply with his confidentiality and non-competition obligations under the Employment Agreement and the Settlement Agreement; and
>
> (b) second, where the *R&O Committee* made a determination, pursuant to cll 3(c) and 3(d), that he had acted to the detriment of Noble.

58 On their part, the appellants contend that it is open to the court to decide on Mr Leiman's entitlements under cll 3(c) and 3(d) of the Settlement Agreement in place of the R&O Committee. Counsel for the appellants, Mr Andre Francis Maniam SC ("Mr Maniam"), submitted that the question of "detriment" under cll 3(c) and 3(d) mirrored the question of whether Mr Leiman had complied with his contractual obligations under the Employment Agreement and the Settlement Agreement. As a result, while the R&O Committee had the primary jurisdiction under cll 3(c) and 3(d) to determine whether Mr Leiman had acted to Noble's detriment, its decisions were not immune from being reversed or annulled by the court. This could happen in a number of ways. First, because the question of "detriment" really concerned whether Mr Leiman had breached the non-competition and confidentiality obligations that bound him, it was implausible that if the court reached a conclusion on these issues that was contrary to the findings of the R&O Committee, the latter would nonetheless prevail. Second, any decision of the R&O Committee would be reviewable by the court, at least on due process and rationality grounds. Mr Maniam further submitted that if the court did set aside

the R&O Committee's decision on those grounds, it could then itself determine whether Mr Leiman had acted to the detriment of Noble. After all, the court had all the requisite information before it: the High Court had considered the same evidence in respect of NRL's counterclaim for Mr Leiman's alleged breach of (among other things) his contractual non-solicitation, non-competition and confidentiality obligations and his duty of fidelity.

Our decision

59 The principles of contractual interpretation are well-established (*CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [19]):

(a) The starting point is that the court looks to the text that the parties have used: *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2].

(b) The court may have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129].

(c) The court has regard to the relevant context because it then places itself in "the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by the parties in the [contract] in their proper context": *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [72].

(d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear: *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31].

60 In addition, the exercise of ascertaining what the parties objectively intended is to be rooted, broadly speaking, in the context of the contractual purpose. Due consideration ought therefore to be given to the commercial purpose of the transaction or provision, and, more narrowly, to why a particular obligation was undertaken: *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 ("*MCH International Pte Ltd*") at [22] and [26].

61 Before we turn to apply these principles to the facts of this case, we reiterate that the parties do not dispute that any question of Mr Leiman's compliance with his contractual non-competition and confidentiality obligations would be a legal question that is to be determined by the court. The real issues between them relate to: (a) the scope of the R&O Committee's jurisdiction; (b) the meaning of "detriment" for the purposes of cll 3(c) and 3(d) of the Settlement Agreement, and in particular, whether it is coextensive with or encompasses considerations of Mr Leiman's breach of contract; and (c) the interface between the scope of the R&O Committee's powers and those of the court.

62 We begin by considering the true construction of cl 3 of the Settlement Agreement, and in this regard, it is helpful to set out the context in which this agreement is to be considered. As we alluded to above at [15], cll 3(c) and 3(d) are critical clauses in the Settlement Agreement that preserve Mr Leiman's interests in the Share Options and the Shares. We explain in the next section of this judgment, to which this is more directly relevant, that Mr Leiman agreed to

subject his entitlement to the Share Options and the Shares under cll 3(c) and 3(d) to the determination of the R&O Committee in the event of a dispute, in the context of a *compromise* with Noble. Pursuant to that compromise, he was granted some rights that he would not otherwise have had or been entitled to exercise. On Noble's part, its entry into the Settlement Agreement (through NRL) allowed it to end NRL's employment relationship with Mr Leiman without terminating him for cause, thereby avoiding potential legal disputes with him and preserving business confidence in the respondents. Seen from this perspective, the Settlement Agreement was a mutually beneficial arrangement between Mr Leiman and NRL that regulated Mr Leiman's post-resignation conduct and relationship with Noble.

63 This is the context in which the terms of the Settlement Agreement are to be construed.

64 Applying the principles we have set out above, we broadly agree with NRL that cl 3 of the Settlement Agreement should be interpreted as establishing a "two track" regime. In our judgment, cl 3(a) encompasses *all* the benefits and payments contemplated under cll 3(a)–3(e) and purports to condition them upon Mr Leiman's compliance with his contractual non-competition and confidentiality obligations. Any dispute as to whether or not Mr Leiman was in such compliance is a matter solely for the court. This much was, in effect, accepted by both parties, and, in our view, with good reason. We will elaborate on this shortly. But the short point is that absent very clear language suggesting otherwise, where parties subject rights to the fulfilment of a legal requirement, the question of whether that requirement has or has not been met is a quintessentially *legal* question and, hence, typically to be resolved by a body tasked with making legal determinations. Clauses 3(c) and 3(d), on the other hand, deal with the entirely separate *commercial* question of whether

Mr Leiman had acted to Noble's commercial detriment, and this was to be determined by the R&O Committee. We elaborate on our reasons for adopting this interpretation.

65 We take the contractual language as the starting point. As stated in cl 3(a), Mr Leiman is "entitled to receive the payments and benefits provided for in this Section 3 and the [payment] schedule [set out in Exhibit A to the Settlement Agreement] but only if he complies with his ongoing non-competition and confidentiality obligations under the provisions of the Employment Agreement and this Settlement Agreement". We agree with Mr Singh's submission at the hearing that "the payments and benefits provided for in [cl] 3" refer to the entitlements specifically provided for under cll 3(b)–3(e). Clauses 3(b) and 3(e) deal with the payments that might be due to Mr Leiman: cl 3(b) sets out his annual remuneration under the Advisory Agreement, and cl 3(e) provides for his entitlement to be considered for the 2011 Bonus. We should add that cl 3(a) also refers to other "payments" under the payment schedule listed in Exhibit A to the Settlement Agreement ("Exhibit A"). This payment schedule sets out various categories of Mr Leiman's "Final Due Payments" from NRL, including his salary for 2011, the monetary value of his accrued untaken annual leave and reimbursement for expenses, although it did not include specific figures for each of these categories of payments and was not signed by NRL. Clauses 3(c) and 3(d) deal with Mr Leiman's benefits, namely, the Share Options and the 17,276,013 Shares. The plain language of cl 3(a) encompasses Mr Leiman's severance entitlements generally and conditions his receipt of them on his compliance with specific contractual obligations (as set out above at [24] and [25]).

66 On this interpretation, Mr Leiman's rights to the Share Options and the Shares that were dealt with under cll 3(c) and 3(d) were made subject to two

conditions: the condition in cl 3(a) that Mr Leiman comply with his contractual non-competition and confidentiality obligations, and the *additional* condition in cll 3(c) and 3(d) that he not act to Noble's detriment. As regards the latter condition, cl 3(c) states that Mr Leiman shall be entitled to exercise the Share Options "provided that prior to exercise he has not acted in any way to the detriment of Noble". Clause 3(d) similarly states that the 17,276,013 Shares and all accrued dividends will vest in Mr Leiman and become free of transfer restrictions in accordance with their terms of grant "provided [Mr Leiman] does not act in any way to the detriment of Noble". In both cases, "the Remuneration and Options Committee of Noble" shall make a final determination in the event of any dispute.

67 We deal first with the interpretation of the word "detriment" in cll 3(c) and 3(d) of the Settlement Agreement. The Judge found, as a matter of common sense and plain reading, that the requirement that Mr Leiman "not act in any way to the detriment of Noble" did not need proof of actual detriment to Noble, as long as Mr Leiman had acted against Noble's business interests: Judgment at [126]. Although the preamble to the Settlement Agreement defines "Noble" as NRL, the parties accept in their submissions that the R&O Committee's task under cll 3(c) and 3(d) was to consider whether detriment had been caused to Noble generally, and not just NRL specifically. We agree with this interpretation, especially given that "Noble" is also used in cll 3(c) and 3(d) to refer to NGL when describing the R&O Committee, which comprised NGL's directors. We also agree with the Judge that the focus of the Committee's inquiry should be on Noble's business interests. However, we depart from his view in relation to the natural and ordinary meaning of "detriment", which must, in our judgment, refer to some negative *consequence* to Noble arising from Mr Leiman's conduct.

68 It should be noted that the operative words in cll 3(c) and 3(d) require that Mr Leiman must not have "act[ed] … to the detriment" of Noble. This suggests that the relevant inquiry must be directed to whether he had done anything that *was in fact* detrimental or harmful to Noble. Put simply, it seems difficult to see how it can be said that Mr Leiman had *acted to the detriment* of Noble absent any actual detriment to Noble. It follows, in our judgment, that any determination that Mr Leiman had so acted must involve some particularisation of actual loss, harm or damage to Noble that can fairly be said to be a consequence of the relevant acts by Mr Leiman. This coheres better with the text of the provision, and any other view, including that which the Judge took and which NRL advanced before us, would mean that Mr Leiman could lose the right to his benefits if he did something that was theoretically capable of being in some way harmful to Noble, even if it was not in fact so. We find this unconvincing and wholly improbable, having regard to the context in which the parties entered into the Settlement Agreement (see [62] above). That context rested on a mutually beneficial arrangement to bring about a smooth and amicable parting of the ways. Such an objective called for commercially sensible arrangements that duly protected both sides. We find it impossible to conceive that Mr Leiman would have given up whatever rights he already had at the time of the Settlement Agreement, in the expectation that he would have more time to exercise those rights and possibly gain more entitlements, as we elaborate on below, while running the risk of losing them all on the most slender of grounds for saying that he had acted to the detriment of Noble. In the circumstances, we agree with the appellants that the R&O Committee was only entitled to find that Mr Leiman had acted "to the detriment of Noble" if it found that his actions had some *actual* adverse consequence on Noble's business interests.

69 Another issue that arises in the interpretation of cll 3(c) and 3(d) relates to *when* the acts of Mr Leiman that are alleged to have been detrimental to Noble must have taken place. The Judge found that on a plain reading, cll 3(c) and 3(d) were not intended to cover detrimental acts occurring *prior* to the parties' entry into the Settlement Agreement. He reasoned that there were no express terms to this effect, and that such an interpretation was not one that a reasonable person with knowledge of the circumstances would come to. Furthermore, the tense used in cl 3(d) ("provided [Mr Leiman] *does not act* in any way to the detriment of Noble" [emphasis added]) suggested that the condition was meant to apply prospectively. While a different tense was used in cl 3(c) ("provided that prior to [the] exercise [of the Share Options] he has not acted in any way to the detriment of Noble"), this was by reference to the stipulated exercise date of the Share Options, and there was no indication that the parties intended the conditions governing Mr Leiman's entitlement to the Shares and the Share Options to be different: Judgment at [187]–[190].

70 The Judge's interpretation in this regard was not challenged by the parties, and we think rightly so. We agree that the "detriment" referred to in cll 3(c) and 3(d) must relate only to conduct taking place after the parties' entry into the Settlement Agreement. This interpretation is in line with Mr Leiman's and NRL's purpose in entering into this agreement, which was to regulate Mr Leiman's post-resignation conduct and relationship with Noble in a mutually beneficial way. Furthermore, the preamble to the Settlement Agreement (reproduced at [19] above) references Mr Leiman's prior arrangements with Noble (through NRL) and expressly provides that his relationship with Noble would be solely determined by the terms of the Settlement Agreement thereafter:

> WHEREAS, [Mr Leiman] and [NRL] are party to an Employment Agreement …

> WHEREAS, [NRL] and [Mr Leiman] have mutually agreed that [he] will cease to be so employed and to so serve on 1 December, 2011 (the 'Effective Date'); and
>
> NOW, THEREFORE, [NRL] and [Mr Leiman] hereby agree as follows …

71 In our judgment, it would not be consistent with the forward-looking nature of the Settlement Agreement for the R&O Committee to be empowered to take past detrimental acts into consideration under cll 3(c) and 3(d).

72 We turn now to the appellants' submission that Mr Leiman would only be found to have acted to Noble's detriment if he was in breach of the contractual obligations specified in cl 3(a): see [58] above. With respect, there is nothing in the contractual language to limit the R&O Committee's remit in such a way. We also consider this to be untenable, having regard to the internal context of cl 3. First, it would be counterintuitive for the parties to have left the identical issue of Mr Leiman's compliance with his contractual obligations to be dealt with by two separate bodies. It is also unclear why they would have wanted such an outcome. Second, we consider that the parties would have repeated the qualification in cl 3(a), namely, that Mr Leiman's entitlement to the benefits provided for in cll 3(c) and 3(d) was subject to his compliance with his contractual obligations, if they had intended the "detriment" considered by the R&O Committee to be coextensive with breaches of those same obligations, instead of framing it in distinct terms in cll 3(c) and 3(d). For these reasons, we prefer NRL's interpretation of cl 3 in so far as it espouses a "two track" regime under this clause, with the court to determine, for the purposes of cl 3(a), whether Mr Leiman had complied with his contractual obligations, and the R&O Committee to determine, for the purposes of cll 3(c) and 3(d), whether he had acted to the detriment of Noble.

73 This brings into focus the interface between each of the "tracks" established under cl 3, meaning the determination by the court in relation to cl 3(a) and that by the R&O Committee in relation to cll 3(c) and 3(d). On this issue, we do not agree with NRL to the extent that its interpretation of cl 3 envisages the R&O Committee being entitled to consider, regardless of any finding that might already have been made by the court, whether Mr Leiman had complied with his contractual obligations in assessing whether he had acted to the "detriment" of Noble: see [57] above. Such an interpretation ignores the fact that the R&O Committee, being a body of commercial people, is not *prima facie* suited to make determinations of a legal nature. In line with this, both Mr Leiman and Mr Elman testified that the Committee's role is to review all matters concerning the terms of engagement, compensation and general remuneration for senior executives of Noble. This role plainly would not have involved the resolution of potentially complex legal questions, and we do not see why it would change in the present context, especially when, as we have already noted, cl 3(a) dealt with precisely those types of questions. This, and the fact that the Committee comprises senior executives and directors of NGL, point towards the correct interpretation being that the Committee was tasked to make commercial, non-legal determinations.

74 NRL seemed to us to share this view at certain points in its submissions. For instance, Mr Singh submitted that the R&O Committee, in considering whether Mr Leiman had engaged in competitive behaviour, was not expected or required to apply the relevant legal tests. Thus, he said, it would not have to consider whether the conduct in question was merely "preparatory" to anticipated future competition or constituted actual competitive activity: *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 ("*Smile Inc*") at [67]. Mr Singh submitted that the Committee would only be expected

to decide whether the conduct in question was detrimental to Noble, but he nonetheless characterised this as an instance where the issues before the court and those before the Committee would essentially be the same.

75 In our judgment, Mr Singh's example in fact serves to demonstrate why the two inquiries are *not* the same. The R&O Committee in that example would consider from a commercial perspective whether or not what Mr Leiman had done was detrimental to Noble. In considering that, the Committee would not be concerned with whether or not there had been a breach of contract by Mr Leiman, or with the fine legal lines drawn between conduct that was merely preparatory to future competitive conduct and that which had gone sufficiently far down the road to constitute actual competitive conduct. While the court would consider Mr Leiman's conduct in terms of the *legal* question of whether he had breached his contractual obligations, the R&O Committee would assess his conduct in terms of the *non-legal* question of whether he had acted to the commercial detriment of Noble. These are self-evidently quite different inquiries even if they might concern what, in broad terms, is the same *factual* terrain. Plainly, commercial detriment can follow upon conduct that does not involve a breach of contract, and it is not necessarily the case that every breach of a contractual obligation will give rise to commercial detriment.

76 This interpretation is further reinforced by the internal structure of cl 3. In order to make sense of cl 3 as a whole, Mr Leiman's compliance with his contractual obligations of non-competition and confidentiality, which is addressed in cl 3(a), ought not to be also covered by cll 3(c) or 3(d). In this regard, we do not think there is force in NRL's interpretation of cl 3 in so far as it is premised on the parties having agreed that Mr Leiman's entitlement to the Share Options and the Shares could be lost through two independent and potentially conflicting determinations by *either* the court *or* the R&O

Committee that he had breached his contractual non-competition and confidentiality obligations (see [57] above). First, this interpretation would effectively render cl 3(a) redundant in many instances of disputes concerning Mr Leiman's compliance with these obligations. Mr Singh implicitly conceded as much when he appeared to acknowledge that on NRL's interpretation of cl 3, even if the court were to find, in relation to cl 3(a), that Mr Leiman was *not* in breach of his non-competition and confidentiality obligations, the R&O Committee might conclude otherwise in respect of the very same issue, and, on that basis, find that Mr Leiman had acted to Noble's detriment and was therefore not entitled to the Share Options and the Shares provided for under cll 3(c) and 3(d). In our view, such an interpretation would give rise to considerable uncertainty as it would leave the parties wholly uncertain as to how and when their rights might be authoritatively determined, and also runs contrary to the presumption against redundancy in contractual interpretation: *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [20].

77 Second, it does not appear objectively plausible that a legal determination by the court should be interpreted as being open to annulment by the determination of a body of commercial people. We reiterate that the commercial purpose of the Settlement Agreement was to achieve a mutually beneficial cessation of the employment relationship between NRL and Mr Leiman. It is unlikely then that Mr Leiman would have assented to the possibility of the court's legal determination being annulled by the R&O Committee, which, after all, was a Committee consisting of NGL's senior personnel.

78 Third, and most fundamentally, the R&O Committee's task was never to determine the appropriate remedies in law for any breach of contract by

Mr Leiman. If Mr Leiman were found by a court to have breached his contractual obligations, it would be the court's task to ensure that NRL was adequately compensated for the loss of its bargain with Mr Leiman through the grant of appropriate remedies: *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 at [71]. It was open to NRL to sue Mr Leiman in a court of law for breach of his obligations under the Employment Agreement and the Settlement Agreement. Indeed, NRL availed itself of this course of action when it brought a counterclaim in Suit 393 in respect of Mr Leiman's alleged breach of (among other things) his contractual non-solicitation, non-competition and confidentiality obligations and claimed damages for such breach in its pleaded case, although it did not ultimately pursue such relief in its closing submissions at the trial (see [42] above). By contrast, the R&O Committee was concerned only with Mr Leiman's Noble-related severance entitlements. The deprivation of these entitlements would not be a recognised remedy for a purported breach of contract. Equally, the courts would not generally countenance the deprivation of a party's contractual entitlements because of its breach of contract. To the extent that the parties agree by contract to impose such a consequence upon a contract-breaker, this would engage the rule against penalty clauses, which we consider in the next section of our judgment.

79 Having regard to the foregoing, we are satisfied that any finding by the R&O Committee that Mr Leiman had acted to the detriment of Noble for the purposes of cll 3(c) and 3(d) could not validly rest on a purported determination that he had breached his contractual obligations. Rather, in ascertaining whether Mr Leiman had acted to Noble's detriment and, in turn, whether he had lost his entitlement to the Share Options and the Shares provided for under these two clauses, the Committee was required to consider whether he had engaged in any

conduct that was *commercially* detrimental to Noble. Such detriment had to comprise actual harm or detriment to Noble, and had to be based on Mr Leiman's conduct after the parties' entry into the Settlement Agreement. Having set out our position on the interpretation of cl 3, the next question is whether cl 3, either as a whole or in part, falls afoul of the rule against penalties. It is to this that we now turn.

Issue 2: Whether the disputed clauses were void for being penalty clauses

The parties' submissions

80 The appellants submit that regardless of whether or not the R&O Committee's finding under cl 3(c) of the Settlement Agreement that Mr Leiman had acted to Noble's detriment is valid, cl 3(c) is an unenforceable penalty clause in so far as it purports to forfeit the 37,090,910 unexercised Share Options that had vested in Mr Leiman as at 22 December 2010 (see above at [9]). The appellants do not make the same submission in respect of the 7,727,272 Share Options that were to vest only on 2 April 2012 or the 17,276,013 Shares mentioned in cl 3(d). This difference in position arises because the appellants appear to proceed on the premise that the rule against penalty clauses applies only to provisions that purport to impose penal sanctions by divesting a party of its entitlement to claim vested rights and benefits, and not to provisions that impose conditions for the vesting of rights and benefits.

81 The Judge ruled against the appellants on this issue. He held that cl 8.3(a) of the Share Option Rules provided that Mr Leiman's unexercised share options would "immediately lapse" once he ceased to be in Noble's full-time employment, and cl 8.4 provided that he would be deemed to have ceased to be a full-time employee on the date he tendered his notice of resignation or

cessation. Although the Settlement Agreement stated that Mr Leiman ceased to be employed by NRL on 1 December 2011, he was not entitled to the Share Options at the time he entered into the Settlement Agreement on 9 November 2011 (Judgment at [26] and [207]) because he had resigned on or before that date (Judgment at [210]). Clause 3(c) of the Settlement Agreement therefore had the effect of "conferring upon Mr Leiman additional benefits which he otherwise would not have had … subject to the condition that [he] did not act in a way detrimental to Noble (as determined by the R&O Committee)": Judgment at [211]. In any event, to the extent that cl 3(c) stipulated a secondary obligation, the Judge considered that the "forfeiture" of the Share Options was "not 'extravagant and unconscionable'". Applying the test laid down by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("*Cavendish*"), he held that cl 3(c) did not impose on Mr Leiman a detriment that was out of proportion to Noble's legitimate interest in ensuring that he did not compete against it or otherwise act to its detriment, and was not unenforceable for being a penalty clause: Judgment at [212]–[214]. In the alternative, even if *Cavendish* were not applicable in Singapore, cl 3(c) was not void for being a penalty clause on the facts: Judgment at [215].

82 The appellants submit that the Judge erred in finding that Mr Leiman was not entitled to the Share Options at the time he entered into the Settlement Agreement. Clause 1 of the Settlement Agreement provided that Mr Leiman would resign on 1 December 2011. Clause 10 of the Settlement Agreement was an entire agreement clause which provided that the Settlement Agreement "sets forth the entire agreement of [NRL] and [Mr Leiman] with respect to the subject matter [therein]". Mr Leiman had not given notice of his resignation within the meaning of cl 8.4 of the Share Option Rules. His right to the vested but unexercised Share Options therefore had not lapsed when he entered into the

Settlement Agreement. The appellants contend that their understanding of this state of affairs was reinforced by Mr Alam's e-mail to Mr Leiman on 26 October 2011 stating that Noble would "honour its legal obligations on [his] vested [share] options, insofar as they [were] vested on or before [his] last date of employment, which [was] 1st December, 2011".

83 The appellants submit, on this basis, that cl 3(c) purports to *forfeit* Mr Leiman's accrued rights if he were found to have acted to Noble's detriment, and it is therefore a penalty clause regardless of whether the court applies the traditional test laid down by the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 ("*Dunlop Pneumatic Tyre*") or the test more recently propounded in *Cavendish.*

84 NRL defends the Judge's reasoning on the basis that the minutes of an NGL board meeting held on 9 November 2011 recorded that Mr Leiman submitted his resignation on that date. The effect of such resignation was that all of Mr Leiman's unexercised Share Options lapsed on 9 November 2011 unless the R&O Committee in its sole discretion decided otherwise (as permitted under cl 8.3(a) of the Share Option Rules). The R&O Committee subsequently decided at a meeting on 29 November 2011 that Mr Leiman would be permitted to exercise the Share Options under cl 3(c) of the Settlement Agreement on the condition that he exercised them on or before 2 April 2013 and did not act to the detriment of Noble prior to the date of exercise. The effect of cl 3(c) was to confer on Mr Leiman additional rights that he would not otherwise have had, on those conditions. In the circumstances, cl 3(c) did not attract the penalty doctrine. In any event, cl 3(c) was commercially justifiable and was not penal.

Our decision

85 We first set out the position in respect of the Share Options and the Shares that Mr Leiman was entitled to before and after his entry into the Settlement Agreement on 9 November 2011, as this forms the context in which cl 3 of the Settlement Agreement is to be interpreted.

86 In relation to the Share Options, Mr Leiman was entitled under cl 8.1 of the Share Option Rules to exercise any vested share options during their relevant option periods, which extended to the tenth year after the grant of the options. At the time of the Settlement Agreement, Mr Leiman was entitled to exercise 37,090,910 vested Share Options, but was not yet entitled to exercise 7,727,272 Share Options that were to vest only on 2 April 2012 (see [9] above). Under cl 8.3(a) of the Share Option Rules, all of Mr Leiman's unexercised share options would immediately lapse upon his ceasing to be in the full-time employment of NRL.

87 As for the shares awarded to Mr Leiman under the AIP, at the time of the Settlement Agreement, neither the 17,276,013 Shares mentioned in cl 3(d) nor the 5,652,421 shares awarded by way of the 4 May 2011 letter (see [11] above) had had their trading restrictions lifted. The trading restrictions on a tranche of 11,098,782 Shares were scheduled to be lifted on 31 March 2012 at the earliest. But unlike the Share Options, Mr Leiman's entitlement to the shares awarded under the AIP was not contingent on his continued employment with NRL. Under the relevant clauses of the AIP (reproduced above at [12]), his right to the shares would only be forfeited if: (a) he was terminated for cause (cl 4); (b) he acted in a way or engaged in activity or conduct which was inimical or contrary to or against the interests of NGL (cl 5); or (c) he resigned as an employee of NGL and within six months of his resignation agreed to take up or

took up employment with, or agreed to act or acted as a consultant, agent or advisor to a competing company (cl 6). The change of his employment status from that of an employee to that of an "advisor" did not constitute a cessation of employment (cl 3).

88 We observed earlier at [15] and [62] above that the parties entered into the Settlement Agreement with a view that each side would benefit from the arrangement. As Mr Alam testified, Noble's intention was to ensure that Mr Leiman was treated "fairly" and "[given] … more than he was entitled to", so that Noble could avoid legal disputes with him if possible. It was in this context that the parties entered into a bespoke arrangement, namely, the Settlement Agreement, to regulate the terms of Mr Leiman's departure from Noble and deal with his vested and contingent rights at the time. In our judgment, provision was therefore made in the Settlement Agreement to cover his entitlement to the Share Options and the Shares, in addition to other outstanding matters and all the consequences of his exit. We also consider that the parties' intention that the Settlement Agreement was to be exhaustive of Mr Leiman's Noble-related rights is reinforced by the correspondence between him and Mr Alam leading up to the signing of the Settlement Agreement.

89 On 25 October 2011, Mr Alam sent a draft settlement agreement to Mr Leiman by e-mail. Mr Leiman replied by e-mail on 26 October 2011 at 12.19am suggesting that the draft agreement be amended, and made certain requests that were eventually covered by the other clauses in the Settlement Agreement (see above at [20]). These included his requests that NRL: (a) appoint him as an advisor; (b) take over his lease obligations in Hong Kong from December 2012 onwards and pay his relocation expenses; and (c) pay him "a pro rata bonus for 2011". As regards his share options and shares, he suggested that Noble accelerate the vesting of his 2012 and 2013 share options

and shares to 2011, and requested that he be free to exercise those share options up to five years after his last day with Noble. In addition, he requested that "the wording of the unvested shares … match the contract under which they were given". He ended the e-mail by stating that he had "served Noble for nearly 6 years and [Noble's accommodation of his requests] would show a great gesture of gratitude from Noble".

90 Mr Alam replied on 26 October 2011 at 4.16pm, informing Mr Leiman that Noble would "honour its legal obligations on [his] vested [share] options, insofar as they [were] vested on or before [his] last date of employment, which [was] 1st December, 2011". Mr Alam also noted that Mr Leiman's shares would vest "as per their terms of grant provided that [he] continue to be a 'good leaver'". Mr Leiman replied at 4.53pm agreeing to this condition on the shares, but objecting to Mr Alam's position on the status of his unvested share options:

> This point [on the share options] is unclear. In your previous message you stated I could keep my unvested options. I am clearly pointing to the options that vest in April [2012]. *If my notice period is 6 months, I should then be able to vest them. Are you telling me that Noble will make me forfeit them*?
>
> This is contrary to the message you gave me on the phone and per your last email. This is something very very serious to me …
>
> Please revert[.]
>
> [emphasis added]

91 Mr Leiman subsequently suggested in an e-mail sent at 5.40pm on 26 October 2011 that he be allowed to "keep the [share options] vesting in 6 months [meaning in April 2012] as well as the ones already vested and that [he] carry them for 9 months", as he would otherwise "have to dump them [meaning the shares obtained from exercising the vested share options] in the market in a very short period from post results until [D]ecember 1st". Mr Alam

explained at the trial that "post results" referred to the posting of Noble's company results on around 9 November 2011.

92 Mr Alam clarified by e-mail on 27 October 2011 that, having received Mr Elman's instructions, Mr Leiman's unvested share options would vest in him "provided [he was] a good leaver at the time of vesting". He similarly agreed to Mr Leiman's request to be entitled to his unvested shares, "provided [he was] a good leaver at the time of vesting". Mr Leiman's e-mail response on 27 October 2011 stated that he was fine with the proposal, but that "[they] just need[ed] to word properly the vesting of the 2012 [share] options as well as the timing for [him] to be able to liquidate [his] current [share] options portfolio and match the wording of the unvested [share options] with the current [share] options as well as the share program etc".

93 Considering Mr Leiman's contractual arrangements with Noble at the time and the e-mail correspondence in October 2011, Mr Leiman would only have been entitled to exercise 37,090,910 vested share options at the time of the parties' entry into the Settlement Agreement. Notwithstanding what appears to be a suggestion to the contrary in his e-mail of 26 October 2011 at 4.53pm (reproduced at [90] above), we are satisfied that but for the Settlement Agreement, if Mr Leiman had served notice of his resignation or been terminated for cause at any point before 2 April 2012, he would have lost all of his vested but unexercised share options and the 7,727,272 share options vesting on 2 April 2012 by virtue of cl 8.3(a) of the Share Option Rules. If he had been terminated for cause before 31 March 2012, he would also have lost all of the shares awarded to him under the AIP, including those that vested on 31 March 2012 at the earliest. Given the agreement to part ways in October 2011, Mr Leiman therefore had two options at the time: he could either exercise the only rights available to him (namely, the 37,090,910 vested share options and

the shares awarded to him under the AIP as and when the trading restrictions on them were lifted), or negotiate for a better position under the Settlement Agreement. In the round, we are satisfied that as at the end of October 2011, the parties intended *by their entry into the Settlement Agreement* to take outstanding matters between Mr Leiman and Noble out of the scope of the previous contractual arrangements between them. These matters would be dealt with in the Settlement Agreement instead, and, by virtue of the entire agreement clause in cl 10 of the Settlement Agreement, apparently *only* in the Settlement Agreement. Clause 10 reads:

> This Agreement sets forth the entire agreement of [NRL] and [Mr Leiman] with respect to the subject matter hereof, and supersedes the Employment Agreement in its entirety except as specifically provided herein. This Agreement may not be amended except in … writing signed by [Mr Leiman] and an authorized representative or representatives of the Noble Group of companies.

94 In our judgment, the effect of the Settlement Agreement was to supersede the Employment Agreement, the Share Option Rules and the AIP in so far as they regulated the subject matter covered by the clauses of the Settlement Agreement. This included Mr Leiman's entitlements under cl 3, and in particular, the vested and unvested Share Options under cl 3(c) and the 17,276,013 Shares under cl 3(d). That said, we note that cl 3(d) does not expressly include the 5,652,421 shares that were awarded to Mr Leiman under the AIP by way of the 4 May 2011 letter, and we address the implications of this at [169]–[176] below.

95 Although the parties and the Judge accepted that the Share Option Rules, and cl 8.3 in particular, were relevant to Mr Leiman's entitlement to the Share Options, we respectfully disagree that these continued to apply after the parties' entry into the Settlement Agreement. Accordingly, although NRL submits that

Mr Leiman's resignation was recorded as being submitted on 9 November 2011 (see above at [84]), it is artificial for NRL to contend that, by reason of cl 8.3 of the Share Option Rules, his unexercised Share Options lapsed on that date. To the contrary, Mr Leiman, having signed the Settlement Agreement on 1 November 2011, with Mr Elman countersigning on 2 November 2011, had preserved his entitlement to the Share Options under and subject to cl 3(c) of the Settlement Agreement. In the same way, NRL's analysis that the R&O Committee only decided on 29 November 2011 to allow Mr Leiman to exercise his Share Options in spite of his resignation is artificial because it ignores the fact that the conditions for such exercise had by then been exhaustively set out in cl 3(c). In general, much the same can be said in respect of the 17,276,013 Shares, the AIP and the effect of cl 3(d).

96 It is with this in mind that we turn to the penalty clause analysis. At the outset, we reiterate that the appellants only contend that cl 3(c) of the Settlement Agreement is a penalty clause in so far as it pertains to the 37,090,910 Share Options that had vested at the time of Mr Leiman's entry into the Settlement Agreement. They do not argue that cl 3(c) is a penalty clause in relation to the 7,727,272 Share Options that were to vest on 2 April 2012, and do not challenge the enforceability of cl 3(d), which deals with the 17,276,013 Shares whose trading restrictions had yet to be lifted at the time the Settlement Agreement was entered into (see [80] above). The appellants appear to link the application of the rule against penalty clauses to the question of whether the entitlements in issue had already accrued. We consider that this focus is misplaced because, as we will elaborate below, the engagement of the rule against penalty clauses depends on the anterior question of whether the clause in question concerns a primary or a secondary obligation.

97 We first explain what the rule against penalty clauses entails. We previously affirmed in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [78] that the law on penalty clauses is embodied in the following principles laid down by Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre* ([83] *supra*) at 86–88:

> 1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* [[1905] AC 6]).
>
> 3. The question whether a sum stipulated is [a] penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner* v. *Hills* [[1906] AC 368] and *Webster* v. *Bosanquet* [[1912] AC 394]).
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> > (*a*) It will be held to be [a] penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in [the] *Clydebank Case* [[1905] AC 6].)
> >
> > (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble* v. *Farren* [(1829) 6 Bing 141]). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover

> further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel M.R. in *Wallis* v. *Smith* [(1879) 21 Ch D 243]—is probably more interesting than material.
>
> (*c*) There is a presumption (but no more) that it is [a] penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage' (Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* [(1886) 11 App Cas 332]).

On the other hand:

> (*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury [[1905] AC 6 at 11]; *Webster* v. *Bosanquet*, Lord Mersey [[1912] AC 394] at 398).

98 We have yet to determine whether the principles laid down in *Dunlop Pneumatic Tyre* continue to apply in the light of the UK Supreme Court's decision in *Cavendish* ([81] *supra*), which modified the test for ascertaining whether a clause is a penalty clause. The test laid down in *Cavendish* is "whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation": at [32]. For the reasons explained below, the applicability of the *Cavendish* test need not be decided in the present appeal because we are satisfied that *cl 3(a)* of the Settlement Agreement is a penalty clause regardless of whether this test or the *Dunlop Pneumatic Tyre* test is applied. As for *cl 3(c)*, and, for that matter, *cl 3(d)*, the question does not arise as we are satisfied that they cannot possibly be regarded as penalty clauses. This is because they do not concern secondary obligations that were triggered by Mr Leiman's breach of contract.

99 The threshold issue that has to be decided is whether the aforesaid clauses concern primary or secondary obligations under the Settlement Agreement. We refer to Lord Diplock's formulation in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848–850 of primary obligations that parties undertake to perform in their contracts, whose breach gives rise to secondary obligations on the part of the defaulting party to remedy the breach. As Lord Diplock explained at 848–849, secondary obligations may either be found in the contract or be imposed by implication of law:

> Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law … The contract, however, is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties …
>
> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach …

100 The parties do not dispute the distinction between primary and secondary obligations, or that the rule against penalties applies only to clauses that impose secondary obligations. In our judgment, these positions are sound. In line with the principle of freedom of contract, the court will give effect to the intention of the parties and hold them to their duty to perform their primary obligations under their contract. The corollary of recognising the parties' freedom of contract is that the law also allows them the freedom to change their mind and break their contractual undertakings if they so wish, albeit at a price.

To address this, the common law imports into contracts a secondary obligation to pay compensatory damages to *remedy* breaches of contract. Where the parties stipulate the way in which a secondary obligation is to be discharged, this will be scrutinised by the court before it is upheld. This was the context in which the penalty doctrine was articulated by Lord Dunedin in *Dunlop Pneumatic Tyre*. Where a clause imposes a stipulated consequence following a breach of contract by one party, and that consequence, in the opinion of the court, is not reflective of the innocent party's interest in being compensated but is in fact stipulated *in terrorem* of the contract-breaker, that clause will be regarded as an unenforceable penalty clause.

101 In our judgment, in considering whether a given clause imposes a primary or a secondary obligation, the court should approach the issue as a matter of substance rather than form. The inquiry should, in our view, be directed towards and guided by:

(a) the overall context in which the bargain in the clause was struck;

(b) any reasons why the parties agreed to include the clause in the contract; and

(c) whether the clause was entered into and contemplated as part of the parties' primary obligations under the contract in order to secure some independent commercial purpose or end, or whether it was, in the round, to hold the affected party *in terrorem* in order thereby to secure his compliance with his primary obligations.

102 As cll 3(a), 3(c) and 3(d) of the Settlement Agreement all potentially engage the rule against penalty clauses, we consider each clause in turn. In line with the approach set out above, we consider whether these clauses imposed

primary or secondary obligations and whether the rule against penalty clauses is therefore engaged.

103 We first discuss the broader factual context leading to Mr Leiman's and NRL's entry into the Settlement Agreement. In our judgment, the impetus for this agreement was the parties' desire to vary their existing contractual arrangements in favour of a fresh agreement dealing with Mr Leiman's exit from Noble. To that end, a mutually beneficial compromise was struck to effect a "clean break" in their employment relationship, with the intention of leaving, as far as possible, no outstanding legal issues between them. Accordingly, provision was made for, among other things, Mr Leiman's lease in Hong Kong, his relocation expenses, as well as his and his family's medical and dental plans: see cll 5, 6 and 8 of the Settlement Agreement, which we outlined earlier at [20] above.

104 We turn to the specific clauses in question. As we explained at [65] above, cl 3(a) covered Mr Leiman's severance payments and benefits under cll 3(b)–3(e), as well as his "Final Due Payments" from NRL under the payment schedule set out in Exhibit A. The plain wording of cl 3(a) states that Mr Leiman "shall be entitled to receive" those payments and benefits "only if he complies with his ongoing non-competition and confidentiality obligations". As a matter of *form*, cl 3(a) is phrased as a *primary obligation* upon NRL to provide Mr Leiman with payments and benefits upon a contingency being fulfilled, namely, Mr Leiman's continued compliance with his contractual obligations of non-competition and confidentiality. However, there does not appear to be an independent commercial purpose behind the parties' inclusion of this clause in the Settlement Agreement. In particular, the rights provided under cll 3(b) and 3(e) and in Exhibit A were premised on considerations that were completely independent of Mr Leiman's continued compliance with his

contractual non-competition and confidentiality obligations. Clause 3(b) provided for Mr Leiman's remuneration for advisory services under the Advisory Agreement. Clause 3(e) related to Mr Leiman's entitlement to be considered for the 2011 Bonus, which would be based on his performance in 2011. Exhibit A concerned his "Final Due Payments" from NRL that were incidental to his resignation, including reimbursements for expenses that he made during his employment. It is not clear what independent commercial purpose would be served by NRL requiring Mr Leiman to continue to comply with his contractual non-competition and confidentiality obligations in order to be entitled to these rights.

105 A distinction can be drawn between the rights under cll 3(b) and 3(e) and in Exhibit A and those under cll 3(c) and 3(d). We elaborate further on the precise nature of the rights under cll 3(c) and 3(d) at [109]–[114] below. But in short, cll 3(c) and 3(d) pertained either to certain enhanced rights that Mr Leiman would not have been entitled to but for his entry into the Settlement Agreement, or to rights that were always made conditional on his being a "good leaver". Clause 3(c) related to Share Options that would have lapsed by virtue of cl 8.3(a) of the Share Option Rules if they were unexercised or unvested at the time of Mr Leiman's resignation or termination. Clause 3(d) related to the 17,276,013 Shares awarded to Mr Leiman under the AIP whose vesting under cl 5 of the AIP was always subject to Mr Leiman being a "good leaver". In our view, it is possible to discern that NRL had an independent commercial purpose in extracting from Mr Leiman an agreement to subject his rights under cll 3(c) and 3(d) to his being a "good leaver" after his resignation. In short, it was agreeing to enhance his rights in some respects on this basis.

106 But even though we consider that the parties had an independent commercial purpose in subjecting Mr Leiman's entitlements under cll 3(c) and

3(d) to conditions that would require him to be a "good leaver", this does not mean that cl 3(a) as a whole *in substance* imposed a primary obligation. Clause 3(a) did not draw a distinction between the different payments and benefits that it encompassed, and it is implausible to construe this clause as penal only in so far as it related to the payments and benefits under cll 3(b) and 3(e) and in Exhibit A. In any event, there is no need to construe cl 3(a) in this manner. The parties specifically provided for a "good leaver" condition in relation to the Share Options and the 17,276,013 Shares under cll 3(c) and 3(d). Seen in this light, cl 3(a) imposed an additional hurdle on Mr Leiman by subjecting his rights to these Share Options and Shares to the additional condition that he not breach his contractual obligations of non-competition and confidentiality. Seen in conjunction with what has been said above, it becomes evident that cl 3(a) was included in the Settlement Agreement *in terrorem* with regard to Mr Leiman and any thought he might have had of breaching his contractual non-competition and confidentiality obligations. We therefore construe cl 3(a) as imposing a secondary obligation on Mr Leiman, and find that it engages the rule against penalty clauses.

107 We are satisfied that cl 3(a) is an unenforceable penalty clause regardless of whether the *Cavendish* test or the *Dunlop Pneumatic Tyre* test is applied. It is not a genuine pre-estimate of damages under the *Dunlop Pneumatic Tyre* test, given that it operates to disentitle Mr Leiman from receiving fixed benefits under cll 3(a)–3(e) regardless of the nature and extent of his breach of his contractual non-competition and confidentiality obligations. There was simply no correlation between the damages that might be awarded to NRL for any breach of contract on Mr Leiman's part and the sanction for such breach, namely, the forfeiture of whatever rights Mr Leiman had under cl 3 to the payments and benefits enumerated therein. Further, as Mr Maniam pointed

out, cl 3(a) in fact operated as a *surcharge* because NRL always retained the right to sue for compensatory damages in respect of any alleged breach by Mr Leiman of his primary obligations of non-competition and confidentiality, and in fact did so in this case (although it did not ultimately pursue its claim for damages in its closing submissions at the trial).

108 Clause 3(a) would also fail the *Cavendish* test, given that it is unclear what legitimate interest NRL could possibly have had in upholding this clause, beyond punishing Mr Leiman if he were to breach his contractual obligations of non-competition and confidentiality in any way. We reiterate that NRL's interest in seeking compensation for any breach of these obligations by Mr Leiman was wholly preserved at all times.

109 We turn to cl 3(c). The question here is whether cl 3(c) should be construed as a primary obligation that *NRL* undertook to *grant* Mr Leiman the right to exercise his Share Options subject to certain conditions, or whether it was a secondary obligation on the part of *Mr Leiman* to *forgo* his Share Options in the event that he breached his primary obligations under the Settlement Agreement.

110 Clause 3(c) purports to allow Mr Leiman to exercise his vested but unexercised Share Options and, specifically, the 7,727,272 Share Options that were to vest on 2 April 2012 on the condition that he not act to Noble's detriment. This bargain was reached in the context of Mr Leiman agreeing in October 2011 to forgo his opportunity to exercise his pre-existing rights under the Share Option Rules in respect of the 37,090,910 Share Options that had already vested in him at the time. He instead subjected his entitlement to these Share Options to the requirements set out in cl 3(c). In exchange, he was allowed to exercise "the outstanding 7,727,272 options … vesting on 2nd April

2012 as well as all options vested to date but unexercised" [underlining in original omitted] as long as he exercised them "on or prior to 2nd April 2013 and provided that prior to exercise he ha[d] not acted in any way to the detriment of Noble". As to whether he had acted to the detriment of Noble, this was to be determined by the R&O Committee in the event of a dispute. Clause 3(c) therefore granted him benefits that he would not otherwise have been entitled to, relating to his ability to exercise his vested Share Options as late as 2 April 2013, when he would otherwise have had to exercise them prior to his resignation from NRL. In addition, cl 3(c) provided for the future vesting of the 7,727,272 Share Options on 2 April 2012 after his resignation from NRL.

111 In short, as a result of cl 3(c), Mr Leiman gave up his unqualified ability to exercise some vested rights in return for an extension of time within which he could exercise those rights and the grant of more rights that he would not otherwise have been entitled to. But the consummation or perfection of those enhanced rights was subject to the condition stipulated in cl 3(c), which was the same as that stipulated in cl 3(d). This condition was mutually arrived at by the parties. As can be seen from the e-mail correspondence set out above, Mr Leiman and Mr Alam agreed in the course of their negotiations that Mr Leiman's entitlement to the unvested Share Options and Shares would be recognised and upheld as long as he was a "good leaver at the time of vesting". Further, it was Mr Leiman who requested that the conditions under cll 3(c) and 3(d) in relation to the Share Options and the Shares "match": see [92] above.

112 This leads us to conclude that the parties agreed to cl 3(c) as part of their primary obligations so that Mr Leiman could exchange one set of entitlements for another, in return for being a "good leaver". As to what this entailed, this was reflected in the condition that he not act to the detriment of Noble. Clause 3(c) thus set out the basis upon which Noble would come under a

primary obligation to allow Mr Leiman to perfect his enhanced rights. Contrary to the Judge's view at [213] of the Judgment, cl 3(c) had nothing to do with a "secondary obligation" on Mr Leiman's part to pay damages to or otherwise compensate Noble for any breach of his contractual obligations. This is also entirely consistent with and follows from our earlier holding at [79] above that in making its determinations under cl 3(c), the R&O Committee would be concerned with the question of whether Mr Leiman had caused *commercial detriment* to Noble, and not with any question of whether Mr Leiman had breached his contractual obligations. It would be meaningless, in our respectful view, to speak of cl 3(c) as imposing a secondary obligation on Mr Leiman to pay damages or suffer some other sanction because of a determination that some commercial detriment had been sustained by Noble, when this had nothing to do with his breach of a primary obligation.

113 We consider cl 3(d) for completeness, even though the appellants did not consider it to be a penalty clause for the reason that it dealt with rights that had yet to vest in Mr Leiman. In our judgment, cl 3(d) is not a penalty clause. This is so not because it dealt with unvested rights, but because, like cl 3(c), it set out a fresh primary obligation on NRL to vest the 17,276,013 Shares in Mr Leiman on the condition that he not act to Noble's detriment, as determined by the R&O Committee in the event of a dispute. We also reiterate the observation we made in the previous paragraph on the significance of the fact that the R&O Committee was never concerned with making any finding as to whether Mr Leiman had breached a primary contractual obligation.

114 In conclusion, cll 3(c) and 3(d) were not intended to operate as secondary obligations that Mr Leiman had to discharge in the event that he breached his primary obligations under the Settlement Agreement. Instead, cll 3(c) and 3(d) superseded the original terms of the grant of the Share Options

and the Shares in relation to the subject matter that they covered, as part of a fresh bargain that Mr Leiman struck with NRL. These clauses imposed a fresh primary obligation on NRL to honour Mr Leiman's enhanced rights in respect of the Share Options and the Shares on the condition that he not act to Noble's detriment. Construed in this manner, we do not agree with the appellants that cl 3(c) is a penalty clause, and dismiss this ground of their appeal.

Issue 3: The validity of the R&O Committee's decisions under cll 3(c) and 3(d) of the Settlement Agreement

The parties' submissions

115 The effect of our holding in the previous section is that the respondents were not entitled to deny Mr Leiman his rights under cl 3 of the Settlement Agreement pursuant to cl 3(a), even assuming they were able to establish that he had breached the obligations stipulated therein. However, it was open to them to deny him those rights if the R&O Committee validly determined under cll 3(c) and 3(d) that he had acted to the detriment of Noble. Hence, even though we are satisfied that cll 3(c) and 3(d) are not penalty clauses, they nonetheless condition the consummation or perfection of Mr Leiman's entitlement to the Share Options and the Shares upon his not acting to Noble's detriment, as determined by the R&O Committee.

116 The R&O Committee exercised its powers under cll 3(c) and 3(d) in the following manner. On 1 March 2012, the R&O Committee decided (without expressly relying on cl 3(c)) that Mr Leiman was not entitled to exercise five million of his Share Options (see [33] above). The R&O Committee reaffirmed this decision on 27 March 2012, which Mr Alam communicated to Rothschild Trust on the same day by way of a memorandum attached to an e-mail sent to Mr Koenig (see [35] above). Subsequently, in a letter dated 10 April 2012,

Mr Alam informed Rothschild Trust that the R&O Committee's determination that "the conditions for [the] exercise of the [Share O]ptions had not been satisfied" likewise applied to the vesting of the 11,098,782 Shares that were meant to be transferred to Rothschild Trust on 31 March 2012. Those Shares would therefore not be so transferred, and, further, Mr Leiman would have no entitlement to the Shares and the accrued dividends under cl 3(d) (see [36] above).

117 The appellants refer to the R&O Committee's decisions of 1 March 2012 and 27 March 2012 collectively as "the Decisions", and submit that they are invalid on two grounds. First, they were made in bad faith, capriciously, arbitrarily, unreasonably or irrationally. Second, the Committee ought to have accorded Mr Leiman due process when making the Decisions but failed to do so. On its part, NRL defends the Decisions as rationally made and submits that the principles of natural justice do not apply in the present context.

118 The appellants cite *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 ("*Kay Swee Pin*") at [7] for the proposition that a party liable to be directly affected by the outcome of proceedings should be given notice of the allegations against him and a fair opportunity to be heard. They submit that these principles are not limited to persons and bodies with a duty to act judicially or quasi-judicially, and apply with equal force here. *Kay Swee Pin* concerned the exercise of disciplinary powers by a disciplinary committee of a social club; the R&O Committee was akin to a disciplinary committee tasked to consider allegations of misconduct against Mr Leiman, and its decisions might deprive the appellants of property rights or impose a penalty on them.

119 NRL contests the appellants' reliance on *Kay Swee Pin*, submitting that the R&O Committee was not a disciplinary committee. Its role was to review

matters concerning remuneration, rewards and incentives for senior executives of Noble. In any event, as the Judge found at [116] of the Judgment, Mr Leiman had previously been a member of the R&O Committee and would have been familiar with its workings. Mr Rubin and Mr Chan gave unchallenged evidence that Mr Leiman could have asked to make representations to the Committee, but had chosen not to avail himself of that right. Mr Leiman also knew what the allegations against him were, having been informed on 27 March 2012 of the reasons for the Committee's decision through the memorandum that Mr Alam sent to Rothschild Trust on that date.

Our decision

The court's jurisdiction to review the R&O Committee's decisions under cll 3(c) and 3(d)

120 At the hearing, we invited the parties to address us on the role of the court in reviewing decisions made by the R&O Committee under cll 3(c) and 3(d) of the Settlement Agreement. The parties agreed that cll 3(c) and 3(d) excluded the court from reviewing the substantive merits of the R&O Committee's decisions. In short, in as much as the parties had agreed under the Settlement Agreement to vest the power to make the relevant decisions under cll 3(c) and 3(d) in the R&O Committee, it was not open to the court to consider the correctness of such decisions or to substitute its own views for those reached by the Committee. Both counsel accepted, however, that the R&O Committee's decisions could be reviewed on irrationality or bad faith grounds. We agree with these propositions. The parties had agreed that Mr Leiman's interests under cll 3(c) and 3(d) were liable to be forfeited in the event that the R&O Committee made a final determination that he had acted to Noble's detriment. Given the contractual mechanism by which the parties had agreed that Mr Leiman's interests could be forfeited, it would not ordinarily be permissible for the court

either to free them of their bargain, or to step into the Committee's shoes and usurp its decision-making powers under the Settlement Agreement. This follows as a matter of contract and seems to us to be uncontroversial.

121 However, while the parties were in agreement on these issues, they disagreed over whether the court could review the *process* by which the R&O Committee made its decisions. In our judgment, the court may indeed review the R&O Committee's decisions to ensure that they were made after applying a fair process. We come to this conclusion in the light of the specific terms of cll 3(c) and 3(d).

(1) The case law

122 In considering the question of what constitutes a fair process, one is typically driven to consider the "rules of natural justice" as distilled to the two essential requirements stated in *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [34] (see also *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [42]). These are, first, that every party to a dispute shall be entitled to a fair hearing; and, second, that the tribunal tasked with determining the dispute shall be impartial and independent. To be clear, we approach this as a question of contract, and so the content of what constitutes a fair process must depend on the terms that the parties have agreed to. In the present case, given that the parties had agreed that a committee of the respondents would finally resolve certain disputed issues even though any such dispute would be between the respondents and Mr Leiman, Mr Leiman could not then contend that the R&O Committee was not an appropriate decision-maker solely on account of its status as a committee of the respondents. In any case, this was not the central point taken by the appellants. Instead, they only took issue with the duty of the

R&O Committee to make its decisions by a fair process, something that seemed to us to come within the fair hearing rule of natural justice.

123 The rules of natural justice are not strictly confined to the administrative law context. In this regard, we find much common sense in the High Court's pithy *obiter* observations in *Stansfield Business International Pte Ltd v Minister for Manpower (formerly known as Minister for Labour)* [1999] 2 SLR(R) 866 at [26]:

> Rules of natural justice are not some arcane doctrine of the law. They represent what the ordinary man expects and accepts as fair procedure for the resolution of conflicts and disputes by a decision making body that affects his interest. The ordinary man will feel that he has not been fairly heard if he has not been allowed a reasonable opportunity to present his case. He will equally feel that he has not been fairly heard if he has not been fully informed of what his opponent has to say or if he has not been given an opportunity to answer it or correct it. He will similarly feel aggrieved if a point is taken by the tribunal and he has not been given an opportunity to answer it or correct it. …

124 However, we do not consider that the rules of natural justice can arise as a matter of course outside the administrative law context and, more particularly, in the context of private contracts. To take one notable example, in employment disputes involving claims of wrongful dismissal, it has not been the case that such claims can be mounted on the basis of the employee's right to a fair hearing having been breached. Be that as it may, we will consider some cases involving such disputes to ascertain whether there is a normative justification for applying the rules of natural justice, which have their origins in administrative law, to a roughly similar private law context.

125 In *Vasudevan Pillai and another v City Council of Singapore* [1968–1970] SLR(R) 100 ("*Vasudevan Pillai*"), the Privy Council emphasised that an employer could terminate an employment contract at any time, and for

any reason or for none, and that *any right to a hearing could only arise if provided for in the employment contract* (at [7], quoting *Ridge v Baldwin and Others* [1964] AC 40 at 65 *per* Lord Reid):

> The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and *the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.* So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: *it depends on whether the facts emerging at the trial prove breach of contract.* … [emphasis added]

126 On this analysis, in contracts of employment, absent a term in the contract to the contrary, there is no basis for finding that an employer is obliged to accord to an employee the right to any particular process before undertaking any action, including even contractually wrongful action. In the latter scenario, the employer may be liable in damages, but there is simply no reason to import any process-related obligations or rights beyond anything that is specifically provided for in the contract. This proposition in *Vasudevan Pillai* was subsequently applied by this court in *Lim Tow Peng and another v Singapore Bus Services Ltd* [1974–1976] SLR(R) 673 at [23], and by the High Court in *Arokiasamy Joseph Clement Louis v Singapore Airlines Ltd* [2002] 2 SLR(R) 924 at [50] as well as *Lai Swee Lin Linda v Attorney-General* [2010] SGHC 345 at [41].

127 In *Vasudevan Pillai*, the Privy Council held that it was "purely a matter of construction" whether the relevant rules of the respondent council "[gave] rights to the employee" or "only … provide[d] a scheme or code for the general administration of the respondent council" (at [17]). Examining the relevant rules, the Privy Council disagreed with the appellant employees that the rules of natural justice applied to an *inquiry* that was conducted prior to their

dismissal. It was only in relation to a rule providing for the right to an *appeal* against a decision of dismissal that the rules of natural justice applied: at [20] and [21].

128 In *Stevenson v United Road Transport Union* [1977] 2 All ER 941, the Court of Appeal of England and Wales considered a claim by a plaintiff employee who contended that his dismissal by the defendant trade union was invalid because he had not been given an adequate opportunity to defend himself in disciplinary proceedings before an executive committee. The executive committee had been established by the union to perform delegated functions on the union's behalf, and its powers were found in the union's rules. Under rr 15(1) and 15(2) of those rules, the executive committee could dismiss officials of the union only if they had failed to "give satisfaction" to the committee. The court considered that in the light of the words "so long as they give satisfaction to the Executive Committee", the executive committee first had to reach a conclusion that the plaintiff's performance was unsatisfactory. This was a decision of a judicial kind that could not be fairly reached without letting the plaintiff know in what respects his conduct was considered to have been unsatisfactory and giving him an opportunity to explain his conduct and put his own case: at 949c–949f. This was how the point was stated at 949b–949c (*per* Buckley LJ):

> … *Where one party has a discretionary power to terminate the tenure or enjoyment by another of an employment or an office or a post or a privilege, is that power conditional on the party invested with the power being first satisfied on a particular point which involves investigating some matter on which the other party ought in fairness to be heard or to be allowed to give his explanation or put his case*? If the answer to the question is Yes, then unless, before the power purports to have been exercised, the condition has been satisfied after the other party has been given a fair opportunity of being heard or of giving his explanation or putting his case, the power will not have been well exercised. [emphasis added]

129 In *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151 ("*Long Kim Wing*"), Woo Bih Li J allowed the plaintiff's claim for wrongful dismissal. At issue was the requirement of "due inquiry" under cl 5(1) of the defendant's General Service Terms, which stated:

> The [defendant] Company may after due inquiry dismiss without notice an employee on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his/her service.

130 Woo J considered that the aforesaid requirement of "due inquiry" was similar to that set out in s 14(1) of the Employment Act (Cap 91, 2009 Rev Ed), which provides that "[a]n employer may after due inquiry dismiss without notice an employee … on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service". Woo J had regard to the High Court's analysis of a predecessor provision to s 14(1) in *Velayutham M v Port of Singapore Authority* [1974–1976] SLR(R) 307 ("*Velayutham M*"). On the facts of *Velayutham M*, the High Court held that there had been "due inquiry" within the meaning of the then equivalent of s 14(1), even though the employee concerned had not been present at the meeting where his employer made the decision to dismiss him for misconduct. It was not necessary for the employee to appear before the meeting and be heard in his own defence as he was, at all times, well aware of the nature of the accusations against him: *Velayutham M* at [33]. Woo J also took into account the guidelines on the Ministry of Manpower's website, which stated that an employee being investigated for misconduct should have the opportunity to present his case: *Long Kim Wing* at [142].

131 Woo J considered that the making of "due inquiry" under the defendant's General Service Terms required "something more than just the making of inquiries and the conduct of an investigation"; otherwise, the word

"inquiry" alone would suffice. He held that what the phrase "due inquiry" suggested was that there had to be some formal process by which the employee concerned was informed of the allegations and the evidence against him so that he had the opportunity to defend himself by presenting his position. This accorded with notions of fairness and justice, which was considered to be especially important because serious consequences might follow. The employee's opportunity to present his case effectively required that he first be clearly informed of what the case against him was: at [161]–[162]. On the facts, as no formal process had been undertaken and there was inadequate evidence to establish what the defendant had told the plaintiff about his alleged misconduct, no "due inquiry" had been conducted: at [174].

132 We were referred to a number of cases that pertained to disciplinary proceedings that were conducted in the context of social or sporting clubs and associations. We do not, in the final analysis, consider these to be especially helpful or relevant. We accept that in these cases, the analysis applied is typically a contractual one: *Kay Swee Pin* ([118] *supra*) at [2]. Nonetheless, it is well established in this context that the rules of natural justice do apply to such proceedings. This is because, among other things, such proceedings entail the application of the *penal* power of the club or association in question over an individual member following a hearing conducted under specific procedural rules. Further, such proceedings may culminate in the loss of valuable social or financial rights, which might sometimes be akin to property rights or which might impact the "rights and livelihood" of the affected persons: see the decision of the High Court in *Haron bin Mundir v Singapore Amateur Athletic Association* [1991] 2 SLR(R) 494 at [23] and [24], and this court's decision in *Kay Swee Pin* at [4] and [6].

133 We consider, drawing from the cases we have considered above, that where a contractually appointed body makes decisions regarding a party's rights under a contract, the position may be stated as follows. There is no general requirement or expectation that a party purporting to exercise a particular contractual right, or to act in a particular way that might be prejudicial to the other party, has a general duty to act fairly, or a more specific duty to observe any particular requirements of natural justice. Contracting parties are generally entitled to act in their own interests. If, in doing so, it should turn out that a party has breached its contractual obligations, then it may be liable in damages.

134 This general position may, however, be displaced by the terms that the parties have agreed on, whether expressly or impliedly. The court's assessment of whether the exercise of a particular contractual right has been made subject to any duty of fairness or to the observance of any particular procedure will be a contextual one that duly considers the particular contractual right in question, the language of the provision setting out or conditioning the right, the consequences of any decision made under that provision and what, if anything, was contemplated by way of any procedural requirements. As a claim that any requirement of fairness has been breached is in actuality a claim in breach of contract, the first port of call must always be the terms of the contract. In that light, we turn to the clauses in question in the present case.

(2) Construction of cll 3(c) and 3(d) of the Settlement Agreement

135 The R&O Committee was vested with decision-making powers under cll 3(c) and 3(d) of the Settlement Agreement. It stands to reason then that those clauses set out the limits, the basis and the terms upon which the Committee could exercise these powers. To ascertain whether there was an express or

implied limit or requirement subject to which the Committee was to act, we return to the specific language used in cll 3(c) and 3(d):

> (c) [Mr Leiman] shall be entitled to exercise the outstanding 7,727,272 options he holds in the Noble Group Limited Share Option Schedule 2004 vesting on 2nd April 2012 as well as all options vested to date but unexercised, in each case provided he does so exercise on or prior to 2nd April 2013 and provided that prior to exercise he has not acted in any way to the detriment of Noble and the [R&O Committee] of Noble shall make a final determination in the event of any dispute.
>
> (d) [Mr Leiman] holds 17,276,013 restricted shares of Noble Group (the 'Restricted Stock'). The Restricted Stock and all accrued dividends shall vest and become free of transfer restrictions in accordance with its term of grant provided [Mr Leiman] does not act in any way to the detriment of Noble and the [R&O Committee] of Noble shall make a final determination in the event of any dispute.
>
> [underlining in original omitted]

136 Clauses 3(c) and 3(d) prescribe that the R&O Committee's discretion was to be exercised in three ways.

137 First, the R&O Committee's jurisdiction would only be triggered if Mr Leiman had allegedly done something that amounted to acting "to the detriment of Noble".

138 Second, the R&O Committee was not tasked to decide in general whether Mr Leiman's benefits or entitlements should vest. The Committee's task under cll 3(c) and 3(d) was not like the usual work that it might otherwise have been engaged in, such as deciding on remuneration policies and performance-based awards, shares, options or bonuses for senior executives of Noble. The relevant benefits of Mr Leiman under cl 3 of the Settlement Agreement had already been fixed, save for his entitlement to the 2011 Bonus under cl 3(e). The only question in relation to the Share Options and the Shares was whether Mr Leiman had met the agreed conditions in cll 3(c) and 3(d) to

exercise them (in the case of the Share Options) and to have them vested in him (in the case of the Shares). The R&O Committee was specifically designated to make a final determination, *in a very specific circumstance*, on the issue of whether Mr Leiman had acted to the detriment of Noble. That circumstance was "in the event of any dispute". We draw a comparison in this regard with the R&O Committee's jurisdiction under cl 5(iv) of the AIP (reproduced above at [12]) to determine whether an employee had engaged in conduct injurious, detrimental or prejudicial to NGL's interests, which finding would result in the forfeiture of shares issued to that employee under the AIP. The Committee was only required under cl 5(iv) of the AIP to make a "reasonabl[e] determin[ation]" in this regard, with no qualification that the determination was to be made in the event of a dispute. This leads us to two further observations:

(a) The requirement in cll 3(c) and 3(d) of the Settlement Agreement that the R&O Committee act "in the event of any dispute" depended on the existence of a contention that Mr Leiman had acted to the detriment of Noble, and self-evidently, only Noble could make such an allegation.

(b) Once Noble did make such an allegation, it would be necessary to determine whether there was a dispute between Noble and Mr Leiman as to the validity of the allegation. Hence, any such allegation had to be put to Mr Leiman, so that he could decide whether he was going to dispute it.

139 Third, and finally, in the event of a dispute, the R&O Committee's determination as to whether Mr Leiman had acted "to the detriment of Noble" would be final. If the R&O Committee made a determination against Mr Leiman under cll 3(c) and 3(d), he would lose his financial rights in the Share Options and the Shares.

140 In our judgment, it is implicit from the combination of these three points that Mr Leiman had to be given notice of Noble's allegations that he had acted to its detriment, and if necessary, the basis for its allegations, before the R&O Committee was even activated to make its determination. This was to enable Mr Leiman to decide whether he wished to *dispute* the allegations. As noted above, it was only if the allegations were disputed that the R&O Committee would be activated to make a determination. Once the R&O Committee's jurisdiction was thus engaged, and after it was apprised of Noble's reasons for its allegations, it was inevitable that the Committee had to afford Mr Leiman an opportunity to put forward his reasons for disputing the allegations before it exercised its power to make a *final* determination as to whether Mr Leiman had acted "to the detriment of Noble". We reach this conclusion as a matter of the proper construction of cll 3(c) and 3(d).

141 We have already explained our analysis. To reiterate, as Mr Maniam submitted, cll 3(c) and 3(d) expressly contemplated the possibility of a dispute between Mr Leiman and Noble as to whether Mr Leiman had acted to Noble's detriment. It was this dispute that was subject to a "final determination" by the R&O Committee. For such a dispute to arise between Mr Leiman and Noble, Mr Leiman had to be told what was being alleged and given the opportunity to respond to this. As we will shortly see when we consider the facts, Mr Leiman did not even know what was being alleged against him until after the R&O Committee had purportedly made its final determination on the matter.

142 Beyond this, once Mr Leiman was apprised of the allegations against him, and if he chose to dispute them, we have no difficulty at all in concluding that the R&O Committee had to act *fairly* in making its final determination on whether he had acted to Noble's detriment. We come to this conclusion in view of the following three points:

(a) First, the contractual purpose of the Settlement Agreement was to attempt to resolve amicably all the separation issues that would likely arise from Mr Leiman's resignation from NRL.

(b) Second, the Settlement Agreement was entered into for the benefit of both Mr Leiman and Noble. While Mr Leiman stood to receive some enhanced entitlements, Noble stood to avoid an involved dispute with Mr Leiman that carried possible adverse consequences for its business.

(c) Third, Mr Leiman, in entering into the Settlement Agreement, was giving up a substantial set of valuable rights that had already accrued and could be exercised without the respondents' interference, namely, the 37,090,910 Share Options that had vested by the time of the Settlement Agreement, in return for some enhanced rights. These enhanced rights were conditional on his being "a good leaver", and if there was a dispute over *this*, he agreed that the R&O Committee would make the final decision.

143 It is simply inconceivable in this context that the parties would have agreed that the R&O Committee was not required or expected to make its decision *fairly*. And in this context, such a requirement would have entailed, *at a minimum*, that Mr Leiman would be apprised of all the allegations against him and their purported basis, and be afforded the opportunity to respond to them before any decision was made to deprive him of his substantial benefits under cll 3(c) and 3(d) of the Settlement Agreement.

144 It is not necessary in the circumstances for us also to consider whether such a requirement could or should be implied into the Settlement Agreement.

Whether the R&O Committee complied with the requirements of fairness in cll 3(c) and 3(d)

145 Having found that the R&O Committee was required to ensure that Mr Leiman had notice of the allegations against him even before its jurisdiction was engaged and, in any case, to permit him to respond to the allegations before it made a final determination on whether he had acted to Noble's detriment, we turn to consider what in fact transpired.

146 The R&O Committee first met on 1 March 2012 to decide on Mr Leiman's entitlement to exercise five million of his Share Options under cl 3(c) of the Settlement Agreement. This meeting was prompted by the 29 February 2012 request of Rothschild Trust to exercise those Share Options. Mr Rubin, who acted as Chairman of the meeting, referred the Committee to Mr Alam's e-mail dated 29 February 2012 informing the Committee of the request and the documents attached to Mr Alam's e-mail. These documents were the 2012 Wolfe Report and copies of Mr Leiman's e-mails to Mr Vinokurov of Summa Capital: see above at [29] and [32]. Mr Alam briefed the Committee on the background and substance of the 2012 Wolfe Report, as well as Mr Leiman's contractual obligations under the Settlement Agreement and the Advisory Agreement. The Committee observed that the e-mails appeared to demonstrate Mr Leiman's involvement in a plan to establish a competitor, and noted that Wolfe Associates would conduct further research on the matters in Brazil and report back "as soon as possible". The Committee considered the material before it and Mr Alam's legal advice, and thereafter "unanimously resolved to refuse to approve the exercise of the [five million Share] Options". At the material time, Mr Leiman had no notice at all that these allegations had been made against him. He therefore had not had a chance to

consider whether to dispute them, much less to respond to them. Yet, the R&O Committee seemed already to have come to a decision.

147 Mr Alam e-mailed Mr Keonig on 1 March 2012 to inform him that the R&O Committee had "considered [Rothschild Trust's] option exercise request and, in view of recent information that ha[d] come to its attention, ha[d] declined to allow it to proceed".

148 Rothschild Trust responded by letter dated 7 March 2012 requesting the reasons underlying the R&O Committee's decision of 1 March 2012 as follows:

> The [R&O] Committee has no grounds (of which we are aware) for refusing the request to exercise the options. If the Committee believes it has good reasons for refusing the exercise, please set them out in detail in writing to us, and do so by return.
>
> As we are sure you will agree any exercise of discretion available to the Committee must be made on proper grounds, on the basis of verified facts and in good faith. Unless there are proper grounds for further delay … we therefore repeat our request that the exercise of these 5 million options be immediately permitted; ie that the Committee's earlier decision be reversed.

149 On 12 March 2012, Mr Alam sent an e-mail to Mr Koenig to inform him that the R&O Committee would reconvene to "*review* its [1 March 2012] *decision*" [emphasis added]. Rothschild Trust replied by letter dated 13 March 2012 again requesting details of the "recent information" which Mr Alam had alluded to in his e-mail of 1 March 2012 (see [147] above). Mr Alam e-mailed Mr Koenig on 15 March 2012, repeating that the R&O Committee had considered Rothschild Trust's option exercise request and had exercised its discretion not to allow it to proceed "in good faith taking all relevant factors into account". He informed Mr Koenig that the R&O Committee would reconvene within three weeks to review its previous decision "in light of further information that is currently under process". Rothschild Trust's reply of

20 March 2012 observed that Mr Alam's e-mail of 15 March 2012 failed to explain the information on which the R&O Committee's 1 March 2012 decision was based and the "further information" that was being processed. Rothschild Trust further stated that the Committee was not acting properly in refusing to allow its exercise of the Share Options. Mr Alam replied on 21 March 2012, but did not disclose any new information. In its letter dated 22 March 2012, Rothschild Trust requested the R&O Committee to provide full reasons for its decision in the event that it affirmed its previous decision not to allow the exercise of the Share Options. Mr Alam stated in his response e-mail of 23 March 2012 that the Committee would consider this request when it next met.

150 The R&O Committee met on 27 March 2012 supposedly to reconsider its decision of 1 March 2012. The Committee considered an updated draft of the 2012 Wolfe Report that Wolfe Associates had submitted on 26 March 2012 together with legal advice from Linklaters LLP ("Linklaters"). Mr Alam briefed the Committee on Linklaters' legal advice and his correspondence with Rothschild Trust from 1 to 27 March 2012. The Committee considered the material before it and concluded that Mr Leiman had acted or engaged in activity or conduct which was "inimical or contrary to or against the interests of the Noble Group", and "in breach of [his] former or existing contractual and fiduciary obligations to [the] Noble Group, its subsidiaries and [its] associates", in that:

(a) He had hired Messrs Carlier and Ozeias even though he was aware of the legal accusations against them. He failed to disclose this information to Noble's board.

(b) He had contacted Noble's employees, former employees, clients, counterparties and advisors to seek their co-operation in taking steps to set up a competitor.

151 Mr Alam conveyed the R&O Committee's 27 March 2012 decision to Rothschild Trust on the same day by way of a memorandum attached to an e-mail sent to Mr Koenig. Mr Alam's memorandum stated that the R&O Committee had reviewed its decision of 1 March 2012 and had decided that that earlier decision would stand. The R&O Committee had concluded that the condition in cl 3(c) of the Settlement Agreement that Mr Leiman not act to the detriment of Noble had not been met in the following respects, any of which would have amounted to a failure to satisfy the condition:

(a) Mr Leiman had approached Noble's clients, counterparties, advisors, employees and former employees with a view to competing against Noble;

(b) Mr Leiman had used confidential information belonging to Noble in the course of the approaches outlined at [151(a)] above; and

(c) members of the management team that Mr Leiman appointed to run Noble's sugar and ethanol mills in Brazil from 2006 had been involved in fraudulent activity and were not qualified to manage the business.

Messrs Carlier and Ozeias were not specifically identified in Mr Alam's memorandum. Mr Alam ended the memorandum by stating that the R&O Committee's determination as to whether the condition stipulated in cl 3(c) for the exercise of the Share Options had been satisfied was final. It should be noted

that this was the first time that Mr Leiman was being apprised of the allegations against him.

152 On 3 April 2012, Rothschild Trust indicated by letter that the R&O Committee's decision of 1 March 2012 was invalid because Mr Leiman had not been informed of the allegations against him or given an opportunity to respond before the decision was made:

> 6. The Committee did not inform us [meaning Rothschild Trust] or Mr Leiman of the Allegations (or afford us and Mr Leiman any opportunity to respond) prior to … rejecting the [request to exercise five million Share Options]. In the course of its purported review of the Decision, the Committee did not inform us or Mr Leiman of the Allegations, or the 'recent information' or 'further information' it had referred to (or afford us or Mr Leiman any opportunity to respond). This was so even after further exchanges of correspondence on 12, 13, 15, 20, 21, 22 and 23 March 2012.
>
> 7. The first time the Allegations were raised was by the Letter of 27 March 2012, in which the Committee indicated that its Decision stands.
>
> 8. Moreover, the Letter is woefully bereft of detail and lacking in particulars (for example, as to who [Mr Leiman] allegedly approached; what confidential and proprietary information was allegedly used and how; and/or what detriment [NRL] has allegedly suffered).
>
> 9. Needless to say, Mr Leiman denies the Allegations. …
>
> 10. Based on the foregoing, we and Mr Leiman must proceed on the basis that the Committee's Decision is invalid.
>
> [underlining in original]

Mr Koenig also wrote to Mr Alam on 3 April 2012 to inquire about the 11,098,782 Shares that were meant to be transferred to Rothschild Trust's account on 31 March 2012 and the 7,727,272 Share Options that were meant to vest in Mr Leiman on 2 April 2012 (see above at [9] and [11(a)]).

153 Mr Alam's letter of 10 April 2012 to Rothschild Trust stated that the R&O Committee had determined that "the conditions for [the] exercise of the [Share O]ptions had not been satisfied because Mr. Leiman had acted to the detriment of Noble". This decision had been based on facts that were "abundantly clear". Mr Alam invited Mr Leiman to provide further information in response to the reasons articulated by the R&O Committee, which would be considered. However, absent "new facts", the Committee's determination would stand. Mr Alam then stated that the vesting of the 11,098,782 Shares referred to in Mr Koenig's 3 April 2012 e-mail was subject to the same conditions as those that applied to the exercise of the Share Options, and that these Shares would not vest for the same reasons that the request to exercise the Share Options would not be processed. Further, Mr Leiman had "no entitlement in respect of the [Shares] and accrued dividends referred to in Clause 3(d) of [the] Settlement Agreement". Mr Alam ended the letter by stating that "under the Settlement Agreement, the determination of the [R&O] Committee on the exercise of options and vesting of Restricted Stock is final".

154 Rothschild Trust rejected the invitation to provide "new facts" in its letter of 13 April 2012:

> As we have stated in our 27 March 2012 letter, … the manner by which the Decision was reached is … clearly lacking in due process. The purported willingness to consider 'further information' or 'new facts' from Mr Leiman in no way redresses this. You seem to expect Mr Leiman to disprove the Allegations against him, whilst declining to supply details/particulars of those Allegations. More fundamentally, you never informed us (or him) of the Allegations, or afforded us or him any opportunity to respond to the Allegations, prior to the Decision being reached or re-affirmed.

155 Having examined the foregoing evidence, we are of the view that the R&O Committee made an express determination on 1 March 2012 under cl 3(c) of the Settlement Agreement that Mr Leiman had acted to the detriment of

Noble such that he was not entitled to exercise five million of his Share Options. This determination was then reaffirmed on 27 March 2012. As clarified by Mr Alam's letter of 10 April 2012, the 1 March 2012 decision was in relation to "the conditions for [the] exercise of [Mr Leiman's Share O]ptions", and these were the same conditions that applied to the vesting of the 11,098,782 Shares that were meant to be transferred to Rothschild Trust on 31 March 2012 and Mr Leiman's other Shares under cl 3(d). In other words, the language of Mr Alam's 10 April 2012 letter extended the R&O Committee's 1 March 2012 decision to all of Mr Leiman's benefits under cll 3(c) and 3(d) without qualification.

156 In our judgment, the purported "final determination" for the purposes of cll 3(c) and 3(d) was made by the R&O Committee on 1 March 2012 and supplemented with further grounds on 27 March 2012. We disagree in this regard with the Judge's finding at [105] of the Judgment that the 1 March 2012 determination was only provisional, pending Wolfe Associates' update to the 2012 Wolfe Report, even though this was the position taken by the members of the R&O Committee and Mr Alam. This is because the 1 March 2012 determination was communicated to Mr Koenig by Mr Alam's e-mail of the same day in terms that it was final. Mr Alam did not in any way qualify his statement that the Committee had declined to allow Mr Leiman to exercise five million of his Share Options: see above at [147].

157 In any event, regardless of whether the R&O Committee's "final determination" was made on 1 or 27 March 2012, the Committee did not comply with the requirements under cll 3(c) and 3(d) to ensure that Mr Leiman was made aware of the allegations against him and afforded the opportunity to decide whether he disputed them, and if so, to respond to them. As stated in Rothschild Trust's letters of 3 and 13 April 2012, no information was provided

to Mr Leiman regarding the case against him before either 1 or 27 March 2012. In the circumstances, Mr Leiman was never in a position even to decide whether to dispute the allegations in the first place, which suggests that the R&O Committee was not even properly convened; further, Mr Leiman was not given any opportunity to make representations to the Committee before it made its determination against him. There was therefore no valid "final" determination for the purposes of cll 3(c) and 3(d) of the Settlement Agreement. The Committee's purported refusal to grant Mr Leiman his entitlements under these two clauses was therefore invalid as it was not made in compliance with the terms of the Settlement Agreement.

158 For completeness, we consider briefly NRL's submission that Mr Leiman could have made representations to the R&O Committee or asked to appear before it, and that he would have known of the possibility of doing so because he had experience sitting on the Committee. At the hearing of the appeal, Mr Singh also brought us through the correspondence to impress upon us that Mr Leiman had been afforded multiple opportunities to make representations to the Committee before and after the 27 March 2012 determination was made, which he failed to take up.

159 We do not accept this argument. In the first place, it is not at all clear to us that Mr Leiman's experience on the R&O Committee was relevant, given that the Committee's competence under cll 3(c) and 3(d) did not remotely resemble the way in which it was usually tasked to function: see above at [138]. In any event, the correspondence set out above shows that the Committee refused Mr Leiman's request to exercise his Share Options without providing reasons, even after the appellants repeatedly requested information and explanations between 1 and 27 March 2012. Even if Mr Leiman had considered making representations to the Committee, he would quickly have realised that

this was going to be a vain exercise since he had no idea what it was that he was supposed to be responding to. The argument that Mr Leiman could have challenged the Committee's 1 and 27 March 2012 determinations after they were made also has no merit. Mr Leiman's right to be given notice of the allegations against him and to be heard should have *preceded* the making of these determinations if it was to have any meaning at all. It was his prerogative not to attempt to persuade the R&O Committee to change its wrongful decision after it was made; his choice does not absolve the Committee of its failure to grant him due process and its failure to comply with the requirements of fairness incorporated in cll 3(c) and 3(d).

160 For these reasons, we find that the Judge erred in holding that the R&O Committee's decision was valid. The Committee's determinations on 1 and 27 March 2012 that Mr Leiman had acted to the detriment of Noble were invalid for failure to comply with the requirements of fairness under cll 3(c) and 3(d). The Committee's subsequent refusal to allow Mr Leiman to exercise his Share Options and receive the Shares on the basis of those determinations was in turn also invalid. This finding suffices to resolve the appellants' appeal against the R&O Committee's exercise of its powers under cll 3(c) and 3(d). It is therefore not necessary for us to consider the alternative ground put forward by the appellants, namely, that the R&O Committee's decision was made arbitrarily, capriciously or in bad faith. But before leaving this section, we make a few observations on the Judge's findings on this issue and the related issue of Mr Leiman's alleged breaches of contract.

161 The definition of "detriment" that we adopted at [68] above entails that any finding by the R&O Committee that Mr Leiman had acted to Noble's detriment had to be premised on a showing of actual commercial detriment or harm to Noble. Applying this interpretation, the Judge was incorrect to conclude

that the R&O Committee's decision was valid on the grounds of Mr Leiman's acts of competition and misuse of Noble's confidential information: see above at [151]; Judgment at [138]–[143]. This is because no actual commercial detriment to Noble resulted from Mr Leiman's acts. In line with this, Mr Alam's letter to Rothschild Trust of 27 March 2012 conveying the grounds of the R&O Committee's decision did not cite any actual commercial detriment, and only stated in vague and general terms that Mr Leiman's acts "[had] been damaging" to Noble and its relationships with its clients, counterparties, advisors, employees and former employees.

162 We also doubt the correctness of the Judge's findings on Mr Leiman's breaches of his non-competition and confidentiality obligations and his duty of fidelity: Judgment at [277]. In relation to Mr Leiman's breach of his non-competition obligation, the Judge relied on his e-mail to Summa Capital of 16 February 2012 (see above at [29]) as evidence that he had engaged in acts of competition: Judgment at [138]. We observe, however, that this e-mail merely indicated that Mr Leiman had met the CEO and partners of BTG Pactual and was arranging to meet Mr Vinokurov of Summa Capital. Mr Leiman's non-competition obligation, as expressly set out in cl 7 of the Employment Agreement read with cl 4 of the Settlement Agreement, provided only that he was not to "directly or indirectly … engage in competition with [NRL], or own any interest in, perform any services for, participate in or [be] connected with" a competitor of NRL (see above at [24] and [25]). We do not think Mr Leiman breached this obligation simply by meeting individuals to pitch his business plans.

163 The Judge also found that Mr Leiman breached his obligation of confidentiality by using information obtained from e-mails between Noble employees about Summa Capital's interest in moving into the commodities

sector to craft his pitch to Summa Capital: Judgment at [162]–[163]. With respect, the Judge failed to consider the scope of Mr Leiman's specific confidentiality obligation under cl 4 of the Advisory Agreement (see above at [27]), which applied only to "confidential information relating to, or to the business of, [NRL] or a related or affiliate company". Having regard to this clause, we disagree that Mr Leiman's use of information relating to *Summa Capital*, as opposed to NRL, amounted to a breach of his confidentiality obligation under cl 4 of the Advisory Agreement.

164 Finally, the Judge found that Mr Leiman owed NRL a duty of fidelity under the Advisory Agreement, which he breached by competing against Noble: Judgment at [147]. With respect, there are two problems with this finding. First, Mr Leiman's employment with NRL ceased on 1 December 2011 by virtue of cl 1 of the Settlement Agreement, and we doubt that he continued to owe a duty of fidelity *as an employee* after that date. While cl 3 of the AIP (see [12] above) provided that the change in Mr Leiman's status from that of an employee to that of an advisor would not be considered a cessation of employment, that was "for [the] purposes of this AIP". In this context, it is clear that pursuant to the Settlement Agreement, Mr Leiman "cease[d] to be so employed [as the CEO of NGL] on 1 December, 2011" (see [19] above). Second, and more significantly, cl 3 of the Advisory Agreement (see above at [27]) expressly delineated the scope of the prohibited competitive activity: Mr Leiman was not to enter into any agreement to provide advisory services relating to commodities supply chain management to another party. This express clause, which was relatively narrow in terms, superseded any broader implied duty of fidelity that related to Mr Leiman's non-competition obligation under the Advisory Agreement: *Smile Inc* ([74] *supra*) at [59]–[61]. We therefore do not think the Judge was correct

to find that there was any implied duty of fidelity on the part of Mr Leiman which he could have breached.

Issue 4: Mr Leiman's other entitlements

165 We turn now to the appellants' contention that the respondents, apart from wrongfully denying Mr Leiman his entitlement to the Shares and the Share Options, also wrongfully denied him other benefits, namely, the 2011 Bonus under cl 3(e) of the Settlement Agreement and the 5,652,421 shares awarded to him under the AIP by way of the 4 May 2011 letter.

The 2011 Bonus under cl 3(e) of the Settlement Agreement

166 The appellants submit that the R&O Committee failed to properly consider Mr Leiman's entitlement to the 2011 Bonus under cl 3(e) of the Settlement Agreement (reproduced above at [21]). The appellants contend that although the bonus was to have been paid in April 2012, the evidence did not show that the Committee considered it before then. In the alternative, any decision not to award the bonus was made arbitrarily or capriciously.

167 The Judge rejected the appellants' claim on this ground, finding that either of the two reasons cited by the respondents, namely, Noble's poor financial performance in 2011 and Mr Leiman's misdeeds, would have stood as a reasonable ground for not awarding Mr Leiman the 2011 Bonus (see [48] above). He accepted the respondents' evidence that the R&O Committee had considered the issue and had determined that no bonus would be awarded for 2011 to all of Noble's top management, and that Mr Leiman was part of this group: Judgment at [256]–[258].

168 Although the appellants are correct in submitting that there is no evidence showing that the R&O Committee discussed Mr Leiman's entitlement to the 2011 Bonus prior to April 2012, the evidence from the R&O Committee members was that a general decision was taken that no bonus would be awarded for 2011 to Noble's top management. The Judge accepted this explanation on the strength of Mr Chan's and Mr Rubin's testimony. Given this finding, coupled with the fact that other members of Noble's top management (namely, Mr Harry Banga, NGL's Executive Vice-Chairman at the time, and Mr Elman) also did not receive bonuses for 2011, we do not see any basis for disturbing the Judge's finding on this issue.

The 5,652,421 shares awarded by way of the 4 May 2011 letter

169 The shares discussed in this section are the 5,652,421 shares that were awarded to Mr Leiman under the AIP by way of the 4 May 2011 letter (see [11(b)] above). We observed above at [94] that these shares were expressly excluded from cl 3(d) of the Settlement Agreement. The Judge found that this exclusion was intentional, given that Mr Leiman and NRL were aware of the existence of these shares when they entered into the Settlement Agreement: Judgment at [220]–[222]. The Judge considered that these shares continued to be regulated instead by the terms of the AIP under which they were granted, and were validly forfeited under cl 5 of the AIP as Mr Leiman "had acted in a way inimical to Noble's interests" by engaging in improper acts of competition during the Restricted Period: Judgment at [225] and [228]–[231].

170 The appellants submit that as Mr Leiman did not act to Noble's detriment, he did not engage in conduct that was "inimical or contrary to or against the interests of [NGL]" for the purposes of cl 5 of the AIP, and remains entitled to the 5,652,421 shares. NRL, on the other hand, contends that the

Settlement Agreement was meant to deal exhaustively with all of Mr Leiman's entitlements, and that Mr Leiman forfeited his right to these shares by entering into the Settlement Agreement. In this regard, it relies on the entire agreement clause in cl 10 of the Settlement Agreement.

171 We first deal with NRL's submission that Mr Leiman lost his entitlement to the 5,652,421 shares by the operation of cl 10 of the Settlement Agreement. With respect, this reliance on cl 10 is misplaced. Clause 10 (reproduced above at [93]) provides that the Settlement Agreement "sets forth the entire agreement of [NRL] and [Mr Leiman] *with respect to the subject matter hereof*" [emphasis added]. As the 5,652,421 shares were expressly excluded from the Settlement Agreement, we do not agree that this agreement "sets forth the entire agreement" of NRL and Mr Leiman where these shares are concerned.

172 Although we considered above at [93] and [103] that the parties entered into the Settlement Agreement with the intention of settling all outstanding issues between them, that view is not inconsistent with a finding that the 5,652,421 shares were omitted from the scope of the Settlement Agreement. As the Judge observed at [220] and [222] of the Judgment, the exclusion of these shares appeared to be intentional. The key piece of evidence in this regard is an e-mail from Ms Leila Konyn ("Ms Konyn"), Noble's Director of Human Resources, to Mr Leiman on 24 October 2011. In response to a specific query by Mr Leiman for all information pertaining to his "options and vested and unvested shares at Noble", Ms Konyn attached statements showing that Mr Leiman was entitled to 17,276,013 shares. She also informed him that she had not included the 5,652,421 shares in the statements because their allotment remained subject to shareholder approval. Mr Alam attested that shareholder approval had to be obtained for the allotment of these shares to comply with the

Singapore Exchange's listing rules. In short, these shares were not included in the list of Mr Leiman's pending benefits and entitlements for an extraneous reason.

173 The parties had Ms Konyn's e-mail of 24 October 2011 in mind when arriving at the precise number of shares to include in the Settlement Agreement. On 31 October 2011, Mr Alam e-mailed Mr Leiman to request an indication of "the exact number of restricted shares" that he was entitled to, for inclusion in cl 3(d) of the Settlement Agreement. Mr Alam followed up with an e-mail on the same day stating that the figure he had was 17,276,013, and asked Mr Leiman to "advise" if he had a different figure. Mr Leiman forwarded Ms Konyn's e-mail of 24 October 2011 to Mr Alam. He later confirmed that the figure of 17,276,013 "seems right", adding that he had sent Mr Alam "the schedule from HR [referring to the statements from Ms Konyn] so we can finalize". Mr Leiman signed the Settlement Agreement on 1 November 2011 with the number of shares in cl 3(d) left blank. The figure of 17,276,013 was inserted into the copy of the Settlement Agreement that Mr Elman countersigned on 2 November 2011, which was sent to Mr Leiman on the same day.

174 The correspondence above shows that the parties were aware, prior to their entry into the Settlement Agreement, that Mr Leiman was entitled to both the 17,276,013 shares referred to in his exchange of e-mails with Mr Alam on 31 October 2011 as well as the 5,652,421 shares whose allotment was *pending shareholder approval*. It appears that the parties excluded the latter group of shares from cl 3(d) because shareholder approval had not been obtained for their allotment. That said, the fact that no mention was made of these shares in the Settlement Agreement is ultimately equivocal. Having contemplated these shares, the parties did not make any provision for them in the Settlement

Agreement, and this could be because they mistakenly thought these shares were already covered by the express terms of the Settlement Agreement, or because they could not arrive at a solution, or because they thought these shares had to be dealt with separately in view of the pendency of shareholder approval of their allotment.

175 Regardless of why the parties excluded the 5,652,421 shares from cl 3(d), nothing in the Settlement Agreement or the context in which it was entered into supports NRL's view that Mr Leiman *forfeited* his right to these shares by entering into the Settlement Agreement. This view is borne out by the parties' correspondence *after* the R&O Committee's decisions of 1 and 27 March 2012 were made. We do not express a definitive view on the admissibility of subsequent conduct for contractual interpretation, which remains to be determined by this court in a future case (*MCH International Pte Ltd* ([60] *supra*) at [20]–[21]). But the correspondence in this case only serves to confirm the view we have already reached, namely, that it was *not* the parties' intention that Mr Leiman's right to the 5,652,421 shares would be forfeited upon the Settlement Agreement being entered into. On 20 April 2012, Rothschild Trust inquired if the R&O Committee's decision of 1 March 2012 extended to these shares. In reply, Mr Alam stated in his letter dated 26 April 2012:

> *The [R&O] Committee has not approved the vesting of the 5,652,421 [NGL] shares* formerly awarded to Mr. Leiman under the Noble Group [AIP] because Mr. Leiman has acted or engaged 'in activity or conduct which is inimical or contrary to or against the interests of the Noble Group'.
>
> This conduct of Mr. Leiman is referred to in my letter of 27 March 2012 to your colleagues in relation to certain share options.
>
> [emphasis added]

In our view, the use of the words "has not approved" in this letter is significant. These words indicate that even after the Settlement Agreement was entered into, Mr Leiman still had rights in the 5,652,421 shares, whose vesting the R&O Committee could either approve or disapprove. This must in turn mean that he did not forfeit his right to these shares when he entered into the Settlement Agreement. It is also pertinent that Mr Alam did not state in his letter that Mr Leiman's right to these shares had been forfeited upon his entry into the Settlement Agreement. If it had been the parties' understanding that that would be a consequence of the Settlement Agreement, it would have been simple enough for Mr Alam to say so in his letter, and to state, on that basis, that Mr Leiman was no longer entitled to these shares, instead of relying on the ground that "Mr. Leiman ha[d] acted or engaged 'in activity or conduct which is inimical or contrary to or against the interests of the Noble Group'".

176 In the light of our view that the 5,652,421 shares were not covered by the Settlement Agreement, it follows that Mr Leiman's entitlement to them continued to be governed by the terms of the AIP. This was the position reached by the Judge at [228] of the Judgment. This is also in fact what is suggested by Mr Alam's letter of 26 April 2012, where he expressly justified the forfeiture of Mr Leiman's entitlement to these shares by reference to the language of the forfeiture clause in cl 5 of the AIP.

177 This leads us to the appellants' submission that any forfeiture of Mr Leiman's right to the 5,652,421 shares by the R&O Committee under cl 5 of the AIP was invalid. Clause 5 of the AIP, as amended by and set out in the 4 May 2011 letter awarding Mr Leiman these shares (see above at [12]), provided that if Mr Leiman "act[ed] or engage[d] in activity or conduct which [was] inimical or contrary to or against the interests of the Noble Group", the shares awarded to him under the AIP would be forfeited. Conduct falling within

this definition included "any other conduct or act reasonably determined by the [R&O] Committee to be injurious, detrimental or prejudicial to the interests of the Noble Group".

178 We repeat our finding at [68] above that the "detriment" assessed by the R&O Committee under cl 5 of the AIP must refer to actual loss, damage or harm to Noble. The same approach ought also to be taken to the terms "injurious" and "prejudicial": some actual injury or prejudice must have been caused to Noble. To the extent that the R&O Committee did make any determination under cl 5(iv) of the AIP, as suggested by Mr Alam's letter of 26 April 2012, the grounds for its determination were those set out in in his earlier memorandum of 27 March 2012 (see above at [151]). In our judgment, on no basis could the Committee's determination under cl 5(iv) of the AIP be sustained as a "reasonabl[e] determin[ation]" of injury, prejudice or detriment to Noble, given that the conduct referred to did not result in any actual detriment or damage to Noble's business interests (see above at [161]). We reach this view in the light of our earlier observations at [162] and [163] above on the supposed breaches by Mr Leiman of the obligations that he was subject to.

179 We also consider the reliance that was purportedly placed on Mr Leiman's hiring of Messrs Carlier and Ozeias to run certain mills and operations of Noble in Brazil in 2006. In our view, still less could the R&O Committee have relied on alleged past misdeeds committed in 2006 to deny Mr Leiman the vesting of shares that were awarded to him as part of an incentive plan pertaining to his work performance in subsequent years: in this case, the 5,652,421 shares were awarded as part of his performance bonus for 2010. This is even more so given that Noble had apparently had some awareness of these matters at a much earlier stage, but had not taken any action at the time (see [31] above). In the circumstances, we do not think the R&O Committee had any valid

basis to deny Mr Leiman his entitlement to the 5,652,421 shares that were awarded to him under the AIP by way of the 4 May 2011 letter, or to refuse to submit the allotment of these shares for shareholder approval. We therefore allow the appellants' appeal in relation to Mr Leiman's entitlement to these shares.

Issue 5: The appellants' economic tort claims

180 We turn to the appellants' final ground of appeal. The appellants submit that the Judge erred in dismissing their claims against the respondents for conspiracy by unlawful means, wrongful inducement of breach of contract and unlawful interference or causing loss by unlawful means. In our judgment, although the Judge ought to have found that the R&O Committee's decision to deny Mr Leiman his entitlements under cll 3(c) and 3(d) of the Settlement Agreement was invalid, we do not think this makes any difference to the outcome where the appellants' economic tort claims are concerned. Having considered the evidence, we see no reason to interfere with the Judge's dismissal of these claims because we are satisfied that the appellants have not adequately proved the elements of the pleaded economic torts, especially in relation to any purported intent of the respondents to cause harm to them. We accordingly uphold the Judge's dismissal of these claims.

Issue 6: The remedies for the appellants

181 For the foregoing reasons, we find that the R&O Committee's decision to disentitle Mr Leiman from the Share Options and the 17,276,013 Shares under cll 3(c) and 3(d) of the Settlement Agreement was invalid and declare this decision to be null and void. We also find that Mr Leiman was not in breach of his contractual non-competition and confidentiality obligations and was not subject to an implied duty of fidelity in relation to the Advisory Agreement, and

grant declaratory relief accordingly. Further, the R&O Committee was not entitled to forfeit Mr Leiman's right to the 5,652,421 shares that were awarded to him under the AIP by way of the 4 May 2011 letter, or to refuse to submit the allotment of these shares for shareholder approval, as the conditions for forfeiture under cl 5 of the AIP had not been met.

182 We have found that the R&O Committee's decision in relation to the Share Options and the 17,276,013 Shares was invalid because the Committee did not comply with the requirements of fairness that were incorporated in cll 3(c) and 3(d) of the Settlement Agreement. Furthermore, the Committee would only have been entitled to deprive Mr Leiman of his right to these Share Options and Shares if he had engaged in conduct that caused actual commercial detriment or harm to Noble, but there did not appear to be any evidence of such detriment or harm having been caused by his conduct. The latter reasoning also applies to the R&O Committee's decision to forfeit Mr Leiman's right to the 5,652,421 shares that were awarded to him under the AIP by way of the 4 May 2011 letter. In these circumstances, we are satisfied that Mr Leiman was wrongfully denied the opportunity to perfect his title to the Share Options, the 17,276,013 Shares and the 5,652,421 shares.

183 We do not consider it appropriate to direct the R&O Committee to reconsider Mr Leiman's entitlements as at March and April 2012. First, the time for any such action has long passed. Second, the parties are agreed that this remedy would be inappropriate because the Committee as it was constituted at the material time no longer exists. NGL, whose Chairman and directors were members of the Committee, is currently subject to winding-up proceedings in Bermuda, the country of its incorporation. In any event, given the animosity between the parties and all that has transpired since April 2012, it is impossible to consider how any proceedings under cll 3(c) and 3(d) of the Settlement

Agreement by the R&O Committee could be fairly carried out even if the Committee could be reconstituted.

184 The appellants have asked instead that judgment be entered for the monetary value of the entitlements that Mr Leiman was wrongly deprived of, quantified on the basis that these entitlements would have been exercised or sold in a timely manner upon their proper vesting. The appellants submit that an order permitting them to exercise the Share Options and sell the 17,276,013 Shares as well as the 5,652,421 shares at this point would have no value in the light of the fall in NGL's share price since 2012. In the circumstances, we order that damages be assessed for the losses sustained by the appellants as a consequence of: (a) the respondents' failure to permit them to perfect their title to the Share Options and the 17,276,013 Shares following the R&O Committee's invalid determination under cll 3(c) and 3(d) of the Settlement Agreement; and (b) the R&O Committee's improper forfeiture of Mr Leiman's right to the 5,652,421 shares.

Conclusion

185 In summary, we allow this appeal in large part, and hold that the R&O Committee's decision under cll 3(c) and 3(d) of the Settlement Agreement was invalid. We order that the Committee's decision be declared null and void, and that there be an assessment of the damages flowing from the respondents' failure to grant the appellants the 17,276,013 Shares and the right to exercise the Share Options. We also reverse the Judge's finding on NRL's counterclaim that Mr Leiman breached his contractual obligations of non-competition and confidentiality as well as an implied duty of fidelity. Further, Mr Leiman is entitled to damages to be assessed for the R&O Committee's improper forfeiture of his entitlement to the 5,652,421 shares that were awarded to him under the

AIP by way of the 4 May 2011 letter. Beyond these issues, we see no basis upon which to interfere with the Judge's decision to dismiss the appellants' other claims.

186 Unless the parties are able to come to an agreement on costs, they are to furnish within three weeks of the date of this judgment written submissions, limited to ten pages each, on the appropriate costs orders that they contend should be made here and below.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

Maniam Andre Francis SC, Sim Mei Ling, Quek Yi Zhi Joel and Jeremy Tan (WongPartnership LLP) for the appellants;
Davinder Singh SC, Jaikanth Shankar, Tan Ruo Yu, Srruthi Ilankathir, Yee Guang Yi, Darren Low and Terence De Silva (Davinder Singh Chambers LLC) (instructed), Pereira Kenneth Jerald and Bay Choon Sing Jeremy (Aldgate Chambers LLC) for the first respondent;
The second respondent absent.