IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 166

Suit No 393 of 2012

Between

(1) RICARDO LEIMAN

(2) ROTHSCHILD TRUST GUERNSEY LIMITED

… Plaintiffs

And

(1) NOBLE RESOURCES LTD

(2) NOBLE GROUP LIMITED

… Defendants

JUDGMENT

[Contract] — [Contractual terms] — [Implied terms]

[Contract] — [Contractual terms] — [Implied terms] — [Discretionary power]

[Contract] — [Privity of contract] — [Common law]

[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]

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v
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26 July 2018 Judgment reserved.

George Wei J:

Introduction

1 At the heart of this action lies a claim by the 1st plaintiff, Mr Ricardo Leiman ("Mr Leiman"), for his entitlements under a contract of employment with the 1st defendant, Noble Resources Ltd ("NRL"), and under which he served in top-level executive positions at the 2nd defendant, Noble Group Limited ("NGL"). The entitlements by and large concern shares and share options in NGL awarded to Mr Leiman and placed into a family trust administered by the 2nd plaintiff, Rothschild Trust Guernsey Limited ("Rothschild Trust"), as trustee.

2 Broadly, Mr Leiman asserts that his entitlements were wrongfully forfeited or withdrawn after his resignation in end-2011. The defendants deny this assertion and claim that they were entitled to forfeit/withdraw the

entitlements on account of various breaches of contract. These breaches basically revolve around the assertion that Mr Leiman was not a "good leaver" and because of non-disclosure of certain information, he was aware of relating to events occurring before and during his years of service.

Facts

Dramatis personae

3 Mr Leiman, a Dutch national, was employed by NRL on 31 March 2006 to serve as the Chief Operating Officer ("COO") of NGL. On 1 January 2010, he became the Chief Executive Officer ("CEO") of NGL.[1] The terms of his employment were contained in an employment agreement dated 6 December 2005 ("the Employment Agreement").[2] In addition, Mr Leiman was appointed as an Executive Director of NGL in April 2009, a position which he retained until 1 December 2011.[3]

4 In short, over the five and half years Mr Leiman was employed at NGL, he served three and a half years as COO followed by two years as CEO. He was also an Executive Director for about two and a half years.

5 NRL and NGL are part of the Noble Group (which I shall generally refer to as "Noble"), a supply chain manager of energy, gas and power products, metals and minerals in over 140 countries. NGL is a Bermuda-incorporated company listed on the Singapore Exchange. NRL is a principal subsidiary of NGL incorporated in Hong Kong.[4]

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1 Plaintiffs' closing submissions ("PCS"), para 6; affidavit of evidence-in-chief ("AEIC") of Mr Leiman, para 2.

2 Agreed bundle vol 1 ("1AB", subsequent volumes denoted "xAB"), p 307 *et seq*; PCS, para 6.

3 AEIC of Mr Leiman, p 2973.

6 Mr Richard Samuel Elman ("Mr Elman") is the founder of NGL and served as its Chairman until he took on the role of Chairman *Emeritus* in 2017.[5] Mr Jeffrey Mark Alam ("Mr Alam") is the Group General Counsel of NGL and a director of NRL.[6]

7 During Mr Leiman's employment, he was given shares and share options in NGL as part of his remuneration, and was paid an annual discretionary bonus. The share options were issued pursuant to rules contained in the Noble Group Share Option Scheme 2004 ("the Share Option Rules"), whereas the shares were issued pursuant to Noble's Annual Incentive Plan (revised 10 September 2008) ("the AIP"). Mr Leiman assigned most of his shares and share options to a trust known as the Adelaide Trust. The stated purpose of the Adelaide Trust is to benefit Mr Leiman's family and to fund charitable ventures.[7] Rothschild Trust is the current trustee of the Adelaide Trust.[8]

8 The award of benefits such as bonuses, shares and share options was determined by NGL's Remuneration and Options Committee ("the R&O Committee"). At the material time, *circa* 2012, the R&O Committee comprised Mr Elman, Mr Edward Walter Rubin ("Mr Rubin") and Mr Robert Chan Tze Leung ("Mr Chan"). Mr Rubin and Mr Chan were independent directors of NGL at the time.[9] I note that Mr Leiman had also served on the R&O Committee prior

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4 Amended statement of claim ("SOC"), paras 1–2.

5 PCS, paras 7 and 10; notes of evidence ("NOE") of 3 August 2017, pp 1–2.

6 AEIC of Mr Alam, para 1; SOC, para 2.

7 AEIC of Mr Koenig, para 2.

8 PCS, paras 9, 11 and 12.

9 PCS, para 10.

to his resignation and would have been familiar and well-acquainted with the R&O Committee's procedures.

9 I further note that whilst Mr Leiman was formally employed by NRL, for all practical purposes, his remuneration and entitlements to shares and share options were determined by the R&O Committee of NGL.

The terms of Mr Leiman's employment contract

10 Mr Leiman's contract with NRL is set out in a letter dated 6 December 2005 on NRL's letterhead and signed by Mr Elman as a director of NRL.[10]

11 The letter states that the agreement "contains the whole agreement" between Mr Leiman and NRL, and that Mr Leiman agreed to comply with Noble's "policies and procedures as issued and/or amended from time to time."

12 The principal terms of the employment contract as relevant to the dispute are, in brief terms, as follows:

(a) *Clause 1: Appointment and Reporting*. This provides that Mr Leiman (as COO) would report to and be subject to the direction of Mr Elman in the latter's capacity as CEO.

(b) *Clause 2: Remuneration*. This provides for an annual salary of US$350,000, which was subsequently increased to US$750,000 with effect from 1 April 2008.[11]

(c) *Clause 3: Annual Performance Review*. This provides that any salary increase, bonus, stock option grant or promotion will "be

[10] AEIC of Mr Leiman, p 139 *et seq*.

[11] AEIC of Mr Leiman, p 144.

determined at the absolute discretion of [NRL]'s management and the frequency of such reviews will be subject to [NRL]'s guidelines."

(d) *Clause 6: Confidential Information*. This provides that Mr Leiman is not to disclose or make accessible to any other person, without the prior written consent of NRL, any confidential information of NRL, and related and affiliated companies. Confidential information is defined to include trade secrets and non-public information concerning financial data, business plans, product and/or services development, client lists, supplier lists, marketing plans and employee lists.

(e) *Clause 7: Non-Competition Requirements*. This clause contains various prohibitions and restraints against engagement in competition. Clause 7 was to apply during the duration of the employment and for a period of six months post-termination. The geographical scope of cl 7 is limited to "the Asia-Pacific and Americas Regions". Among other things, cl 7 prohibits Mr Leiman from competing, whether directly or indirectly, as a director, officer, employee, independent contractor, advisor or otherwise, with the business of NRL or a related or affiliate company which he was involved in or had supervisory responsibility during the 12 months preceding his last day as an employee of NRL. Clause 7 also prohibits soliciting the patronage of any client or customer with whom Mr Leiman had personal contact or dealings on behalf of NRL or a related or affiliate company over the 12 months preceding his last day as an employee. A similar provision applies in respect of prohibiting Mr Leiman from employing or soliciting senior management of NRL or a related or affiliate company.

(f) *Clause 8: Trading Policies*. This clause prohibits trading in shares of Noble without the written consent of Noble's CEO and the Group Legal Counsel.

(g) *Clause 11: Termination*. This provides, *inter alia*, that the agreement could be terminated on six months' notice. It also provides that upon resignation from NRL, Mr Leiman would not be entitled to any further compensation, costs or damages resulting from such termination.

(h) *Clause 12: Governing Law and Jurisdiction*. This provides that the parties agreed for the agreement to be governed by the laws of Hong Kong and to submit to the non-exclusive jurisdiction of the courts of Hong Kong.

Overview of Mr Leiman's employment history

13 Given the broad range and numerous issues raised, it is convenient to set out a brief overview of Mr Leiman's background and his entry into Noble in 2005 before going into a more detailed discussion of the evidence.

14 Mr Leiman's career has mostly been in what might be loosely referred to as commodity trading in the area of agricultural and related products and services. Previous companies he worked for include:[12]

(a) 1987 to 1989: Louis Dreyfus Corporation ("Louis Dreyfus") as an export manager;

(b) 1989 to 1991: Continental Grain Co ("Continental Grain") as a senior trader and import manager;

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12 8AB, p 5926; AEIC of Mr Leiman, paras 2 and 8.

(c) 1991 to late 1999 or early 2000: Eximcoop SA ("Eximcoop") as a senior trader, then General Manager for Europe, and finally international General Manager;

(d) early 2000 to 2002: Mr Leiman worked in the media industry;

(e) 2002 to 2005: Louis Dreyfus as COO for soft commodities;

(f) 2005 to 2009: NRL as COO for NGL; and

(g) 1 January 2010 to 1 December 2011: NRL as CEO of NGL.

15 It was when Mr Leiman joined Louis Dreyfus in 1987 that he first met a Mr Ferdinando Carlier ("Mr Carlier") and a Mr Ozeias Silva de Oliveira ("Mr Ozeias") (collectively, "Messrs Carlier and Ozeias"). At that time, they were senior to Mr Leiman.[13] Shortly after Mr Leiman left Louis Dreyfus for Continental Grain, Messrs Carlier and Ozeias founded Eximcoop together with several Brazilian cooperatives.[14] One year later in 1991, the three were reunited when Mr Leiman joined Eximcoop.

16 In 1998, shortly after the Asian Financial Crisis, Eximcoop ran into financial difficulties. As a result, negotiations commenced with the Itochu Group ("Itochu"), a potential investor from Japan. At or around the same time, serious problems arose in respect of a contract and bill of lading involving Continental Grain. These involved allegations of improper or irregular discharge and delivery of cargo without proper bills of lading and or shipping documents which could expose Eximcoop to an allegation of fraud. Whilst Mr Leiman does not appear to be directly involved in the shipment and bills of lading, it appears he was asked by Eximcoop to assist in resolving the problem.[15]

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13 AEIC of Mr Carlier, para 5; AEIC of Mr Ozeias, para 4.

14 AEIC of Mr Carlier, para 6; 8AB, p 5942.

17 On 2 February 1999, Itochu purchased 51% of the shares in Eximcoop.[16] In October 1999, Eximcoop was declared insolvent and Mr Ozeias was dismissed from Eximcoop. This was followed by the dismissal of Mr Carlier in December 1999 for mismanagement [17] I pause to note that Mr Carlier denies mismanagement and brought proceedings in Brazil against Eximcoop for wrongful dismissal.[18]

18 After their departures from Eximcoop, Messrs Carlier and Ozeias incorporated Agricole – Agricultura, Comercio, Logistica e Exportacao Ltda ("Agricole"), a grain trading company in Brazil.[19] Agricole did work relating to the purchase and sale of soybeans and soymeal for a company called Alliance Grain Inc. Agricole's contract with Alliance Grain Inc was subsequently terminated and its business was transferred to Conagra, another Brazilian company, which was run at the time by a Mr Thomas Daetwyler ("Mr Daetwyler") and a Mr Jose Kfuri ("Mr Kfuri"). Subsequently, Mr Daetwyler and Mr Kfuri joined Noble's grain business in Brazil as its managing director and trader respectively.[20]

19 In brief, what followed were protracted legal proceedings between Eximcoop and Messrs Carlier and Ozeias. Legal issues also arose in respect of Agricole. On top of this, a legal dispute arose between Itochu and Eximcoop in connection with the purchase of Eximcoop's shares. Indeed, it is apparent that various related legal proceedings ran from 2000 all the way to around 2006 and

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15 8AB, pp 5942–5943, 5949 and 5991–5992.

16 8AB, p 5942.

17 10AB, p 7522; 8AB, p 5944.

18 AEIC of Mr Carlier, para 11.

19 8AB, p 5950.

20 AEIC of Mr Carlier, para 13.

beyond, including investigations by the Brazilian tax authorities for tax offences.[21]

20 The significance of the difficulties at Eximcoop, the Itochu litigation, the tax investigation and so on will be examined in more detail later. The general point is that the period from 1997 to 2000 was clearly difficult for Messrs Carlier and Ozeias. Not only had Eximcoop run into financial problems, there were problems with the Continental Grain dispute, the Itochu litigation and the Brazilian tax authorities' investigations. Whilst Mr Leiman was included in an initial complaint for tax offences he was never convicted or even charged with an offence. On the other hand, Mr Carlier was indicted on 23 June 2003 and convicted on 25 June 2007. Mr Carlier's appeal against his conviction was eventually dismissed by the Brazilian Federal Court in January 2010.[22]

21 Between 2000 and 2002, Mr Leiman was working outside of the commodities trading industry. His evidence is that he did not have much contact with Messrs Carlier and Ozeias during this time. In 2002, Mr Leiman made a successful return to the commodities trading industry as he was appointed COO of Louis Dreyfus. His evidence is that between 2002 and the end of 2005, whilst he remained in touch with Messrs Carlier and Ozeias, there was little direct contact and he was unaware of the details of the unresolved legal problems regarding Eximcoop, Itochu and the tax investigations. I pause to comment that whilst Mr Leiman tried to play down the closeness of his relationship with Messrs Carlier and Ozeias, I have no doubt that they were good friends.[23]

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21 8AB, pp 5946–5947, 5948, 5951–5953 and 6018

22 8AB, pp 6017–6018; 10AB, p 7409.

23 See DCS, paras 4–8.

22 These were the prevailing circumstances at the time when Mr Leiman joined NRL to serve as COO of NGL on 6 December 2005. As will be seen (at [180] below), at or around the time Mr Leiman joined NRL, he facilitated the recruitment of Messrs Carlier and Ozeias into Noble Brasil SA ("Noble Brazil"). Leaving aside the details for the moment (many of which are disputed), Messrs Carlier and Ozeias were brought in by Mr Leiman to assist on a specific mission Mr Leiman was undertaking for Noble, namely, the operation of Noble's newly-acquired sugar mill in Brazil and sugar commodity trading. The question whether Mr Leiman concealed his relationship with Messrs Carlier and Ozeias and their legal problems and proceedings (summarised above) is a matter in dispute, and relates to the defendants' assertion that Mr Leiman was in breach of his duties to Noble by failing to make proper disclosures. The defendants also complain that Mr Leiman recruited his friends and former colleagues into Noble Brazil to manage and run the sugar mill business when they did not have the necessary experience in sugar mill operations. On the other hand, there is also a dispute as to whether Noble conducted a proper due diligence check on Mr Leiman and Messrs Carlier and Ozeias, and whether it had sufficient information to at least be put on notice as to Messrs Carlier and Ozeias's backgrounds and legal problems. I will return to address these factual disputes later.

Mr Leiman's resignation from NRL

23 Although the parties dispute the precise circumstances that led to Mr Leiman's departure from NRL, it suffices to say that in or about mid-2011, there were disagreements between Mr Leiman and Mr Elman which resulted in the former's resignation at the end of October 2011.[24] In brief, according to Mr

[24] PCS, para 15; NOE of 7 July 2017, pp 43–44; AEIC of Mr Leiman, para 19; AEIC of Mr Elman, para 43.

Leiman, he decided to leave NRL because he was unhappy with Mr Elman's interference with the performance of his duties as CEO. Mr Leiman also alleged that he was "increasingly concerned with Noble's intention to adopt questionable accounting practices and how [Mr Elman] was prepared to compromise on proper corporate governance in dealing with Noble's disclosure obligations."[25]

24 On the other hand, according to the defendants and Mr Elman, they had "serious concerns about [Mr Leiman's] integrity and suitability to continue as CEO of Noble". They allege that Mr Leiman had: (a) given instructions to fire the entire board of a Noble subsidiary, Gloucester Coal Ltd, but later irreverently and flatly denied doing so; (b) represented to other senior staff of Noble that he had the approval of the board to conduct certain trades in sugar and cadmium when he did not;[26] and (c) failed to observe Noble's internal protocols before approving amendments that were made to the agreement concerning the purchase of two sugar mills in 2011.[27]

25 In any case, plans for Mr Leiman's exit from Noble started to take shape around late 2011. After Mr Leiman informed Mr Elman of his intention to resign, there were discussions on the arrangements for his departure, including the matter of Mr Leiman's entitlements. According to Mr Leiman, Mr Elman assured him that his entitlements would be honoured, and this was followed by a similar assurance from Mr Rubin around 10 to 11 November 2011.[28] The entitlements concern the shares and share options that had been awarded to Mr Leiman under the Share Option Scheme and the AIP over the past years and

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25 AEIC of Mr Leiman, para 21.

26 AEIC of Mr Elman, paras 41–56.

27 AEIC of Mr Alam, para 17.

28 AEIC of Mr Leiman, para 23; SOC, paras 13–14.

which (by and large) he had assigned/transferred to the Adelaide Trust. As will be seen, the number of shares and share options is substantial. The defendants do not agree that any such assurances or representations were provided or made to Mr Leiman.

26 What is not in dispute is that Mr Leiman and Mr Alam negotiated and exchanged drafts of a settlement agreement ("the Settlement Agreement") and an advisory agreement ("the Advisory Agreement") over e-mail.[29] On 9 November 2011, Mr Leiman and NRL entered into the Settlement Agreement and the Advisory Agreement, which were to take effect on 1 December 2011.[30]

The Settlement Agreement

27 The Settlement Agreement contains the terms of Mr Leiman's resignation from NRL and his severance benefits. Its preamble specifically states that NRL and Mr Leiman agreed that the employment would cease on 1 December 2011 (the effective date). Leaving aside for the moment Mr Leiman's severance payments and benefits, some of the key provisions in the Settlement Agreement are, in brief, as follows:[31]

(a) As of the effective date, Mr Leiman resigned from all his positions as an officer or board member of any subsidiaries or affiliates of Noble.

(b) Mr Leiman was not required to report for work at Noble's headquarters after the effective date.

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29 3AB, p 2256 *et seq*; p 2336.

30 AEIC of Mr Leiman, pp 276–282.

31 4AB, p 2340 *et seq*.

(c) NRL would continue to pay Mr Leiman his base salary through the effective date and for six months thereafter as "notice period payments".

(d) The duration of the non-competition clause of the Employment Agreement was amended such that Mr Leiman would be restricted from competing with NRL as long as the Advisory Agreement remained in force, or for nine months from the effective date, whichever is longer.

(e) The Settlement Agreement set forth the entire agreement of NRL and Mr Leiman and superseded the Employment Agreement in its entirety except as specifically provided.

(f) The governing law was Singapore law and both parties agreed to submit to the non-exclusive jurisdiction of the Singapore courts.

28 Clauses 3(c) to (e) of the Settlement Agreement relate to his shareholding and his bonus for 2011 ("the 2011 Bonus"), and they read as follows:[32]

> (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] 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*

[32] 4AB, pp 2340–2341.

> *detriment of Noble* and the [R&O Committee] 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.
>
> [emphasis added]

The Advisory Agreement

29 Pursuant to the Advisory Agreement, Mr Leiman became an advisor of NRL and was to be paid a retainer fee of US$350,000 per year for his advisory services relating to commodities supply chain management. The preamble to the Advisory Agreement states that Mr Leiman "wishes to perform advisory services for [NRL]" and makes express reference to NRL's desire to benefit from Mr Leiman's extensive experience in commodities supply chain management.[33]

30 I observe that even though Noble was parting company with Mr Leiman, Mr Elman and NRL evidently still valued Mr Leiman's knowledge, experience and ability in commodities supply chain management. I note the annual retainer fee was the same as the salary provided for in Mr Leiman's original employment contract of 2005 (see [12(b)] above). Furthermore, under the Settlement Agreement, Mr Leiman was to be paid for six months at the same rate as he was under the Employment Agreement (see [27(c)] above).

31 The term of the Advisory Agreement was set at a minimum of nine months, renewable on mutual agreement. The Advisory Agreement contained another non-competition clause under which Mr Leiman represented that he did "not have any agreement to provide [advisory services] to any other party, firm,

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[33] 4AB, p 2344 *et seq*.

or company and [would] not enter into any such agreement during the term of [the Advisory Agreement]."

32 NGL publicly announced Mr Leiman's resignation on 9 November 2011.[34] As of 1 December 2011, Mr Leiman ceased to be CEO of NGL and thereafter was no longer involved in meetings of the R&O Committee.[35]

The request to exercise the share options

33 On 21 December 2011, Mr Peter Stephan Koenig ("Mr Koenig"), the Senior Trust Manager of Rothschild Trust (Switzerland) Ltd (which is a company related to Rothschild Trust), informed NGL of Mr Leiman's intention to use a cashless facility to exercise his share options in NGL. Mr Alam subsequently replied by e-mail stating that as a significant employee shareholder, Mr Leiman should be instructed not to sell his shares or use the cashless facility. Further e-mail correspondence between Mr Alam, Mr Koenig and Mr Leiman ensued, in which Mr Alam continued to deny Rothschild Trust's attempt to exercise the share options. Finally, in response to a query from Mr Leiman regarding the basis and duration of the trading ban, Mr Alam stated in an e-mail on 1 February 2012 that the trading ban would be lifted on 28 February 2012, and that Mr Leiman would be given approval to sell up to five million shares at that time.[36]

The engagement of the PI

34 In the meantime, unbeknownst to Mr Leiman, Noble had hired a private investigator ("the PI") to keep watch on his activities, in order to find out

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34 AEIC of Mr Leiman, para 8 and p 312; 4AB, pp 2338 and 2348.

35 AEIC of Mr Leiman, paras 2 and 8.

36 AEIC of Mr Leiman, paras 47–49 and 51–52; RL-70, RL-73, RL-74 and RL-75.

whether Mr Leiman was attempting to set up a business that would compete with Noble.[37] The PI's reports to Noble revealed that Mr Leiman met up with a number of current and former Noble employees between late 2011 and early 2012, including Mr Elliott Spitz ("Mr Spitz") who was an advisor to Noble at the time, and Mr Kenneth Courtis ("Mr Courtis") who was a former director of NGL.[38]

35 The PI also found e-mail printouts in Mr Leiman's garbage bin outside his home in England. These e-mails indicated that Mr Leiman was in discussions with Mr Alexander Vinokurov ("Mr Vinokurov"), the President and CEO of a company named Summa Capital. Summa Capital is part of the Summa Group, which was one of Noble's business and strategic partners. In an e-mail from Mr Leiman dated 16 February 2012 titled "BTG", he 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. The e-mail added:[39]

> They [BTG Pactual] have a strong presence in Brazil in all aspects of finance,as well ownership of some agri firms(Argentina, Brazil, etc) and a power platform there. They are expanding the franchise quickly into Lat Am, having now a foothold in Chile, etc
>
> They really like the project and the business plan, and are ready to move quickly… They have been trying to get into commodities for 10 years but never found the right avenue. They think this is the right opportunity for them.
>
> They would like to do the project all by themselves, but I am convincing them that to have a large strategic as you and perhaps 2 small ones would accelerate and strengthen the platform to build a truly global firm.
>
> BTG wish to move fast, and I spoke about your firm as a great potential partner to build this into the new Glencore…

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37 AEIC of Mr Alam, paras 94–96.

38 AEIC of Mr Elman, para 98.

39 5AB, p 3443; AEIC of Mr Alam, paras 119–122.

I note that Noble places much emphasis on the part of the e-mail where Mr Leiman mentions the possibility of building BTG Pactual "into the new Glencore". Glencore plc ("Glencore") is said to be one of the largest commodities trading companies in the world.[40]

The engagement of Wolfe Associates (2012)

36 In early February 2012, Mr Alam, on behalf of Noble, engaged Wolfe Associates to conduct an investigation into Mr Leiman. Wolfe Associates is a boutique consulting firm which is helmed by Mr Barry Wolfe ("Mr Wolfe") and specialises in, among other things, uncovering corporate crime through investigative work.[41]

37 This was not the first time that Noble had engaged Wolfe Associates. Previously in 2008, Wolfe Associates had prepared a confidential memorandum ("the 2008 Wolfe Memo") for Noble in relation to certain investigations it had conducted in Brazil which I will discuss later.[42] For now, it is sufficient to note that the 2008 Wolfe Memo was prepared shortly after Mr Leiman was employed by NRL. It concerned the relationship between Mr Leiman and Messrs Carlier and Ozeias and the possibility of impropriety in respect of certain matters at or concerning Continental Grain and Eximcoop.[43] Whilst the 2008 Wolfe Memo raised some red flags, it does not appear that any action was taken by NRL at the time the memorandum was produced.

38 The engagement of Wolfe Associates in 2012 was for the purpose of conducting a further enquiry into certain matters contained in the 2008 Wolfe

40 AEIC of Mr Elman, para 86.

41 AEIC of Mr Wolfe, paras 6, 7 and 9.

42 AEIC of Mr Alam, para 100.

43 1AB, pp 631–633.

Memo concerning Mr Leiman's relationship and dealings with Messrs Carlier and Ozeias. It is apparent that the ultimate purpose of the further investigation into these matters was to ascertain whether there were any breaches of duty owed to NRL by Mr Leiman in respect of these matters.[44]

39 Wolfe Associates submitted a preliminary report to Mr Alam on 23 February 2012 and an updated draft on 26 March 2012. The report continued to be amended until the final version was later submitted in April 2014.[45] I will generally refer to this report along with its draft versions as "the 2012 Wolfe Report". It is a lengthy report. It will suffice to summarise some of the key points here:

(a) The 2012 Wolfe Report mentions at the outset that Wolfe Associates was "instructed to investigate whether there exists evidence that [Mr Leiman] acted to the detriment of Noble and/or in breach of his fiduciary duty, specifically in relation to the employment of [Messrs Carlier and Ozeias] by Noble and the relationship between [Mr Leiman], on the one hand, and [Messrs Carlier and Ozeias], on the other hand, while employed by Noble."[46]

(b) In a nutshell, the 2012 Wolfe Report states that Messrs Carlier and Ozeias had fraudulently mismanaged Eximcoop and fraudulently misrepresented its financial situation to Itochu so as to induce it to acquire Eximcoop in 1998, and that Mr Leiman had knowingly participated in these schemes. Messrs Carlier and Ozeias were also involved in a separate case of fraud, conspiracy and racketeering arising

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44 8AB, p 5941.

45 AEIC of Mr Wolfe, paras 11–15.

46 8AB, p 5941.

from their business in Agricole. The findings of the 2012 Wolfe Report were based on the Brazilian court files for the numerous legal proceedings that arose out of the Eximcoop and Agricole affairs.[47] Further, a criminal complaint was made to the Brazilian prosecution in 2000 requesting investigation on a number of persons including Mr Leiman and Messrs Carlier and Ozeias for tax evasion and money laundering. Mr Carlier was formally indicted in 2003 for not declaring funds he had received abroad, and was later convicted in 2007.[48]

(c) The 2012 Wolfe Report noted that despite Mr Leiman's knowledge of these matters – and in respect of the Eximcoop matters, his *participation* – he instructed Noble's hiring of Messrs Carlier and Ozeias and made them responsible for running Noble's newly acquired sugar mill notwithstanding their lack of knowledge and experience in the field. The report found that Mr Leiman had made misrepresentations to Mr Elman to the effect that Messrs Carlier and Ozeias were experienced, knowledgeable, competent and trustworthy, and that the allegations made by Itochu against them were false, just so that they could be hired by Noble to run the sugar mill. The matters surrounding the subsequent "management failures" of this sugar mill and the considerable losses it caused to Noble were mentioned in the 2008 Wolfe Memo, as noted at [37] above.[49]

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47 8AB, pp 5942, 5944, 5950 and 5953.

48 8AB, pp 5946 and 6017–6018.

49 8AB, pp 5954–5955.

The decision by the R&O Committee to refuse the request to exercise the share options and to sell the shares

40 On 28 February 2012, the date on which Mr Leiman expected the trading ban on his shares to be lifted according to Mr Alam's earlier representations (see [33] above), Mr Alam instead sent Mr Leiman an e-mail stating that Mr Leiman was not entitled to use the cashless facility to exercise and sell his share options.[50] The next day, Mr Koenig sent NGL an e-mail stating that Rothschild Trust would proceed with the exercise of five million share options *without* using the cashless facility, and transfer the price of $3.4m to NGL accordingly.

41 Shortly afterwards on that same day, Mr Alam e-mailed the R&O Committee stating that NGL had received Mr Leiman's notice to exercise his five million share options. Apart from the notice, Mr Alam's e-mail also enclosed several documents which he described as "rather disturbing information and documentation" which Mr Elman had asked him to share with the R&O Committee, namely:[51]

(a) the existing draft of the 2012 Wolfe Report, which Mr Alam's e-mail described as "a report from Brazil containing information that [Mr Leiman] introduced inexperienced and unsuitable management into [Noble's] top sugar mills' positions because he was in some murky way beholden to them, and perhaps even in collusion with them, and he did not disclose to [Noble] that [they] had criminal convictions and had been sued in the same case as himself by a former employer"; and

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50 AEIC of Mr Leiman, p 450.

51 5AB, p 3569 *et seq*.

(b) copies of Mr Leiman's e-mails with Summa Capital which the PI had retrieved from Mr Leiman's garbage, which Mr Alam's e-mail described as "concern[ing] [Mr Leiman's] current activities in building a new 'Glencore' (as he calls it); clearly a business to compete with Noble".

42 The R&O Committee convened on 1 March 2012. Committee members Mr Elman, Mr Rubin and Mr Chan were all present, as well as Mr Alam and Noble's Director of Human Resources, Ms Leila Konyn ("Ms Konyn"), who were invited to attend. The existing draft of the 2012 Wolfe Report and copies of Mr Leiman's e-mails with Summa Capital were tabled before the R&O Committee. The R&O Committee unanimously resolved to refuse to approve Mr Leiman's/Rothschild Trust's exercise of the share options.[52]

43 Following the meeting, Mr Alam proceeded to convey the decision of the R&O Committee to Mr Koenig via e-mail.[53] Representatives of Rothschild Trust replied by letter on 7 March 2012, stating that the five million share options had vested and there were no grounds upon which the R&O Committee could refuse the request to exercise the share options. The letter requested that the R&O Committee furnish Rothschild Trust with written grounds for its refusal.

44 On 12 March 2012, Mr Alam e-mailed Mr Koenig to inform him that the R&O Committee would reconvene to review its decision.[54] In the interim, Rothschild Trust was given the green light to sell the remaining 900,589 NGL shares held in the Adelaide Trust.[55]

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52 5AB, p 3582.

53 AEIC of Mr Leiman, p 464.

54 AEIC of Mr Leiman, pp 468–469.

45 The R&O Committee affirmed its decision on 27 March 2012.[56] In a letter to Rothschild Trust, Mr Alam explained that the right to exercise the share options (which was conferred in the Settlement Agreement) was conditional on Mr Leiman not "acting in any way to the detriment of Noble prior to exercise", and that the R&O Committee considered that this condition had not been satisfied. Mr Alam's letter also referred to the following:

(a) Mr Leiman's actions in approaching clients, counterparties, advisors and Noble employees and former employees with a view to setting up a competitor to Noble; and

(b) Without naming Messrs Carlier and Ozeias specifically, that Mr Leiman had appointed certain persons to run Noble's sugar mills from 2006 despite their participation in "fraudulent conduct at a previous employer" and lack of expertise in the sugar and ethanol business.[57]

Entitlements in dispute and the events following the R&O Committee's decision

46 On 3 April 2012, Mr Koenig e-mailed Mr Alam requesting a status update regarding 11,098,782 NGL shares and 7,727,272 share options which were held in the Adelaide Trust and which had recently vested on 31 March 2012 and 2 April 2012 respectively.[58] Mr Alam replied by way of a letter dated 10 April 2012 stating that the vesting of these shares and share options were subject to the same conditions as the exercise of the other five million share options, thus Mr Leiman was not entitled to them in view of the fact that he had

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55 5AB, pp 3654–3657.

56 6AB, pp 3924–3925.

57 AEIC of Mr Leiman, pp 483–484.

58 6AB, p 4007.

acted to the detriment of Noble.[59] In other words, the R&O Committee's decision was to cover these newly-vested shares and share options as well. On 26 April 2012, Mr Alam sent a letter to Rothschild Trust further clarifying that the R&O Committee's decision also applied to another lot of 5,652,421 shares that had previously been awarded to Mr Leiman.[60]

47 To summarise, the NGL share options that are the subject of this action ("the Share Options") are set out in the following table. All of these options are held in the Adelaide Trust.

Number of share options	**Date of grant**	**Date on which share options 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

48 The NGL shares that are the subject of this action ("the Shares") are as follows:[61]

59 AEIC of Mr Leiman, p 497.

60 6AB, p 4067.

61 SOC, para 8; PCS, para 74.

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
1,413,105	4 May 2011	1 April 2013
4,239,316		1 April 2014

Out of these shares, only the shares awarded on 4 May 2011 (totalling 5,652,421 shares) are held by Mr Leiman himself, while the remaining shares are held in the Adelaide Trust.

49 In response to an earlier enquiry from Mr Leiman about the payment of the 2011 Bonus, Mr Alam e-mailed Mr Leiman on 3 May 2012 stating that the R&O Committee had decided that no discretionary bonus was to be awarded to Mr Leiman for 2011. Mr Leiman responded on 8 May 2012 asking Mr Alam to check with Mr Elman, as they "had an understanding that [Mr Leiman] would be receiving such a bonus".[62] Mr Leiman was ultimately not given the 2011 Bonus.

50 The nine-month term provided in the Advisory Agreement expired on 1 August 2012. Following that, Mr Leiman became a consultant at a Brazilian investment bank, BTG Pactual, in October 2012, and joined BTG Pactual as a partner in March 2013.[63]

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62 AEIC of Mr Leiman, pp 506–507.

63 AEIC of Mr Leiman, paras 99, 157 and 158.

Commencement of the present action

51 Mr Leiman commenced the present action against NRL on 11 May 2012, and Rothschild Trust and NGL were later added as the 2nd plaintiff and the 2nd defendant respectively.[64] The plaintiffs seek the following relief:[65]

(a) a declaration that the R&O Committee's decisions pertaining to Mr Leiman's benefits are invalid, and consequent thereto, that:

(i) the plaintiffs are entitled to exercise the Share Options and/or sell the Shares;

(ii) the plaintiffs are entitled to be paid the dividends accruing from the Shares; and

(iii) Mr Leiman is entitled to be considered for and be paid the 2011 Bonus;

(b) a declaration that NRL is in breach of the Settlement Agreement, and consequent thereto, for an order that the defendants shall forthwith take all necessary action to remedy such breaches; and

(c) further or in the alternative, damages:

(i) against both defendants, for conspiracy;

(ii) against NGL, for inducing NRL's breach of contract and/or unlawfully interfering with NRL's performance of the Settlement Agreement; and

(iii) against NGL, for causing loss to the Adelaide Trust by unlawful means.

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64 SOC, generally.

65 SOC, pp 31–32.

52 NRL counterclaims the following relief:[66]

(a) an account and repayment by Mr Leiman of all amounts that he received from NRL under the Settlement Agreement and the Advisory Agreement; and

(b) further or in the alternative, damages for Mr Leiman's breaches of fiduciary and contractual duties.

53 Although the defendants initially pleaded that the Settlement Agreement and the Advisory Agreement are void for fraudulent misrepresentation and/or mistake, they are no longer pursuing this plea.[67] The counterclaim also includes other prayers, namely:[68]

(a) a declaration that the plaintiffs are not entitled to the Share Options, the Shares and the dividends;

(b) an account and repayment of all profits the plaintiffs made from the sale of NGL shares Mr Leiman had been given; and

(c) an account and repayment of all salary, bonus and other payments he received from NRL from the date of his breaches of fiduciary and contractual duties.

However, the defendants state in their closing submissions that they are no longer pursuing these prayers; they only seek the relief listed at [52] above.[69]

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66 Amended defence and counterclaim ("DCC"), p 51 and paras 25.2 and 26.

67 Defendants' closing submissions ("DCS"), para 46; PCS, paras 82–83.

68 DCC, paras 25.2 and 26.

69 DCS, para 399.

54 I heard the trial over 18 days in July and August 2017. The plaintiffs called five witnesses, namely, Mr Leiman, Mr Koenig, Mr Courtis, Mr Carlier and Mr Ozeias. The defendants called six witnesses, namely, Mr Elman, Mr Rubin, Mr Chan, Mr Alam, Mr Wolfe and the PI, Mr Russell Bradley. I simply note for now that much was said by the defendants about the veracity of the testimony given by Mr Leiman and the other witnesses for the plaintiffs, and I will go into my findings regarding the witnesses' evidence in greater detail below when discussing the relevant issues in which these points arise.

The plaintiffs' case

Failure to reach a final decision

55 The plaintiffs' case is advanced on several fronts. As a start, they take the position that the decisions of the R&O Committee relating to Mr Leiman's entitlement to his benefits did not amount to a *final determination* under the Settlement Agreement as they were expressed to have been made "pending … investigations." For this reason, the plaintiffs submit that the Court is entitled to decide whether Mr Leiman had in fact acted to Noble's detriment.[70]

R&O Committee's decisions invalid for being arbitrary and in bad faith

56 The plaintiffs further submit the R&O Committee's decisions are in any case invalid as they were made arbitrarily and in bad faith. They argue that the R&O Committee was not entitled to rely on past misconduct to establish that Mr Leiman had acted to Noble's detriment for the purposes of cll 3(c) and (d) of the Settlement Agreement, nor was it the parties' intention for the Settlement Agreement to cover conduct relating to competition that would not amount to a breach of the express non-competition clauses. Further, they contend that the

[70] PCS, paras 82–87.

defendants have not shown what detriment they suffered as a result of Mr Leiman's alleged acts. The R&O Committee's decisions are therefore invalid according to the plaintiffs.[71]

Failure to consider the 2011 Bonus

57 As for the 2011 Bonus, the plaintiffs argue that this issue had not even been considered by the R&O Committee. In short, the failure by the R&O committee to consider Mr Leiman for the 2011 Bonus was a breach of the defendants' obligations in and of itself.[72]

Scope of the Settlement Agreement

58 According to the plaintiffs, even though the Settlement Agreement only expressly mentioned 17,276,013 of the Shares awarded to Mr Leiman, the true intention was for the Settlement Agreement to cover all of the Shares that had been awarded to Mr Leiman, which included the 5,652,421 shares awarded on 4 May 2011 and which were still held by Mr Leiman (and not yet transferred to the Adelaide Trust). On this basis, the total number of shares that the Settlement Agreement was actually intended to cover was 22,928,434.[73]

59 In the alternative, they argue that Mr Leiman is entitled to the remaining 5,652,421 of the Shares (plus the accruing dividends) under the terms of the AIP.[74]

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71 PCS, paras 87–90 and 173.

72 PCS, paras 87–90 and 173.

73 PCS, para 109.

74 PCS, paras 119–122.

60 The plaintiffs further contend that NRL is not entitled under cl 3(c) of the Settlement Agreement (*ie*, on the ground that Mr Leiman had acted to the detriment of Noble) to forfeit 37,090,910 of the Share Options which had already vested prior to the R&O Committee's decisions, as this would amount to a penalty under the contract.[75]

Conspiracy and economic torts

61 Finally, the plaintiffs advance claims based on the economic torts of conspiracy, wrongful inducement of breach of contract, and unlawful interference/causing loss by unlawful means. The heart of their case is that the defendants took active steps to procure an indefensible decision by the R&O Committee to deprive the plaintiffs of the Shares and Share Options.[76]

The defendants' case

Arguments in defence

62 In response, the defendants first argue that the plaintiffs have no cause of action for the following reasons: (a) first, because Rothschild Trust is not a party to the Settlement Agreement, and Mr Leiman had already assigned his Shares and Share Options to Rothschild Trust; (b) second, because the plaintiffs have not pleaded that the R&O Committee is an agent of either NRL or NGL; and (c) third, because there is no basis upon which the R&O Committee's decisions may be challenged.[77]

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75 PCS, paras 25(e) and 86.

76 PCS, para 91.

77 DCS, paras 258–281 and 393–398; defendants' reply submissions ("DRS"), paras 293–294.

63 Moreover, the defendants argue that Mr Leiman did in fact breach his ongoing non-compete and confidentiality obligations, as well as his fiduciary and contractual duties by soliciting Noble employees, competing with Noble and hiring Messrs Carlier and Ozeias to run Noble's sugar mill.[78] The R&O Committee's decisions were therefore not made arbitrarily or in bad faith, even if they could be challenged.

64 The defendants' position with regard to the alleged conspiracy, unlawful inducement of breach of contract, unlawful interference and loss by unlawful means is that these claims are plainly unsustainable. The defendants contend that these pleaded claims are devoid of particulars, were not put to the witnesses and lack any evidential or logical basis.[79]

Arguments in counterclaim

65 Finally, with regard to the counterclaim for an account and repayment of all sums and benefits received by Mr Leiman under the Advisory Agreement and the Settlement Agreement, the defendants' case is that Mr Leiman breached the implied condition and/or warranty in these agreements that he had complied with his duties under the Employment Agreement.

66 To this end, the defendants again rely on Mr Leiman's alleged acts in having wrongfully solicited Noble employees, misused Noble's confidential information and engaged in competition with Noble. They further argue that Mr Leiman breached his fiduciary duty to act in good faith and in the best interests of Noble by hiring Messrs Carlier and Ozeias.[80] The plaintiffs deny all of these breaches.[81]

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78 DCS, pp 2–3 and para 143.

79 DCS, pp 4–5 and paras 365–371.

Issues to be determined

67 Given the considerable number of issues which have been raised, it will be convenient to approach them by segmenting them into groups.

68 The first consists of the threshold questions raised in light of the defendants' arguments which are set out at [62] above:

(a) Do the plaintiffs have the requisite *locus standi* to commence this action, in view of the fact that Rothschild Trust is not a party to the Settlement Agreement or the Advisory Agreement, and that Mr Leiman had already assigned his Shares and Share Options to Rothschild Trust?

(b) Do the plaintiffs have a valid cause of action in view of the plaintiffs' omission to plead that the R&O Committee is an agent of either NRL or NGL?

69 The second issue stands on its own: do the decisions of the R&O Committee amount to a final determination under the Settlement Agreement?

70 The third set of issues concerns whether the R&O Committee's decisions are invalid, and on what basis such a finding might be made. This involves a large number of sub-issues including the interpretation of the relevant contractual terms in the Settlement Agreement, as well as an examination of the underlying findings of the R&O Committee that Mr Leiman had acted to Noble's detriment within the meaning of cll 3(c) and (d) of the Settlement Agreement by reference to his alleged acts of solicitation, competition, misuse

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[80] DCS, paras 402–403.

[81] PCS, pp 242–249 generally.

of confidential information and other breaches of fiduciary and contractual duties.

71 The next question flows from the previous set of issues: is NRL entitled under cl 3(c) of the Settlement Agreement (*ie*, on the ground that Mr Leiman had acted to the detriment of Noble) to forfeit the 37,090,910 of the Share Options which had already vested prior to the R&O Committee's decisions, or does this amount to a contractual penalty?

72 The fifth group of issues concerns the remaining 5,652,421 of the Shares which were not expressly mentioned in the Settlement Agreement.

(a) Are these 5,652,421 shares covered by the Settlement Agreement, such that they should be treated in the same way as the rest of the Shares which were expressly mentioned?

(b) If not, is Mr Leiman entitled to these 5,652,421 shares under the terms of the AIP?

73 The sixth issue relates to the question of whether Mr Leiman is entitled to the 2011 Bonus or to bring a claim for the alleged failure by the R&O Committee to even consider him for a bonus in 2011.

74 The seventh issue relates to whether the plaintiffs' claims in conspiracy, wrongful inducement of breach of contract and unlawful interference are sustainable and made out in fact and in law.

75 The last group of issues concerns the defendants' counterclaim. These questions must be considered while keeping in mind the Court's findings in

relation to the earlier issues (notably, Mr Leiman's alleged breaches of contractual and fiduciary duties).

(a) Was there an implied condition or warranty in the Advisory Agreement and the Settlement Agreement that Mr Leiman had to have complied with his duties under the Employment Agreement?

(b) If so, was this implied condition or warranty satisfied by Mr Leiman?

Preliminary issues

76 The defendants raise two preliminary objections. First, they contend that Mr Leiman does not have the requisite standing to bring this action, because he assigned the Shares and the Share Options to Rothschild Trust. Rothschild Trust is not, however, a party to the Settlement Agreement or the Advisory Agreement.[82] Second, they contend that the plaintiffs have no cause of action against either of the defendants, because the thrust of the plaintiffs' complaint is that they have suffered loss on account of the R&O Committee's decisions; yet, the plaintiffs never pleaded that the R&O Committee was acting as an agent of either defendant.

Whether the plaintiffs have locus standi

77 I note at the outset that the question of *locus standi* is not new. NRL had applied, unsuccessfully, to strike out Mr Leiman's claim on the grounds that the proper parties, which it said were NGL and Rothschild Trust, were not before the court.[83] NRL's appeal was dismissed on 17 September 2012.[84] This was

82 Defendants' Opening Statement (27 June 2017) at [16].

83 High Court Summons No 2704 of 2012.

84 High Court Registrar's Appeal No 346 of 2012.

before Rothschild Trust and NGL were added as parties to the proceedings on 20 October 2014.[85]

78 The defendants now take the position that Rothschild Trust, as a non-party to the Settlement Agreement and the Advisory Agreement, has no right to sue on these agreements. Further, whilst Mr Leiman is a party to both agreements, it is said that he is disentitled from claiming in respect of the Shares and the Share Options because these have been transferred to Rothschild Trust. In short, the defendants' objection is that Mr Leiman does not have property rights in the Shares or the Share Options and any loss that arises accrues only to the Adelaide Trust.

79 The somewhat "odd" consequence of the defendants' argument is that it effectively means no one apart from NRL can sue on the Settlement Agreement and the Advisory Agreement. Respectfully, I am unable to agree with the defendants' *locus standi* objection.

80 There is no doubt that the issue as to when a claimant has sufficient standing to sue and recover substantial damages in respect of a third party's property has long been a vexed issue in the common law. From privity of contract through to agency, trust, bailment, causation of pure economic loss and tort, the common law has strived to find the appropriate balance between the interests and rights of the claimant, the defendant and the third party.

81 One approach has been to address the issue from the perspective of what constitutes "substantial loss" in the context of a breach of contract. In *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*"), the Court of

[85] SOC, p 1.

Appeal stated at [31] (albeit by way of *obiter dicta*) that there are two exceptions to the general rule that a plaintiff cannot ordinarily recover substantial damages for a breach of contract where he has suffered no loss (for instance, where the substantial loss was instead suffered by the third party who was the intended beneficiary of the contract). These exceptions can be referred to as the "narrow ground" and the "broad ground". They are exceptions which give effect to the reality that sometimes, where the promisor contracts to render a contractual performance that would benefit a third party to the contract, the promisee can also suffer substantial losses of his own, and should therefore be entitled to recover substantial damages: see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") at para 15.093. It should further be noted that both grounds are conceptually distinct and inconsistent with each other such that it is not possible to apply both grounds simultaneously: *Family Food Court* at [56].

82 The narrow ground allows a plaintiff to recover substantial damages *on behalf of a third party*, and it is applicable where the contracting parties have contemplated that the proprietary interest in the contractual subject matter may be transferred from the plaintiff to the third party after the contract had been entered into and before the defendant's breach occurs. The narrow ground, however, is only applicable where the third party has no contractual remedy against the contractual promisor. The availability of an action in tort does not, however, have the effect of rendering the narrow ground inapplicable: *Family Food Court* at [47].

83 The broad ground, in contrast, allows the plaintiff to recover substantial damages for breach of contract in respect of *his own loss*, on the basis that the plaintiff has an interest in the performance of the contract: *Family Food Court* at [31]. The broad ground, however, is subject to an overriding objective test of

reasonableness as to the performance interest claimed. This serves the purpose of curbing what would otherwise be an unjustified windfall and to limit the broad ground to cases where the performance interest is genuine: *Family Food Court* at [53].

84 In the present case, it appears that the narrow ground is inapplicable. At the time when the Settlement Agreement was entered into by Mr Leiman, the parties knew that the Adelaide Trust had been set up by Mr Leiman. The parties knew that Mr Leiman's contractual entitlements to the Shares and the Share Options had by and large been assigned to the trust.[86] The identity of the trustee was known. This is not a case where the contracting parties contemplated that the proprietary interest in the contractual subject matter may be transferred from the plaintiff to the third party after the contract was entered into and before the breach occurred.

85 Instead, this is a case in which the broad ground applies. The fact that Mr Leiman had assigned his shares and share options to Rothschild Trust does not detract from the fact that this dispute is about Mr Leiman's claim that he has not received the bargain he had contracted for under the Settlement Agreement.

86 It is clear that NRL was aware at all material times that the Share Options and the bulk of the Shares had been assigned to Rothschild Trust, and that the parties had intended all along that these Share Options and Shares would be covered under the Settlement Agreement between Mr Leiman and NRL. Thus, when Mr Alam first informed Mr Koenig of a trading ban on 21 December 2011 (see [33] above), it was not on the basis of anything to do with Rothschild Trust, but on the basis of Mr Leiman being a significant employee shareholder.

[86] NOE of 26 July 2017, p 105; see also PCS, para 11.

Moreover, when Mr Koenig sent the 29 February 2012 e-mail stating that Rothschild Trust would exercise the five million share options without using the cashless facility, it is telling that Mr Alam's almost immediate reaction was to inform the R&O Committee that NGL had received *Mr Leiman's* notice to exercise his five million share options. It is not surprising then, that in his testimony, Mr Alam admitted that if Mr Leiman had not acted to Noble's detriment, Rothschild Trust would have been allowed to exercise those options.[87]

87 There is also no doubt that Mr Leiman's interest in Rothschild Trust's exercise of the Share Options arises directly from his own interest in having the Settlement Agreement performed. Mr Leiman's performance interest is reasonable and genuine. He was the settlor of the Adelaide Trust. The assets of the trust were intended to comprise Mr Leiman's entitlements under Noble's 2004 Share Option Scheme and the AIP. It follows that Mr Leiman has standing to bring this action and to seek substantial damages for his own loss. The question as to how damages (if any) are to be assessed and whether it is necessary to show that Mr Leiman as the plaintiff/promisee incurred loss in making good the shortfall in performance will be addressed below after the question of liability on the facts is determined.

The Adelaide Trust

88 It is convenient at this point to set out (in brief terms) some of the salient features of the Adelaide Trust which was set up on 16 May 2006.[88] The trust settlement is stated to be irrevocable (cl 12) and governed by the laws of the Cayman Islands (cl 11). Mr Leiman is the settlor, the trust protector, as well as

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87 NOE of 24 July 2017, p 16.

88 AEIC of Mr Koenig, para 3.

one of the named beneficiaries. The trustees were empowered to pay or apply the trust income to or for the benefit of any of the beneficiaries as the trustees think fit during the trust period (cl 4.1).

89 Mr Leiman, as the protector, enjoyed certain powers to exclude and add beneficiaries (cl 7.1). But, unless provided otherwise (for example, amendment of administrative provisions), the powers of the trustees are exercisable at their absolute discretion (cl 8.1).

90 The initial trust fund was US$10. Subsequent to the setting up of the Adelaide Trust, Mr Leiman transferred NGL shares and NGL share options to the trust by assignments. Notice of the assignments were given to the R&O Committee. Further, Rothschild Trust also contractually undertook to be bound by the Share Option Rules under which the options were granted.[89]

91 The Shares and the Share Options referred to above (save for the 5,652,421 shares) were assigned to Rothschild Trust prior to the Settlement Agreement and Advisory Agreement. It is clear that Rothschild Trust and NGL had contractually agreed to be bound by the Share Option Rules. These rules, of course, were also binding on Mr Leiman by virtue of the terms of his contract of employment.

Whether the plaintiffs' omission to plead agency precludes a cause of action against the defendants

92 The defendants' second objection is that, since the R&O Committee is a separate body whose decision caused loss to Mr Leiman, Mr Leiman's remedy is against the R&O Committee. Mr Leiman only has a cause of action against NRL if he pleads that the R&O Committee is an agent or is in any other way

[89] Defendants' core bundle ("DCB"), pp 46, 66, 73, 85 and 92.

acting on behalf of NRL. But since Mr Leiman did not so plead, he can have no remedy against NRL. The defendants cite the cases of *Steven Andrew Clark v Nomura International Plc* [2000] IRLR 766 ("*Nomura*"), *Braganza v BP Shipping Limited* [2015] UKSC 17 ("*Braganza*"), and *Mark Hills v Niksun Inc* [2016] EWCA Civ 115 in support.

93 But I do not think that those cases assist the defendants in any way. If anything, they show instead that "[c]ontractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common": *Braganza* at [18], *per* Lady Hale.

94 In *Braganza*, the issue was whether the deceased employee seaman who fell overboard at sea had committed suicide or been a victim of an accident. BP Shipping (the defendant), the owners and manager of the vessel, set up an inquiry in accordance with its own internal procedures. A team investigated the events and produced a final report (following several drafts and some discussions with in-house legal) setting out the opinion that the most likely cause was suicide. The report was forwarded to the General Manager of BP Maritime Services (Singapore) Pte Ltd – the company which provided management services to the defendant. On the basis of the report, the General Manager concluded that there had been wilful default and that death in service benefits were not payable.

95 Lady Hale stressed at [2] that the court's task was not to decide what actually happened to the deceased seaman. Instead the court's task was to decide whether the employer of the deceased seaman was entitled to form the opinion which it did. It is clear that in many cases, the exercise of a contractual discretion or power to form an opinion on relevant facts will involve or require some sort of fact-finding exercise. Indeed, there may be several inquiries on facts: external

and internal. It must follow that the exercise of contractual discretion may be based on findings made or opinions reached by the party entitled to exercise that discretion or based on findings, opinions or recommendations of other legal persons. But at the end of the day, the key point for the purposes of the objection raised is that the right under the contract to exercise that discretion still vests in the party that is contractually granted that discretion.

96 In *Nomura*, the plaintiff was employed as a senior proprietary trader in equities. His remuneration comprised a basic salary supplemented by an annual bonus awarded under a discretionary scheme. The plaintiff was subsequently dismissed on three months' notice on the ground of irretrievable loss of confidence in his ability, *etc*. Subsequently, whilst the plaintiff was serving out the three-month notice, the employers learnt of certain disparaging remarks made by the plaintiff. The plaintiff was informed that no discretionary bonus would be paid because of the assessment of his financial performance and his behaviour. Burton J found at [56] that the decision to dismiss the plaintiff was taken during a two-day meeting of the International Markets Division ("IMD") Management Committee (of which he had not been given prior notice). The decision to pay a nil bonus was reached later after the head of the IMD consulted the IMD Management Committee (at [75]). The point which I note is that the decision under review was made by the IMD Management Committee and the head of that division.

97 In the present case, Mr Leiman's employer is NRL. Under the Employment Agreement, he was required to serve as COO of NGL, and subsequently, he was tasked to serve as CEO of NGL. He was also bound by Noble's policies and, in particular, by the Share Option Rules and the AIP.

98 The Share Option Rules states at cl 3 that the scheme is a share incentive scheme.[90] The purpose of such a scheme is to provide executive directors and employees of the group (*ie*, NGL and its subsidiaries, including NRL) an opportunity to participate in the equity of NGL. The scheme is administered by "the Committee", which "compris[es] directors of [NGL], duly authorised and appointed by the Board to administer the Scheme". I pause to underscore that there can be no doubt that the R&O Committee is "the Committee" as defined in cl 2 of the Share Option Rules. The Share Option Rules goes on to set out detailed rules including those on: (i) grant and acceptance of options; (ii) subscription price; (iii) rights to exercise options; and (iv) exercise of options. These rules include, for example, provisions on the lapse of the right to exercise options because of cessation of employment and so on.

99 The AIP is concerned with the annual discretionary bonus as determined by the R&O Committee.[91] I pause here to underscore the point that the R&O Committee is a committee made up of the Chairman and members drawn from the board of directors.[92] The AIP sets out detailed provisions such as one providing for a restricted period during which the shares are held by a discretionary trust set up by NGL and during which the shares cannot be transferred or assigned save in the event of death.[93]

100 The decisions made by the R&O Committee in the present case were based, *inter alia*, on: (i) the PI's report, (ii) the Wolfe Report and (iii) discussions and input from Noble's legal team. The R&O Committee is not an independent legal person. It simply comprises certain directors of the NGL

90 7AB, p 5276.

91 1AB, p 570.

92 AEIC of Mr Leiman, para 7.

93 1AB, pp 571–572.

board together with the Chairman. There is no doubt that when the R&O Committee considers an issue relating to discretionary bonuses, share options or other entitlements under the Share Options Scheme or the AIP, it does so as the duly-appointed committee of the NGL board tasked precisely with that responsibility for NGL and indeed NRL (by virtue of the terms of the Employment Agreement). NGL and NRL, as corporate persons, act through their responsible officers, boards and committees.

101 Under the Settlement Agreement between NRL and Mr Leiman, NRL undertook certain promises to Mr Leiman in respect of the Share Options and the Shares, provided Mr Leiman did not act to Noble's detriment. In short, Mr Leiman retained his rights to exercise the Share Options and to sell the Shares so long as he did not act to Noble's detriment.

102 The R&O Committee's role is to determine whether Mr Leiman had in fact acted to Noble's detriment in the case of a dispute. Put another way, the parties to the Settlement Agreement designated the R&O Committee as the *mechanism* that would have the final say in determining, in the event of a dispute between the parties, whether Mr Leiman had acted to Noble's detriment. It is clear that the R&O Committee does not, as a result of such an arrangement, become a party to any contract with either Mr Leiman or NRL.

103 Parenthetically, I note the defendants' point that the plaintiffs have not made submissions to the effect that: (a) there was a collateral contract between either of them and the R&O Committee, or (b) NRL or NGL were under any obligation to procure the R&O Committee to act in a particular way.[94] But the fact of the matter is that the plaintiffs need not frame their case as such; although the R&O Committee's decision undoubtedly impacts NRL's discretion to grant

[94] DCS, para 267.

Mr Leiman's entitlements, it is ultimately still a contractual discretion which NRL exercises. The promise that is said to have been breached remains a promise under the Settlement Agreement; the parties thereto remain Mr Leiman and NRL. I find, therefore, that the plaintiffs are not precluded from bringing this suit against the defendants.

Whether there was "a final determination"

104 As noted, cll 3(c) and (d) of the Settlement Agreement (see [28] above) repose in the R&O Committee the authority to make a "final determination", in the event of a dispute between Mr Leiman and NRL, on whether Mr Leiman had acted to the detriment of Noble.

105 The plaintiffs argue that the decisions of the R&O Committee relating to Mr Leiman's entitlement to his benefits do not amount to a final determination under the Settlement Agreement, as they were expressed to have been made "pending … investigations".[95] This is true in relation to the R&O Committee's 1 March 2012 decision. Indeed, all three Committee members (*ie*, Mr Elman, Mr Rubin, and Mr Chan) gave evidence that the R&O Committee had declined Rothschild Trust's exercise request *pending* investigations into the matters raised at the meeting of 1 March 2012.[96] This was confirmed in cross-examination.[97] Mr Alam, who was present when the exercise request was discussed, also confirmed that the 1 March 2012 decision was not final.[98] The plaintiffs point out that, of the three R&O Committee members, only Mr Elman took the position that this decision was a final one, even though Mr Elman

95 PCS, para 173.

96 AEIC of Mr Chan, para 18; AEIC of Mr Rubin, para 51; AEIC of Mr Elman, para 101.

97 NOE of 26 July 2017, p 11, 139; NOE of 27 July 2017, pp 91–93 and 97; NOE of 4 August 2017, pp 19–21 and 82–83.

98 NOE of 24 July 2017, pp 7 and 33.

claims that the other R&O Committee members were prepared to reconsider the decision if new information came to light.[99]

106 However, I find that the R&O Committee's decision of 27 March 2012 was a final determination within the meaning of cll 3(c) and (d).

107 The plaintiffs say that Mr Chan and Mr Rubin were of the view that no final decision was made at the conclusion of the 27 March 2012 meeting. They assert this on the basis of Mr Chan's and Mr Rubin's evidence that the R&O Committee had asked Mr Alam to "complete the Brazilian investigation" after the 27 March 2012 decision was made.[100] Yet, it seems to me that Mr Chan's and Mr Rubin's evidence is consistent with Mr Elman's, namely, that a final decision was indeed made on 27 March 2012, subject to whatever new information that may come to light (if any) to cause the R&O Committee to re-consider its decision. Thus, Mr Chan deposed that the R&O Committee had unanimously decided to withhold its permission for Rothschild Trust to exercise the Share Options, but tasked Mr Alam to invite Mr Leiman to provide any response or explanation which the latter wished to bring to the R&O Committee's attention.[101] By a letter dated 10 April 2012, Mr Leiman was invited to advance any further information in response to the R&O's Committee's 27 March 2012 decision. He did not respond.[102] Mr Rubin's account of events in this regard is similar.[103]

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99 PCS, para 174.

100 AEIC of Mr Chan, para 32; AEIC of Mr Rubin, para 64.

101 AEIC of Mr Chan, para 30.

102 AEIC of Mr Chan, para 34.

103 AEIC of Mr Rubin, paras 67.

108 Mr Alam, on the other hand, gave evidence that he did not consider the 27 March 2012 decision to be a final determination. But I ascribe little weight to this in light of the consistency in the evidence of the three R&O Committee members. In fact, the plaintiffs themselves recognise that although, after the 27 March 2012 decision, investigations have since been completed and the 2012 Wolfe Report finalised, there has been no further meeting of the R&O Committee convened to reconsider its decision.[104]

109 Accordingly, I find that the R&O Committee's decision of 27 March 2012 amounts to a final determination under the Settlement Agreement.

The validity of the decisions of the R&O Committee

110 Clause 3 of the Settlement Agreement is titled "Severance Payments and Benefits". In particular, cl 3(c) sets out Mr Leiman's entitlement 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) covers Mr Leiman's entitlement to the Shares and their accrued dividends, and provides that they "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". In both cases, the R&O Committee "shall make a final determination in the event of any dispute": see [27] above.

111 Having found that the R&O Committee had in fact made "a final determination" within the meaning of cll 3(c) and (d), the inquiry now turns to whether the R&O Committee's decisions are valid. I begin by considering the appropriate standard by which the R&O Committee's decisions are to be reviewed.

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104 PCS, para 175.

112 It is now established that where one party to a contract is given the power to exercise a discretion, the courts will seek to ensure that such contractual powers are not abused by implying a term as to the manner in which such powers may be exercised. Such a term may vary according to the terms of the contract and the context in which the decision-making power is given: *Braganza* at [18]. In cases such as the present one, the court will imply "a term that the decision-making process be lawful and rational in the public law sense, [and] that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose": *Braganza* at [30]. In other words, "in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously": *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] UKSC 42 ("*British Telecommunications*") at [37].

113 These principles have been accepted by the local courts. In *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319 which concerned the extent of a party's discretion to decide its own remuneration and commission for services (see [9]), Belinda Ang J quoted with approval (at [104]) the following passage from the English Court of Appeal's decision in *Socimer Bank Ltd v Standard Bank Ltd* [2008] All ER (D) 331 ("*Socimer*") at [66]:

> It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also not concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness …

114 The analogy drawn in *Socimer* to the concept of *Wednesbury* unreasonableness (as developed in the seminal administrative decision of

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680) presents the interesting question of whether the principles of judicial review of administrative action may apply in the contractual context. This was considered by the United Kingdom Supreme Court in *Braganza*. Although their Lordships found it fitting to draw some parallels to the *Wednesbury* test, they did not reach a conclusion as to the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action: *Braganza* at [30] and [32]. Likewise, it is not necessary for me to decide this question, especially considering that the parties are in agreement that the R&O Committee's exercise of discretion would be invalid if it was arbitrary, capricious or in bad faith. I pause to stress that the present case, like *Braganza*, is only concerned with the exercise of contractual discretion in an employment context.

115 The parties, however, do not agree as to whether the R&O Committee's decisions may also be invalid for its failure to act in accordance with natural justice. In particular, the plaintiffs contend that Mr Leiman should have been given notice of the allegations against him and a fair opportunity to be heard by the R&O Committee. The defendants argue that there is no basis in law for the imposition of any such duty or implied term for the R&O Committee to accord due process to Mr Leiman.

116 I agree with the defendants that there was no requirement for the R&O Committee to have informed Mr Leiman of the allegations made against beforehand or to have given him an opportunity to be heard. The defendants have not been able to cite any authority in which such a requirement was recognised in the contractual context. They rely only on the cases of *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR(R) 802 and *Singapore Amateur Athletics Association v Haron bin Mundir* [1993] 3 SLR(R) 407, both

of which involved decisions made by disciplinary committees. I do not think it is appropriate to read such a requirement into the contract. In the present case, there is no indication that the parties had envisioned that Mr Leiman would have an opportunity to be heard. I add that Mr Leiman was himself a member of the R&O Committee between January 2010 and December 2011, and would have been familiar with the workings of the R&O Committee. There is no allegation that the R&O Committee departed from its usual procedure in this regard when dealing specifically with Mr Leiman. Mr Leiman was in any case aware that he could make representations to the R&O Committee. Indeed, there is evidence that on 10 April 2012, NRL wrote to Rothschild Trust stating that the R&O Committee would consider any request from Mr Leiman to advance information in response to the allegations that had arisen.[105] Mr Leiman did not take up the invitation.

117 I also do not think there is a separate duty for the R&O Committee to act "fairly",[106] over and above the existing requirement or implied term that it must not exercise its discretion arbitrarily, capriciously or in bad faith. "Fairness" appears to me to be no more than a more general and nebulous description of this standard. I do not see how it adds anything to the test or how it serves as a distinct ground upon which the decisions of the R&O Committee may be challenged. It follows from this that the plaintiffs must still show that the R&O Committee exercised its discretion arbitrarily, capriciously or in bad faith. I shall return to the issue of fairness and good faith later when considering the issue as to whether there was a breach in respect of the 2011 Bonus.

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105 DCS, para 291.

106 See PCS, para 305.

118 In order to satisfy the relevant standard (*ie*, arbitrary, capricious or in bad faith), the plaintiffs advance a number of arguments which can be taken in four general strands:

(a) first, that the R&O Committee acted arbitrarily, capriciously and/or in bad faith by *prejudging* the matter;

(b) second, that the R&O Committee acted arbitrarily, capriciously and/or in bad faith by failing to review the relevant contractual agreements which would have made them realise that there had to be evidence of detriment caused to Noble in order to deny Mr Leiman of his entitlements;

(c) third, that the R&O Committee acted arbitrarily, capriciously and/or in bad faith in finding that Mr Leiman had solicited Noble employees, misused Noble's confidential information and competed against Noble, in the absence of any evidence or proper discussion; and

(d) fourth, that the R&O Committee acted arbitrarily, capriciously and/or in bad faith in determining that Mr Leiman had hired Messrs Carlier and Ozeias in breach of his duties, even though they were already aware of the relevant matters at the time the parties entered into the Settlement Agreement.

Whether the R&O Committee pre-judged the matter or acted partially

119 I deal first with the contention that the R&O Committee had already made up its mind prior to the meetings that it would not allow Mr Leiman to exercise the Share Options, and the related allegation that the R&O Committee

saw itself as a representative of Noble.[107] The plaintiffs point to the following evidence in support of this argument:

(a) The R&O Committee did not inform Mr Leiman of the allegations prior to their first meeting on 1 March 2012 or give him an opportunity to respond. Mr Alam initially claimed that there was no time, but later conceded that there was no real urgency to make a decision. The R&O Committee also did not invite Mr Leiman to respond after the meeting on 1 March 2012.[108]

(b) The R&O Committee did not make a final decision on 1 March 2012, and instead asked that Mr Alam look into the issue of whether Mr Leiman had informed Noble of Messrs Carlier and Ozeias's legal troubles and that more research be conducted by Wolfe Associates. According to the plaintiffs, this showed that the R&O Committee recognised that they had insufficient information at the time.[109]

(c) On 1 March 2012 after Mr Leiman had been informed of the R&O Committee's decision, Mr Rubin sent the rest of the R&O Committee an update about a telephone conversation he had with an agitated Mr Leiman. Mr Leiman had allegedly told Mr Rubin that he was upset with Noble not giving him what it owed him, and that he had a lot of material to use against Noble for a "full blown legal war" that would be played out in the news. Mr Alam replied with the comment that it sounded like Mr Leiman was "now adding blackmail to his other dubious talents", and added, "If we give him enough rope …." Mr Chan

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107 PCS, paras 289 and 300.

108 PCS, paras 290(a), 291 and 298.

109 PCS, para 290(e).

then replied, "I think we keep our cool and stick to our plan….cross the bridge when we come to it."[110]

(d) On 9 March 2012, Mr Alam e-mailed the R&O Committee conveying that Mr Rubin's preference was to "play for time" whilst the investigations against Mr Leiman continued.[111] Mr Elman replied and indicated his agreement with Mr Rubin's preference.

(e) On 12 March 2012, Mr Alam e-mailed the R&O Committee stating that there was no record with Noble's human resources department that Noble was informed about problems with Messrs Carlier and Ozeias, but that the Brazilian court records of the relevant proceedings had just been located. Mr Chan replied, "Hopefully the Court docs will be more revealing."[112]

(f) On 14 March 2012, Mr Alam forwarded the letter from Rothschild Trust asking the R&O Committee to reach a fresh decision. Mr Rubin replied, "Let's just work on gathering the information we need [as soon as possible]."[113]

(g) Mr Alam was able to send out the letter notifying Rothschild Trust of the R&O Committee's affirmation of its decision at 6.54pm on 27 March 2012, which was less than two hours after the R&O Committee meeting. Mr Alam admitted that the letter had been pre-drafted.[114]

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110 5AB, p 3587, *cf* NOE of 13 July 2017, pp 48–52.

111 5AB, p 3634.

112 5AB, p 3647.

113 5AB, p 3658.

114 PCS, para 296.

(h) The R&O Committee did not discuss Rothschild Trust's request for full reasons to be given for its decision.[115]

(i) Neither Mr Rubin nor Mr Chan asked for the final version of the 2012 Wolfe Report, and a fresh R&O Committee meeting was not reconvened to discuss the findings contained therein. This indicated that the R&O Committee was not genuinely interested in the outcome of the investigations because it had already made up its mind.[116]

(j) Mr Rubin stated in his evidence that the R&O Committee "owed a duty to the shareholders of Noble to properly investigate the matter before allowing [Mr Leiman] to exercise the options under the Settlement Agreement." Mr Elman was the largest shareholder in NGL, yet he remained on the R&O Committee.[117]

120 Having considered all the evidence in context, I do not think that the R&O Committee's general attitude towards Mr Leiman's matter was arbitrary or capricious. As I found at [116] above, the R&O Committee was not obliged to allow Mr Leiman to make representations, nor did they have to provide full reasons for their decisions. The fact that Mr Elman was concurrently a representative and large shareholder of Noble while acting as a member of the R&O Committee does not in itself taint the decisions of the R&O Committee, considering that, at the time the Settlement Agreement was signed, Mr Leiman knew and accepted that Mr Elman would be a member. In any case, I accept that Mr Rubin and Mr Chan were independent non-executive directors.

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115 PCS, para 297.

116 PCS, paras 301–304.

117 PCS, para 300; AEIC of Mr Rubin, para 51.

121 The plaintiffs rely on certain phrases used by Mr Rubin and Mr Chan, such as "stick to our plan", to show that the R&O Committee had pre-judged the matter and was merely trying to buy time and gather information to substantiate its decisions. But I do not think that these messages should necessarily be read in such a light. Instead, it seems more likely to me that the R&O Committee made a tentative decision based on the reports that were before them, and that their "plan" was that this decision would stand unless further investigations revealed new information to the contrary. This was consistent with Mr Chan's testimony.[118] Other comments about the need to gather the requisite information were likely to have been in response to the real possibility of Mr Leiman taking legal action – which I find that Mr Leiman did threaten, despite his denial – and in view of ensuring that their decisions would be unassailable before the courts. I note that Noble sought and obtained independent legal advice from Linklaters between the R&O Committee's meetings of 1 and 27 March 2012.[119]

122 I also do not make much of Mr Rubin and Mr Chan's omission to ask for the final version of the 2012 Wolfe Report, when they likely proceeded on the basis (and reasonably so) that Mr Elman or Mr Alam would keep them apprised if the final report revealed anything that would make them question their initial decision. It does not appear that anything of this nature was revealed in the final version of the 2012 Wolfe Report, and it was therefore reasonable that another meeting was not held considering that the R&O Committee had already met twice to discuss this matter. With all things considered, I am not satisfied that the R&O Committee acted partially or unfairly prejudged the matter, or acted arbitrarily, capriciously or in bad faith in this regard.

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118 AEIC of Mr Chan, pp 97–98.

119 AEIC of Mr Rubin, para 59.

The R&O Committee's omission to review the relevant agreements

123 Next, the plaintiffs contend that the R&O Committee "did not even bother to review the [Settlement Agreement]" at either of its meetings. According to the plaintiffs, this shows that the R&O Committee was not exercising its discretion in good faith or rationally, and it failed to appreciate that Mr Leiman had to have acted to Noble's detriment if it wished to validly decline his request to exercise the Share Options. They further argue that the R&O Committee had erroneously assumed that a breach of Mr Leiman's contractual or fiduciary obligations would have been sufficient *per se*, without detriment having been caused to Noble.[120]

124 I do not see why it was necessary for the members of the R&O Committee to have had the Settlement Agreement in front of them during the meetings. The minutes of the 1 March 2012 meeting show that Mr Alam "explained to the [R&O Committee] [Mr Leiman's] contractual obligations under his Settlement Agreement and [Advisory] Agreement with Noble".[121] There is nothing to suggest that the R&O Committee did not appreciate their task was to determine whether Mr Leiman had acted in a way that was detrimental to Noble. This question was a relatively straightforward one. The minutes of the 27 March 2012 meeting further make clear that the R&O Committee did conclude that Mr Leiman had "acted or engaged in activity or conduct which is inimical or contrary to or against the interests of [Noble]", and I do not read anything contained in the minutes to suggest that the R&O Committee regarded detriment as an option rather than a requirement.[122] While Mr Rubin's testimony during cross-examination revealed that he did not

120 PCS, paras 201–205.

121 5AB, p 3582.

122 6AB, p 3925.

understand or realise the requirement of a detriment over and above a breach of duty,[123] it is at least apparent to me that the R&O Committee did in fact base their decision on a finding that Mr Leiman had acted in ways detrimental to Noble.

125 For similar reasons, I reject the plaintiffs' arguments that the R&O Committee did not have the Employment Agreement and the Advisory Agreement before them. The members were already briefed by Mr Alam on Mr Leiman's relevant contractual obligations at the 1 March 2012 meeting, and a memorandum from Noble's solicitors at Linklaters on issues to be considered by the R&O Committee was tabled at the 27 March 2012 meeting. Further, there was nothing too unusual about Mr Leiman's non-solicitation and non-competition restrictions. The plaintiffs argue that the R&O Committee failed to consider that the restrictions in the Employment Agreement were limited to the Americas and the Asia-Pacific regions, whereas the PI had only reported Mr Leiman attending meetings in London.[124] But the location of Mr Leiman's meetings say nothing about where the actual competition would take place, and it is at least clear that BTG Pactual, as a Brazilian company with a large South American presence (see [35] above), would be competing in the Americas. There is also nothing in the minutes indicating whether the R&O Committee did or did not consider whether the persons Mr Leiman had allegedly approached were part of Noble's senior management or otherwise fell within the restrictions contained in the Employment Agreement, and I will shortly address this point as I turn to discuss the issue of Mr Leiman's alleged solicitation.

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123 NOE of 26 July 2017, p 77.

124 PCS, para 210.

126 On a related note, the plaintiffs argue that the defendants have not shown what "detriment" Noble has suffered, or provided any evidence of loss caused to Noble as a result of Mr Leiman's acts.[125] However, I do not read the requirement that Mr Leiman "does not act in any way to the detriment of Noble" (as stated in cll 3(c) and (d) of the Settlement Agreement) to mean that the defendants or the R&O Committee would have to show evidence of some tangible loss caused to Noble. As a matter of common sense and a plain reading, this phrase simply means that Mr Leiman would not be entitled to the Shares and the Share Options if he acted *against Noble's interests*. In my judgment, proof of actual detriment is not required, especially on the present facts where all of the alleged acts would clearly have been contrary to Noble's business interests.

Alleged acts of competition, solicitation and misuse of confidential information

127 Before moving to the next two issues (on which a substantial amount of evidence was led), I pause to underscore that the Court is not meant to step into the shoes of the R&O Committee and to conduct a *de novo* review, as the cases make clear that the Court must not "substitute its own decision for that of the decision-maker": *Braganza* at [29]; see also *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 at [84]. A decision-maker in the contractual context should not be expected to undertake "the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a court of law": *Braganza* at [31], quoting *The Vainqueur José* [1979] 1 Lloyd's Rep 557 at 577. I reiterate that the focus of the inquiry here is on whether the R&O Committee exercised its discretion

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125 See, *eg*, PCS, para 379.

arbitrarily, capriciously or in bad faith, such as by making a finding in the absence of any factual basis.

128 Part of the grounds relied upon by the R&O Committee in its refusal to allow Mr Leiman to exercise his Share Options relate to his conduct following the Settlement Agreement. The conduct in question is described in the minutes of the R&O Committee's 27 March 2012 meeting:[126]

> [W]hile being a party to valid and existing Settlement and [Advisory] Agreements, both within [Noble], [Mr Leiman] is undertaking actions, such as contacting employees and former employees of [Noble], clients of [Noble], counterparties of [Noble], advisors to [Noble] with whom he had contact/dealings while at Noble, seeking their co-operation in taking steps to set up and/or operate an entity or entities which would compete with [Noble].

The defendants' case is that Mr Leiman engaged in acts of competition and solicitation against Noble's interests, and misused Noble's confidential information. Although these are related points, I will deal with each of these in turn for convenience, beginning with the alleged acts of competition against Noble.

129 For now, I note that the plaintiffs argue that the parties did not intend for "detriment" in cll 3(c) and (d) of the Settlement Agreement to apply to conduct that relates to competition and solicitation which does not actually amount to a breach of the non-competition and non-solicitation clauses in the Employment Agreement. Otherwise, it is said this would unfairly widen the scope of Mr Leiman's non-competition and non-solicitation obligations.[127] I agree but only in so far that "detriment" in terms of competition and solicitation must be interpreted in line with the relevant clauses in the Employment Agreement, and

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126 6AB, p 3925.

127 PCS, paras 337(b) and 358–359.

that it would be difficult for the defendants to allege detriment as a result of such acts if the conduct complained of would have been permissible under the Employment Agreement. For reference, cl 7 of the Employment Agreement, titled "Non-Competition Requirements", reads as follows:[128]

> 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 the Company, and within the Asia Pacific and Americas Regions, you will refrain from:
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> - directly or indirectly (as a director, officer, employee, independent contractor, advisor or otherwise) engage in competition with, or own any interest in, perform any services for, participate in or being connected with any business or organization which engages in competition with the business of the Company or a related or affiliate company with which you were involved or had supervisory responsibility during the twelve (12) month period immediately preceding your last day as an employee of the Company,
> - solicit directly or indirectly the patronage of any client or customer with whom you have had personal contact or dealings on behalf of the Company, or a related or affiliate company, during the twelve (12) month period immediately preceding your last day as an employee of the Company.
> - directly or indirectly employ, solicit for employment or advise or recommend to any person that they employ or solicit for employment, any senior management of the Company or a related or affiliate company with which you were involved or had supervisory responsibility during the twelve (12) month period immediately preceding your last day as an employee of the Company.

Competition against Noble

130 It will be recalled from Mr Leiman's e-mail to Mr Vinokurov of Summa Capital (see [35] above) that Mr Leiman was assisting with BTG Pactual's efforts in breaking into the commodities market. Mr Leiman was reaching out to Mr Vinokurov to assess if Summa Group would be interested in being a

[128] 1AB, p 309.

partner on this project to build BTG Pactual's commodities arm into "the new Glencore". I note that the defendants presented evidence that Summa Group was one of Noble's strategic partners with whom Noble was discussing potential joint ventures in Russia and Indonesia,[129] and that Mr Leiman would have come to know about Summa Capital's interest in moving into the commodities sector through internal Noble e-mails sent between August to October 2011 in which this was discussed and Mr Leiman was copied.[130] Mr Alam gave evidence that he and Mr Elman were alarmed and deeply concerned by the PI's findings for these reasons.[131] Scanned images of Mr Leiman's e-mail to Mr Vinokurov were sent to the members of the R&O Committee prior to the 1 March 2012 meeting, and tabled at that meeting.[132]

131 At the 27 March 2012 meeting, Mr Alam informed the R&O Committee that the PI had reported Mr Leiman meeting with certain Noble employees and advisors, such as:[133]

(a) Mr Spitz, an advisor of NRL at the time, on 6 December 2011 and 9 January 2012;

(b) Mr David Cherrett ("Mr Cherrett"), then Chief Commodity Strategist of Noble Europe Ltd, on 2 February 2012;

(c) Mr Andrea Valerio, then Managing Director in Oil Liquids of Noble Americas Corps, on 22 February 2012; and

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129 AEIC of Mr Elman, paras 86(3) and 95; AEIC of Mr Alam, para 121.

130 NOE of 12 July 2017, p 22.

131 AEIC of Mr Alam, paras 120–122.

132 5AB, p 3569.

133 AEIC of Mr Chan, para 28; DCS at para 82(c).

(d) Mr Nick Brewer ("Mr Brewer"), then Chief Operating Officer of Noble,[134] on 9 March 2012.

Mr Leiman had also been seen meeting with representatives from BTG Pactual and Summa Group.[135]

132 During the course of discovery in these proceedings, the defendants obtained further evidence relating to Mr Leiman's conduct around and during the time the Advisory Agreement was in effect. Briefly, this included the following:

(a) A document dated 5 December 2011 detailed Mr Leiman's concept plan for a commodity merchant bank ("CMB"). The idea was to set up a commodity merchant bank which would provide trade financing to commodities suppliers in exchange for repayment in commodities, which the bank could then leverage or hedge against to generate further returns. The CMB would also invest in and manage assets relevant to the production and supply of commodities in the sectors of agriculture, metals, mining, energy and shipping, as well as trade in commodities.[136] I will refer to this concept as "the CMB Plan".

(b) In November 2011, Mr Leiman was corresponding via e-mail with several headhunting firms.[137] He stated to one firm that he wanted to find a new role outside of London and that he was "looking at private equity/sovereign wealth funds that want to start or expand into the commodity business".[138] In an e-mail dated 29 November 2011, another

134 DCS, para 82.

135 AEIC of Mr Chan, para 29.

136 8AB, p 5655; AEIC of Mr Leiman, para 142.

137 DCS, para 75.

headhunting firm told Mr Leiman that it would "follow-up with BTG Pactual as promised".[139]

(c) On 6 December 2011, Mr Giovanni Salvetti ("Mr Salvetti"), a friend of Mr Leiman, introduced him to one Mr Christian Ollig of global investment firm Kohlberg Kravis Roberts & Co ("KKR") by e-mail. Mr Salvetti stated that he was making the introduction because he was aware that several private equity investors were willing to enter into the commodities business, and that a way to do so was to invest in a team and to build the business up from scratch. Mr Salvetti added that Mr Leiman had "clear ideas on what [could] be done" and could pull together a team.[140]

(d) On 13 February 2012, Mr Leiman e-mailed Mr Spitz with the executive summary of what appears to be an evolved form of the CMB Plan with the name "Alliance Commodities". The summary stated that Alliance Commodities was "[l]ed by an unrivalled management team" with an "[e]xcellent and long track record in setting up, managing and scaling a global commodities business".[141] There was also correspondence in May and June 2012 showing Mr Leiman and Mr Courtis's attempts to convince prospective investors that an experienced management team had been identified.[142]

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138 4AB, p 2382.

139 4AB, p 2384.

140 4AB, p 2921.

141 5AB, pp 3383–3384.

142 See DCS, paras 79–80.

Although the defendants place substantial reliance on such evidence, I reiterate that these documents and correspondence were not before the R&O Committee when they made their decisions. As the inquiry for this Court is to determine whether the R&O Committee's decisions were arbitrary, capricious or in bad faith, it is imperative that I look primarily to the documents which were actually placed before the R&O Committee and which it relied on in coming to its decisions.

133 In my judgment, Mr Leiman's e-mail to Summa Capital was the "smoking gun". That e-mail made clear that Mr Leiman had actively reached out to and met with Mr Vinokurov to assess if Summa Group would be interested in being a partner in building BTG Pactual's commodities arm into the "new Glencore".

134 The plaintiffs characterise the above e-mail as being mere preparatory steps, and cite the Court of Appeal's decision in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [67] for the proposition that an employee's implied duty of good faith and fidelity is only breached "if more than mere preparatory steps [towards future competition] had been taken" by the employee. The Court of Appeal highlighted at [68]–[70] that this would be a highly fact-specific inquiry in each case, and endorsed Etherton J's remarks in *Shepherds Investments Ltd v Walters* [2007] FSR 15 at [108]:

> … It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the

> director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case.

135 It is clear that an employee who has tendered his notice of resignation and is serving out his notice period (the twilight period) still owes a contractual duty of fidelity to his employer. That said, the law recognises that if a question of compliance with the duty of fidelity arises in the notice period, it is proper to make the assessment bearing in mind the fact that the employee will soon cease to be an employee. This is because the law recognises the tension between the interests of the employer and those of the employee, especially during the twilight period of his employment as well as post-employment: see Andrew Stafford and Stuart Ritchie, *Fiduciary Duties: Directors and Employees* (Jordans Publishing Limited, 2nd Ed, 2015) ("*Fiduciary Duties*") at paras 4.30–4.31, where it is said at para 4.31 that:

> An act should not be held to be a breach of the duty of fidelity if the employee goes no further than reasonably required for the purpose of exploring his employment prospects elsewhere. This is so even if the employee contemplates setting up in competition.

136 This is why, leaving aside any express terms to the contrary, an employee who in his spare time makes arrangements for setting up his own office, is not necessarily in breach of the duty of fidelity unless such acts interfere with his work or if he actually starts business whilst still employed: see *Robb v Green* [1895] 2 QB 1 at 15; *Balston Filters v Headline Filters* [1987] FSR 330 generally; and *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1996] FSR 629 at 678–679 where the defendant employee was held to have engaged in more than purely routine acts in preparation for departure and was found to have breached his duty of fidelity.

137 The line between permissible preparatory acts and those which breach the duty of fidelity depends on the terms of the contract and the facts of each case. It cannot be assumed that so long as the employee does not actually start competition that he is free to embark on "preparatory" acts with full speed and fervour. As suggested by *Fiduciary Duties* at para 4.45, as an alternative to the label "preparatory steps", it may be appropriate to ask whether the steps taken reveal a potential conflict between the interests of the employer and those of his employee. Yet another test or guide is to ask whether a person of ordinary honesty and intelligence would regard the employee's acts as dishonest towards his employer: see para 4.38.

138 In the present case, I am of the view that Mr Leiman's acts as evidenced by his e-mail to Summa Capital indicated that he had gone beyond mere preparatory steps. Instead, he had actively sought out Summa Capital to make his pitch and flown to Russia to meet them (as well as to Brazil to meet BTG Pactual), all while serving as Advisor to Noble.[143] The e-mail mentioned a "project" and "business plan" which was already in place, and BTG Pactual wanted things to "move fast": see [35] above.

139 Further, I accept the defendants' evidence that Summa Group was one of Noble's strategic partners with whom Noble was discussing potential joint ventures in Russia and Indonesia, and it appears likely that Mr Leiman only got to know about Summa Capital's interest in moving into the commodities sector by virtue of internal Noble e-mails which he was privy to (see [130] above). Although neither Summa Capital nor Summa Group was a "client" or "customer" for the purposes of the non-solicitation clause in the Employment

143 5AB, pp 3570–3571.

Agreement (see [129] above), such solicitation is nonetheless a fact that lends itself strongly to a finding of a breach of the non-competition clause.

140 Indeed, as will be discussed later, it is clear Mr Leiman was using sensitive confidential information about Summa Capital that he received when he was CEO of NGL. Under these circumstances, there was certainly a valid basis for the R&O Committee to find (or take the view) that Mr Leiman had breached his duty of fidelity to Noble and acted in a way detrimental to Noble's interests. Further, even taking account of the fact that by January 2012 Mr Leiman was no longer CEO of NGL or an employee of NRL, he was a highly-paid advisor to NRL. Mr Leiman was receiving not only a retainer but also his base salary (as COO) under the Employment Agreement pursuant to the Settlement Agreement. Furthermore, it bears repeating that the non-competition provisions of the Employment Agreement had been incorporated into the Settlement Agreement.

141 The plaintiffs make the argument that the CMB Plan would not have been competing with Noble, as what Mr Leiman envisioned was akin to a private equity fund that would invest in commodities and commodity assets, and engage in asset management and trading.[144] Mr Elman was clear in his evidence that Noble was in the business of commodities trading and asset management.[145] Noble was also involved in fund management until February 2012 when a fund it was managing closed down.[146] Although there were certainly novel elements to the CMB Plan which distinguished its business model from Noble's, this does not necessarily mean that it was not in competition with Noble. Indeed, the first concept plan document dated 5 December 2011 stated that "[t]he CMB is

144 PCS, para 413.

145 AEIC of Mr Elman, para 7; NOE of 3 August 2017, p 75.

146 NOE of 4 August 2017, pp 1–2.

effectively a company with three divisions": (a) commodities trade finance; (b) "investment in and management of assets relevant in commodities value chain"; and (c) "traditional commodities trading business based on optimizing information flows and optionality which is presently exclusive to the commodity trade houses".[147] The CMB would certainly compete with Noble in terms of "traditional commodities trading business" in category (c), if not also in categories (a) and (b).

142 Nor do I accord much significance to the plaintiffs' argument that the CMB Plan did not ultimately take off.[148] Although the management committee of BTG Pactual declined the proposal to establish a standalone commodities trading unit, it was open to have Mr Leiman "join as a partner to build a commodities capability on an incremental basis within BTG Pactual".[149] In any case, this subsequent event is of limited relevance to the R&O Committee's decisions in March 2012 and the nature of Mr Leiman's conduct upon which its decisions were based.

143 Given the above reasons, I do not find that the R&O Committee acted arbitrarily, capriciously or in bad faith in the exercise of its discretion. Its decisions were validly based – at least in part – on proof of Mr Leiman's acts which were in competition against and detrimental to the interests of Noble.

144 I pause to note that the Advisory Agreement was entered into on the same day as the Settlement Agreement. Whilst the Advisory Agreement does not make express reference to the Settlement Agreement, the Settlement Agreement does make reference to the Advisory Agreement and expressly

147 8AB, p 5655.

148 PCS, para 412.

149 6AB, p 4607.

extends or applies the non-competition clause in the Employment Agreement to the Advisory Agreement. Clause 4 of the Settlement Agreement states that the non-competition clause in the Employment Agreement continued to apply until the end of the Advisory Agreement, or for nine months from the effective date, whichever is longer: see [27(d)] above.

145 The Advisory Agreement also expressly provides that Mr Leiman's duty is to "provide advisory services relating to commodities supply chain management … as designated to him by Mr Richard Elman". The basic remuneration provided was the same as when he was first appointed as COO of NGL. Furthermore, Mr Leiman undertook in cl 3 of the Advisory Agreement that he did not have any agreement to provide advisory services in commodities supply chain management to any other company and that he would not enter into such an agreement during the term of the Advisory Agreement.[150]

146 The point that I make is that Mr Leiman as COO and later as CEO owed duties of fidelity to NGL. Indeed, bearing in mind that he was also an executive director of NGL, he was in the position of a fiduciary. As *Fiduciary Duties* describes at para 3.17:

> A fiduciary is someone who has undertaken to, or is obliged to, act in the interests of another. He is required to demonstrate single-minded loyalty to his principal. … Fiduciaries are obliged to avoid self-interest in their dealings with their principals."

147 After his resignation and termination of his positions as CEO and director of NGL, Mr Leiman's obligation not to compete against Noble (as originally provided for in the Employment Agreement) continued. Even if Mr Leiman was not in a fiduciary position as an advisor, I have no doubt that he owed a duty of fidelity to NRL under the Advisory Agreement. Whilst NRL is

150 4AB, p 2344.

not NGL, a reasoned determination (that is not capricious, *etc*) by the R&O Committee that Mr Leiman had acted to the detriment of NGL would, in my view, also provide a reasonable and legitimate basis for finding that Mr Leiman had acted to the detriment of NRL (a principal subsidiary of NGL).

Solicitation of Noble senior management

148 As stated at [131] above, Mr Alam informed the R&O Committee at the 27 March 2012 meeting that according to the PI's reports, Mr Leiman had been meeting a number of Noble employees and advisors. In their statement of claim, the plaintiffs named six Noble employees (at the time they were allegedly approached), two former Noble employees and four financial advisors (companies) to Noble whom Mr Leiman had allegedly approached with a view to soliciting them to compete against Noble, as well as a list of 23 former Noble employees and directors who had joined BTG Pactual by the time the suit was filed.[151]

149 The non-solicitation clause in the Employment Agreement prohibits Mr Leiman from soliciting members of Noble's senior management for employment, as well as clients and customers of Noble: see [129] above. One of the plaintiffs' contentions is that the defendants have not shown that the persons allegedly solicited by Mr Leiman fall within these categories.

150 It is clear that the four companies who were stated in the pleadings to be Noble's financial advisors (Ernst and Young, KKR, Royal Bank of Scotland and UBS) were service providers and are not members of senior management or clients and customers of Noble. Further, *former* directors and employees of

151 SOC, para 36A.2.

Noble such as Mr Courtis fall outside the non-solicitation clause as they were not members of senior management at the material time.

151 Nevertheless, it is apparent from the job positions and titles that a number of the named individuals such as Mr Brewer and Mr Cherrett were "senior management of [NRL] or a related or affiliate company with which [Mr Leiman had been] involved or had supervisory responsibility during the twelve (12) month period immediately preceding [his] last day as an employee of [NRL]": see [131] above.

152 The difficulty with the allegations of solicitation of Noble's senior management, however, is that there was very little information before the R&O Committee about the purpose of Mr Leiman's meetings with these individuals. According to Mr Leiman, these meetings were social in nature. Indeed, Mr Leiman had served at NGL for many years and it is not at all surprising that he might have occasional contacts and meetings with some of his former colleagues. Even if the conversation included chit-chat on Mr Leiman's plans for the future, this does not mean that he was soliciting his former colleagues for employment.

153 Against this, the defendants basically assert that an inference can be drawn that Mr Leiman discussed employment opportunities with the former colleagues whom he met up with, from the fact that 23 persons who used to be with Noble are now with BTG Pactual. The problem, however, is that even now, there is little evidence to show that Mr Leiman had in fact approached these named individuals to solicit them for employment.

154 The defendants point to several documents suggesting discussions and meetings between BTG Pactual and Mr Brewer with which Mr Leiman was

involved, but it appears that the first meeting only took place on 21 August 2012 which was after the expiry of the Advisory Agreement on 1 August 2012.[152] That said, Mr Leiman did meet Mr Brewer earlier on 9 March 2012 in London, although the plaintiffs' position is that this meeting was for purely social purposes. I note that Mr Brewer did end up joining BTG Pactual in March 2013[153] and that he was not called by the plaintiffs as a witness. At the same time, I note that several of the named individuals such as Mr Cherrett were still Noble employees at the time of the trial,[154] but were not called by the defendants as witnesses.

155 Looking at the evidence as a whole, I have doubts that there was sufficient evidence by which the R&O Committee could have properly and rationally concluded that Mr Leiman was soliciting *all* of the named Noble senior management for employment. That said, even if the R&O Committee did not have a sufficient basis to find that there was solicitation, the overall evidence before them did show that around the same time as these meetings, Mr Leiman had moved beyond mere preparatory steps in his discussions with Summa Capital and BTG Pactual and was pursuing them hard. Even if Mr Leiman had not specifically asked Mr Brewer or any of the other senior Noble employees to come on board with his plans at this stage, the R&O Committee certainly had a basis to take the view that Mr Leiman had discussed his plans with Mr Brewer and others, and to take this into account when coming to its decision as to whether Mr Leiman had acted to Noble's detriment. I do not think that this would have been an arbitrary or capricious finding.

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152 DCS, para 82(g); 4AB, pp 2344–2345.

153 DCS, para 82(f).

154 PCS, para 387.

156 In any event, nothing turns on the solicitation point given my finding that the R&O Committee already had a proper basis for coming to the conclusion that there was conduct detrimental to Noble because of Mr Leiman's acts of competition against Noble. Even if Mr Leiman was just discussing business matters with senior Noble employees such as Mr Brewer for the purpose of firming up his plans (BTG Pactual or the CMB Plan) as opposed to specific solicitation of services, Mr Leiman would clearly be engaging in more than preparatory acts in the period when he was bound by the non-compete obligation.

157 I pause to reiterate that it is not for this Court to substitute the opinion of the decision-maker. The task, as stated by Lady Hale in *Braganza* at [2], is to decide whether the employer was entitled to form the opinion which it did. The standard of review is whether the decision was made in good faith and not arbitrarily or capriciously, that decision being the finding by the R&O Committee that Mr Leiman had acted to the detriment of Noble. I am satisfied that the R&O Committee made this finding in good faith, on the basis of the evidence showing a breach of Mr Leiman's non-competition obligations.

Misuse of confidential information

158 Given my above findings, it is not strictly necessary for me to consider the allegations of misuse of confidential information for the purposes of determining the validity of the R&O Committee's decisions. Indeed, the minutes of the meetings and the other contemporaneous documents do not indicate that this particular issue was specifically discussed by the R&O Committee, and it did not form part of the grounds for its decisions.

159 I note that Burton J in *Nomura* held at 780 that "whereas, in cases of wrongful dismissal, an employer can, in order to justify a dismissal, rely on matters which he can later show to have been the case, even if he did not know of and/or rely upon them at the time to justify dismissal", the position is different where the issue is not wrongful dismissal but whether the employer exercised a discretion in breach of contract. For this reason, it may be thought that it is not appropriate for this Court to have regard to these allegations in deciding whether the decisions made by the R&O Committee were legally defensible. That said, it is clear that the R&O Committee was at least aware of the approaches made to Summa Capital and BTG Pactual in light of Mr Leiman's e-mail to Mr Vinokurov. Further, even if the R&O Committee did not specifically address the issue of breach of confidence, I am of the view that this would have formed part of the context in which it found that Mr Leiman had acted to the detriment of Noble.

160 In any case, I will set out my findings and observations on the issue of breach of confidence, as it is relevant to NRL's counterclaim against Mr Leiman that is discussed towards the end of this judgment.

161 The basic principles of the law on confidence as set out in the seminal English cases of *Saltman Engineering Co v Campbell Engineering Co* (1948) 65 RPC 203 and *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco v Clark*"), which have been followed and applied in numerous Singapore cases including *PH Hydraulics & Engineering Pte Ltd v Intrepid Offshore Construction Pte Ltd and another* [2012] 4 SLR 36 at [55], and *Invenpro (M) Sdn Bd v JCS Automation Pte Ltd and another* [2014] 2 SLR 1045 ("*Invenpro*") at [129]. The three basic elements to be satisfied are as follows:

(a) the information must possess the necessary quality of confidentiality;

(b) the information must have been imparted or received in circumstances such as to give rise to an obligation of confidentiality; and

(c) there must have been unauthorised use and (possibly) detriment (see [165]–[169] below).

162 The information that NRL claims to have been confidential was that "Summa Capital was interested in moving into the commodities sector, and in particular, that Summa Capital had been warned off working with Glencore, that Glencore was being squeezed out of major Russian grain ports, and that the business was being flipped to Noble or Louis Dreyfus".[155] Mr Leiman was made privy to this information by way of Noble's internal e-mail discussions from August to October 2011 which related to Summa Capital. On 29 October 2011, a NRL director, Mr William Randall, e-mailed Mr Brewer and one Mr Raj Kapoor, stating that Noble had "been closely working with a group called Summa Capital (controlled by MgM) over last 4 months". Among other things, the e-mail stated that Summa Capital had "been warned off working with Glencore from the top" as "[s]omething went wrong" and that "MgM is progressively squeezing them out of major Russian grain ports and trying to flip business to Noble / [Louis Dreyfus]".[156] Mr Leiman and Mr Elman were the only other persons copied in the e-mail chain.

163 It is clear that this information regarding Summa Capital was in fact confidential. Not only does it appear to cover commercially sensitive matters,

155 DCS, para 112(a).

156 3AB, p 2283.

Mr Leiman also confirmed during cross-examination that such information was not available in the public domain.[157] The circulation of such information was also restricted to a few key members of Noble. Clause 6 of the Employment Agreement provides for the obligation not to reveal Noble's confidential information without prior written consent, and defines "confidential information" to include "trade secrets and non-public information concerning financial data … business plans, [and] product and/or services development".[158] In my view, the information in question falls squarely within the ambit of cl 6.

164 I also find that there was unauthorised use of the said confidential information. Mr Leiman contacted Summa Capital without NRL's knowledge and in pursuit of his own CMB Plan, and effectively used the confidential information in crafting a pitch to Summa Capital, which he knew to be interested in moving into the commodities sector. I also do not think it was entirely a coincidence that Mr Leiman used the phrase "the new Glencore" as part of his pitch. Needless to say, none of this was authorised by NRL, whether implicitly or expressly.

165 Megarry J in *Coco v Clark* (at 48) and the authors of Tanya Aplin *et al*, *Gurry on Breach of Confidence* (Oxford University Press, 2nd Ed, 2012) ("*Gurry*") at para 15.43 remark that the case law contains no clear answer as to whether there is a separate requirement to show detriment, although it is suggested in *Gurry* that "i[n] almost all cases where there is an obligation and there is breach, there is likely to be detriment in some form".

166 Much of the uncertainty or hesitation over whether there is a separate requirement of detriment arises because of lingering doubts over the doctrinal

157 NOE of 12 July 2017, p 23–24.

158 1AB, p 308.

basis of the cause of action of breach of confidence. Contract, tort, property and equity have all been referred to as possible jurisdictional bases, while some subscribe to the view that the law of confidence is *sui generis* in nature. Under each of these approaches, a different emphasis may be placed on the requirement of detriment. For example, analogising a breach of confidence to a trespass in tort would mean that detriment is less important as the torts of trespass to land, goods and the person are generally actionable *per se*, while an approach grounded in equity may require detriment given the maxim that "equity does not act in vain": see Ng Siew Kuan, "The Spycatcher Saga: Its Implications and Effect on the Law of Confidence" [1990] 32 Malaya Law Review 1 at Part VI(1) and generally. Perhaps the real question is what exactly is meant by "detriment", and in particular, whether loss of confidentiality (for example, from an unauthorised disclosure) is sufficient in and of itself to establish detriment.

167 In the area of commercial or industrial trade secrets and confidential information, the value or significance of confidential information lies not in the information *per se*, but in the fact that the information is *confidential* and not known to or readily available to the public at large: John Hull, *Commercial Secrecy: Law and Practice* (Sweet & Maxwell, 1998) at p 44. In *A-G v Newspaper Publishing plc* [1989] 2 FSR 27 at 48, Donaldson LJ likened confidential information to an "ice cube":

> Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial… Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

168 I agree with the authors of *Gurry* at para 15.43 in preferring the view that "the requirement of detriment is not a discrete element, but rather is subsumed within both the nature of the information in question and the scope of the obligation". I note that the same "basic" law of confidence generally applies to all types of information which passes the threshold test of confidentiality (*ie*, not readily available to the public at large). The range of information is enormous and is often organised into classes such as: (i) personal information; (ii) state and/or official information; (iii) business information; and (iv) trade secrets. That said, behind the classification of convenience there remains a question as to whether different nuances or details of the basic principles may apply depending on the nature of the information, the scope of the obligation and the circumstances under which the obligation arises.

169 I add by way of general observation that the question of detriment is also relevant to the remedy that is in issue given the nature or scope of the breach. For example, where the breach consists of unauthorised disclosure of the confidential information to the public at large (*eg*, publication on a website), the unauthorised use (disclosure) has the effect of destroying the very subject matter of the confidence. On the other hand, where the unauthorised use comprises disclosure to just one other person (an indirect recipient) in breach of confidence, the information may still be confidential as a matter of law if that other person is caught by an obligation of confidentiality. In the former case, aside from an award of damages or accounting of profits, there is a tricky question as to whether there remains any basis for a grant of a final injunction against the defendant. On the other hand, in the latter case, the timely grant of injunctive relief against the defendant and the indirect recipient may: (i) preserve the confidentiality of the information and (ii) avoid the prospect of consequential losses to the plaintiff.

170 Coming back to the case at hand, it appears that no tangible consequential loss was ultimately caused to NRL in light of the fact that the pitch to Summa Capital did not succeed. Indeed, I note for the time being that NRL does not contend that the Court ought to award damages beyond that necessary to "compensate" for benefits received by Mr Leiman under the Settlement Agreement and the Advisory Agreement. I will return to this issue in my analysis of the counterclaim below.

171 NRL further submits that Mr Leiman misused confidential information pertaining to the number of vessels owned by Noble.[159] This information was set out in a chart contained in a business plan for Alliance Commodities dated January 2012.[160] Other companies such as Cargill, Louis Dreyfus and Glencore were also listed, but Mr Leiman did not have information on how many vessels they had. NRL argues that it must be inferred that Mr Leiman had obtained the information about Noble's vessels by virtue of his position as CEO of NGL. I have doubts about the confidentiality of this information, especially given that there is no evidence about how this information was imparted to Mr Leiman. Even if it is accepted that such information was confidential, it is unclear whether Mr Leiman even shared this business plan document with anyone else. I therefore do not think that the claim of misuse of confidential information can be sustained on this separate ground.

Prior conduct in relation to Messrs Carlier and Ozeias

172 Another ground upon which the R&O Committee concluded that Mr Leiman had acted in a way contrary to Noble's interests was Mr Leiman's hiring of Messrs Carlier and Ozeias without disclosing that they had, as the defendants

159 DCS, p 55.

160 5AB, pp 3312 and 3323.

allege, "serious integrity issues and were facing serious allegations of fraud, deceit and other wrongdoings in multiple ongoing proceedings".[161] As stated in the minutes of the R&O Committee's meeting on 27 March 2012, the R&O Committee concluded that the following formed part of the grounds of its decision:

> [T]he actions of Ricardo Leiman in hiring [Messrs Carlier and Ozeias] and/or continuing to employ them whilst knowing of the legal accusations against them (and a resulting criminal conviction of Mr. Carlier while an employee of Noble Group) in Brazil in respect of their activities at Eximcoop and their actions vis-a-vis Itochu, and never informing the Board of Noble or other senior officers of the Group of same, and misleading Noble senior management about their previous employment history and legal disputes, and further knowing their work experience was not in the management of sugar mills, all the while placing them in very senior positions of trust in the Group's Brazilian sugar mill operations which subsequently suffered poor financial results …

173 Extensive evidence pertaining to matters involving Mr Leiman and Messrs Carlier and Ozeias was led during the trial. It is not necessary for me to set this out in detail; a broad summary of the relevant facts will suffice for present purposes and a short description has already been provided. In brief, I accept the 2012 Wolfe Report's factual findings on the situation regarding Eximcoop *circa* 1998.

174 In November 1998, Eximcoop's subsidiary, Graincoop, ordered soymeal from a company named Continental Grain. Without having paid for the cargo, Graincoop took possession of the master bills of lading in January 1999, procured the cargo and sold it onwards to third parties. There was evidence from Continental Grain that it had just been acquired by another company at the time, and was a target for customers who were trying to evade payment.[162] Continental

[161] DCS, p 100.

[162] 8AB, p 5991; DCS, paras 176–177.

Grain demanded payment, but Eximcoop was in severe debt – its liabilities exceeded its assets by over US$19m.[163] Mr Carlier was Eximcoop's CEO at the time, and Mr Ozeias' position was Commercial Director.[164]

175 On 21 January 1999, Mr Leiman e-mailed Messrs Carlier and Ozeias and two other Eximcoop colleagues stating that Graincoop had been "officially ac[c]used of fraud for cashing an unpaid [bill] and issuing two [bills]" by Continental Grain and one of the third-party purchasers. Mr Leiman's proposed strategy to deal with this problem was to pay off Continental Grain by borrowing funds from one of Eximcoop's shareholders, CAROL, and to issue an official statement stating that Graincoop was merely "late in payment" but not responsible for any fraud.[165] Graincoop then borrowed US$2.45m from CAROL to pay Continental Grain for the soymeal cargo. When Itochu subsequently invested in Eximcoop believing that the funds would be used to expand Eximcoop and develop new business, part of the funds were instead used to repay CAROL without Itochu's knowledge.[166] This later became a subject of Itochu's claim against Eximcoop, which was settled following an arbitral award in Itochu's favour.[167]

176 It is clear that there was fraud perpetrated by Graincoop in respect of the Continental Grain incident, and that Mr Leiman was aware of such fraud. The word "fraud" appeared in several of the e-mails from or involving Mr Leiman such that the plaintiffs cannot reasonably maintain that no issue as to fraud existed.[168] In my view, this went beyond mere tardiness in making payment.

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163 9AB, p 6313; DCS, para 178(a).

164 AEIC of Mr Carlier, para 6; AEIC of Mr Ozeias, para 4; PCS, para 231.

165 9AB, p 6751.

166 9AB, pp 5998 and 6000; DCS, para 178(d).

167 8AB, pp 6021–6022.

177 The plaintiffs also contend that Messrs Carlier and Ozeias had not personally perpetrated the fraud against Continental Grain, but I am sceptical of this argument in view of their respective positions as Eximcoop's principal managers[169] and their involvement in covering up the fraud. In any case, Mr Leiman was, likewise, at least aware of the fraud even if he was not himself complicit in it.

178 These were not the only legal troubles faced by Messrs Carlier and Ozeias. On 7 November 2000,[170] after Itochu had taken over Eximcoop, Eximcoop filed a criminal complaint alleging that the former administrators of Eximcoop were involved in tax evasion through off-book payments to themselves and a number of other Eximcoop employees.[171] This included Mr Carlier, Mr Ozeias and Mr Leiman as the alleged three biggest beneficiaries of the scheme. Only Mr Carlier was indicted on 23 June 2003 and convicted on 25 June 2007, and his final appeal was dismissed on 17 October 2013.[172] The parties disagree as to when Mr Carlier told Mr Leiman about this indictment, but Mr Carlier gave evidence that he probably told Mr Leiman about it sometime around 2003,[173] while Mr Leiman's testimony on this matter was inconsistent.[174] Especially considering that Mr Leiman was himself involved in the criminal complaint and would have likely stayed abreast of the developments on the matter, and also given the fact that the criminal complaint was reported in a Brazilian newspaper in 2001,[175] it appears to me that Mr

168 NOE of 4 July 2017, p 131; see 9AB, pp 6751 and 6759.

169 See 8AB, p 6025.

170 9AB, p 6112.

171 8AB, p 6008 *et seq*.

172 DCS, para 214, citing 10AB, p 7407 and AEIC of Mr Carlier, para 93.

173 NOE of 19 July 2017, p 97.

174 See DCS para 218.

Leiman would have known about Mr Carlier's indictment prior to Mr Carlier joining Noble.

179 I add that around 2006, Messrs Carlier and Ozeias were involved in other legal proceedings in respect of their running of Agricole, and they were accused of fraud and racketeering in a criminal complaint which was later dropped (see [39(b)] above).[176] The evidence regarding Mr Leiman's knowledge of this was thin. The same goes for Mr Leiman's knowledge of the legal proceedings brought against Mr Carlier by his former lawyers for the non-payment of legal fees, where they accused him of lying and litigating in bad faith, even though these were ongoing at the time that Messrs Carlier and Ozeias joined Noble.[177] It suffices for me to focus on Mr Leiman's knowledge of the matters mentioned at [173]–[178] above.

180 Agricole was in the process of closing down around September 2006, and it was around that time that Mr Ozeias told Mr Leiman that he was looking for a job.[178] Shortly afterwards, Mr Leiman requested a meeting with Mr Carlier and told Mr Carlier that he might potentially be able to offer Mr Carlier a job at Noble Brazil.[179] In early November 2006, Mr Leiman offered Mr Ozeias the job of managing and operating a sugar mill.[180] Following negotiations on the terms of their employment, Messrs Carlier and Ozeias signed their employment contracts on 12 December 2006.[181] Mr Carlier was employed as the CEO of the

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175 NOE of 19 July 2017, p 12.

176 8AB, p 5951.

177 NOE of 19 July 2017, pp 3–4; DCS, para 225.

178 NOE of 18 July 2017, p 54.

179 13AB, pp 9136 and 9145.

180 NOE of 18 July 2017, pp 31–32.

181 1AB, pp 362 *et seq*; 13AB, pp 9149 and 9161.

sugar mill operations at Noble Brazil.[182] Mr Ozeias was employed as the Commercial Director of the sugar plant business.[183]

181 On 26 December 2006, in response to an earlier request from Mr Elman regarding the backgrounds of Messrs Carlier and Ozeias who had just been hired by Noble Brazil to run its sugar mill, Mr Leiman set out their work experience in an e-mail and described them in a positive light.[184] Mr Leiman made the following representations about Messrs Carlier and Ozeias, which the defendants argue he knew were false:[185]

(a) that they had good track records which included working for and having "joined" Conagra (a big name in the global agri-trading industry)[186] and another "Brazilian trading company", when they were in fact only agents of Conagra[187] and had set up Agricole themselves;

(b) that they had "very good experiences that fit very well [with] the role", when they did not have any prior experience managing and operating sugar mills;

(c) that they were "very knowledgeable and trustworthy";

(d) that they "got hit by the false allegations" made by Itochu which "are finished now" (presumably, this referred to the legal

182 AEIC of Mr Carlier, para 16.

183 AEIC of Mr Ozeias, para 16.

184 1AB, p 370.

185 DCS, para 171.

186 NOE of 6 July 2017, p 54.

187 NOE of 6 July 2017, pp 56–60.

proceedings which were in fact ongoing) and that they had "not done any wrongdoing"; and

(e) that initial references obtained by Mr Fabio Nascimento ("Mr Nascimento"), Noble Brazil's Chief Financial Officer, were positive,[188] and that Mr Leiman would advise Mr Elman accordingly if anything out of the ordinary was discovered.

182 There would have been nothing wrong with Mr Leiman being eager to hire Messrs Carlier and Ozeias on the basis that he had worked with them and trusted them, but I agree that several of these factual representations (notably, those at [181(a)] and [181(d)] above) he had made to Mr Elman were demonstrably false. I further note some inconsistencies in the plaintiffs' case as to whether NGL's board of directors was involved in the decision to hire Messrs Carlier and Ozeias – contrary to what was pleaded, it appears that the board was not in fact consulted.[189] The defendants therefore contend that Mr Leiman breached his fiduciary and implied contractual duties to act in good faith and in Noble's interests by hiring Messrs Carlier and Ozeias despite his knowledge of the aforementioned matters and by concealing the relevant facts from Noble.[190] On this point, I note the statement in *Fiduciary Duties* at para 4.80 that whilst a director owes a duty to report his own wrongdoing, a mere employee does not necessarily owe such a duty simply as a result of his duty of fidelity. That said, there is support for the view that an employee can owe a duty to report the wrongdoing of a fellow employee: see *Fiduciary Duties* at para 4.83, citing *Sybron Corporation v Rochem* [1984] Ch 112.

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188 *Cf* 8AB, p 6053.

189 NOE of 6 July 2017, p 21, *cf* amended reply and defence to counterclaim, para 25(c).

190 DCS, paras 250 and 254–256.

183 The plaintiffs, however, argue that Noble's senior management did in fact know of these matters relating to Messrs Carlier and Ozeias by October 2011 at the latest, yet chose not to take action.[191] Indeed, there was ample evidence showing that the existence of civil and criminal proceedings against Messrs Carlier and Ozeias had been raised to Noble:

(a) Mr Leiman's e-mail to Mr Elman on 26 December 2006 which introduced Messrs Carlier and Ozeias mentioned that Itochu had brought proceedings against them (see [181] above).

(b) Around the same time, Mr Nascimento found out "the whole story" about Messrs Carlier and Ozeias from Mr Dinilson Lins ("Mr Lins"), the Controller of the sugar mill. Mr Lins told Mr Nascimento that he had worked with them at Allicorp, and that they did "not have a good record". Mr Lins provided the details of the problems at Allicorp and stated that there was a criminal complaint as well as investigations against them "for fraudulent management and illegal currency remittances".[192] Mr Nascimento was also given copies of documents relating to the Eximcoop civil proceedings against Messrs Carlier and Ozeias, the Eximcoop criminal complaint and charge against Mr Carlier, and the Allicorp criminal complaint,[193] which he showed to Noble's lawyers at Linklaters.[194]

(c) In May 2007, Mr Alam e-mailed Mr Elman and Mr Leiman stating that there were sentiments in Noble Brazil that Messrs Carlier and Ozeias "may not have the expertise to manage sugar issues since

191 PCS, para 487 *et seq*.

192 1AB, pp 594–596.

193 8AB, p 6053.

194 6AB, p 6053.

they have non sugar backgrounds" and that "they are 'untouchable' because they are hired and protected by [Mr Leiman]". Mr Leiman informed Ms Konyn (of Noble's human resources department) of these observations, and Mr Alam forwarded the e-mail to her upon her request.[195]

(d) The 2008 Wolfe Memo mentioned the Eximcoop proceedings against Messrs Carlier and Ozeias, the Eximcoop criminal complaint against them and Mr Leiman, "a possible investigation/prosecution" against Mr Carlier, and the Allicorp criminal complaint against Messrs Carlier and Ozeias. Mr Wolfe added that he would be "able to verify and investigate these allegations and verify the matters raised in the criminal and civil proceedings" if instructed to by Noble.[196]

(e) In November 2009, Mr Carlier's lawyers sent Noble's lawyers a report summarising the status of the criminal proceedings against him.[197]

184 It is clear that Noble indeed knew of the matters (at least in broad terms) involving Messrs Carlier and Ozeias which the defendants now complain of but did not take any action in relation to this. After all, a copy of the 2008 Wolfe Memo was provided by Mr Spitz to Noble's then Group Finance Director and its Accounts/Finance Director of Projects in November 2008.[198] Indeed, the contents of the 2008 Wolfe Memo were shared with Mr Elman, even though he claimed not to recall when this happened.[199] In all likelihood, the 2008 Wolfe

195 1AB, pp 510–511.

196 1AB, p 633.

197 2AB, p 987–993.

198 PCS, para 235; NOE of 28 July 2017, pp 85–86.

199 PCS, para 235; NOE of 3 August 2017 at pp 33–34 and 99; NOE of 4 August 2017, pp 105–106.

Memo would have been shared with Mr Elman closer to 2008 than 2011. Other senior staff such as Mr Alam and Ms Konyn would also have been aware (and ought to have been aware) of the general concerns, and they and Mr Elman could have easily taken action to pin down details very much earlier if they thought necessary or desirable.

185 Instead, Mr Leiman was promoted to CEO of NGL in 2010, and Messrs Carlier and Ozeias remained employed by Noble Brazil until 2012. Even if Mr Leiman's false representations in the hiring of Messrs Carlier and Ozeias amounted to breaches of his fiduciary or contractual duties, Noble's conduct between 2007 and 2011/12 indicates that it did not consider these to be sufficiently serious or fundamental breaches (contrary to what they now argue) and that they had, in any event, waived or chosen not to pursue their objections. I also note that despite the alleged poor performance of Noble's sugar mill operations in Brazil and the information which Noble already had about Messrs Carlier and Ozeias and the problems at Eximcoop, Mr Leiman was doing well at NGL and in regular receipt of annual discretionary bonuses. According to Mr Rubin, Mr Leiman "did do a lot of work and very hard work and very important work" during his tenure.[200]

186 I therefore do not accept the defendants' argument that the Shares and Share Options would have been forfeited (as a result of Mr Leiman's purported breaches of his contractual and fiduciary duties with respect to the allegations concerning Messrs Carlier and Ozeias) regardless of the validity of the R&O Committee's decision.[201]

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200 NOE of 26 July 2017 at p 25.

201 DCS, para 257.

187 It also does not appear to me that the Settlement Agreement was intended to cover detrimental acts prior to the parties entering into the agreement, much less conduct that pre-dated it by several years. There are no express terms to this effect, and I am of the view that this is not an interpretation that a reasonable person with knowledge of the circumstances would come to on the facts of this case.

188 Nor do I think it is appropriate, especially bearing in mind the well-known stringent tests for implying terms into a contract (see *The Law of Contract* at para 6.055), to read in an implied term that a past breach would disentitle Mr Leiman from his benefits under the agreement. This is especially so if the implied term included any past breach even if NRL/NGL knew of the breach or relevant facts and had still awarded Mr Leiman discretionary bonuses comprising shares and share options. If the position were otherwise it would mean that Mr Leiman and NRL were entering into an agreement whereby Mr Leiman was effectively surrendering shares and share options already awarded because of the past breach. It would be inequitable and in bad faith for NRL to enter into the contract knowing fully well that Mr Leiman would not be able to satisfy its terms on the basis of past conduct, and then later seeking to divest Mr Leiman of the benefits accruing under the contract as well as his past entitlements. I note that the defendants' case as pleaded and fought at trial included a claim against Mr Leiman for an account and repayment of all salary, bonus and other payments he received from NRL from the date of his fiduciary and contractual breaches, although they have stated in their closing submissions they are no longer pursuing these claims. The point I make is that in the circumstances as a whole, there are insufficient grounds to suggest that the metaphorical officious bystander would have said, "it is obvious there must be this implied term," or that the Settlement Agreement would not have made

commercial sense and would have lacked business efficacy without such an implied term: see *The Law of Contract* at paras 6.060–6.064.

189 I note also that the tense used in cl 3(d) ("provided [Mr Leiman] *does not act* in any way to the detriment of Noble" [emphasis added]) further suggests that the condition was meant to apply prospectively. Although a different tense was used for cl 3(c) ("provided that prior to exercise 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 is no indication that the parties intended for the conditions governing Mr Leiman's entitlement to the Shares and the Share Options to be different. A plain reading thus militates against the defendants' interpretation of the Settlement Agreement.

190 Hence, the R&O Committee should not have considered Mr Leiman's prior conduct in relation to Messrs Carlier and Ozeias when determining whether or not he had acted in a way detrimental to Noble's interests within the meaning of cll 3(c) and (d) of the Settlement Agreement. It follows that the R&O Committee could not have rationally based their decisions on such conduct. However, its decisions were also based on an independent alternative ground (Mr Leiman's acts of competition against Noble) which I have earlier found to be valid in the sense that this decision was not capricious, arbitrary or made in bad faith. In other words, I find that the R&O Committee's decisions were valid, but only in so far as they were based on Mr Leiman's acts of competition subsequent to the Settlement Agreement, and not on his conduct relating to the hiring of Messrs Carlier and Ozeias prior to the Settlement Agreement.

Whether cl 3(c) of the Settlement Agreement is a penalty clause

191 Although I have upheld the validity of the R&O Committee's decisions, the plaintiffs also advance the further argument that cl 3(c) of the Settlement Agreement, which covers Mr Leiman's entitlement to the Share Options, amounts to a penalty clause and is unenforceable. The plaintiffs point out that 37,090,910 out of the 44,818,182 Share Options had already vested and could have been exercised by Mr Leiman at any time prior to his resignation, under the Share Option Rules.[202] I note that the plaintiffs do not make the same argument in respect of cl 3(d) which covers Mr Leiman's entitlement to the Shares.

192 The defendants' position is that cl 3(c) is not a penalty clause, as it does not provide for forfeiture of any accrued right, but conferred on Mr Leiman additional rights which he would not have otherwise had and which were contingent upon him fulfilling his obligation not to act in a way detrimental to Noble.[203] They further argue that in any case, cl 3(c) is commercially justifiable and not penal in nature.[204]

193 The law on penalty clauses is helpfully summarised by Lord Dunedin in the following oft-cited passage from *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("*Dunlop*") at 86–88, quoted with approval by the Court of Appeal in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [78]:

> 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

202 PCS, paras 124–126.

203 DRS, paras 221 and 230.

204 DRS, para 233.

> 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 …
>
> 3. The question whether a sum stipulated is 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 …
>
> 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 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 …
> >
> > (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum is a sum greater than the sum which ought to have been paid …
> >
> > (*c*) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more of all of several events, some of which may occasion serious and others but trifling damage' …
> >
> > 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 …
>
> [internal citations omitted]

194 As Lord Neuberger and Lord Sumption (Lord Carnwath agreeing) remarked in the UK Supreme Court decision of *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("*Cavendish*") at [22], "Lord Dunedin's speech in

the *Dunlop* case achieved the status of a quasi-statutory code in the subsequent case-law." However, their Lordships found that subsequent case law had developed the law in an unsatisfactory direction (at [31]):

> In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. In *Legione v Hateley* (1983) 152 CLR 406, 445, Mason and Deane JJ defined a penalty as follows:
>
> > "A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation ..."
>
> All definition is treacherous as applied to such a protean concept. This one can fairly be said to be too wide in the sense that it appears to be apt to cover many provisions which would not be penalties (for example most, if not all, forfeiture clauses). However, in so far as it refers to "punishment" and "an additional or different liability" as opposed to "in terrorem" and "genuine pre-estimate of loss", this definition seems to us to get closer to the concept of a penalty than any other definition we have seen. The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.

Instead, Lord Neuberger and Lord Sumption found at [32] the "true test" to be "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."

195 The plaintiffs highlight that the *Dunlop* test remains good law in Singapore.[205] The Court of Appeal in *Xia Zhengyan* (decided just before *Cavendish*) expressly stated at [78] that the law in Singapore on this area is still basically embodied within the principles laid down by Lord Dunedin. Indeed, the Court of Appeal has not yet considered the relevance or applicability of the statements made in *Cavendish*. Nevertheless, the above passage in *Cavendish* does not suggest that that *Dunlop* is no longer good law in the UK either. Instead, the point made in *Cavendish* is that Lord Dunedin's test in *Dunlop* remains "perfectly adequate" to determine the validity of "a straightforward damages clause", but in other cases, "compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations" (at [32]). In other words, "[a] damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach", and this will "depend on whether the innocent party has a legitimate interest in performance extending beyond the prospect of pecuniary compensation flowing directly from the breach in question" (at [28]).

196 *Cavendish* has been cited in local decisions for the proposition that "the rule against penalty clauses regulates only remedies available for breach of a party's primary obligations, *ie*, only *secondary obligations*, and not the primary obligations themselves": *Allplus Holdings Pte Ltd and others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144 at [15]. As stated in *Cavendish* at [73], the

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205 PCS, para 132.

rule does not empower courts to review the fairness of parties' primary obligations. *Cavendish* has also been cited for "the strong initial presumption" in negotiated contracts between properly advised parties of comparable bargaining power that "the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach": *iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronic*") at [177], citing *Cavendish* at [35]. It is not for the courts to relieve a party from the consequences of what may prove to be an onerous or possibly even a commercially imprudent bargain: *iTronic* at [177], citing *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 at 403.

197 It is clear that cl 3(c) of the Settlement Agreement is not "a straightforward damages clause". It provides for Mr Leiman's entitlement to exercise the Share Options, subject to his forbearance to act in a way detrimental to Noble (see [28] above). In this connection, concepts such as "*in terrorem*" and "genuine pre-estimate of loss" mentioned in Lord Dunedin's speech in *Dunlop* fit rather uneasily, just as Lord Neuberger and Lord Sumption observed in *Cavendish* (see [194] above). In such circumstances, my view is that the *Cavendish* inquiry as to whether the secondary obligation "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]) offers the most appropriate guidance.

198 The defendants further cite the case of *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB) ("*Imam-Sadeque*"), the context and facts of which are quite close to those of the present case. That case involved a senior employee of an asset management company, Mr Imam-Sadeque, who had been remunerated over the years with shares under certain bonus plans which would vest at future dates. These shares were invested in

fund units pursuant to Mr Imam-Sadeque's directions. His entitlement to the shares under the bonus plans and the fund units would be dependent on whether he was a "good leaver", if his employment were to be terminated before the vesting dates of the shares. He would not be considered a "good leaver" if he were to leave voluntarily. Mr Imam-Sadeque however entered into a compromise agreement with his employer, which provided that Mr Imam-Sadeque was to be treated as a "good leaver" for the purpose of the vesting of the fund units, provided that he complied with the terms of the compromise agreement and his employment contract. The employer later found out that Mr Imam-Sadeque had agreed to join a new asset management start-up, which he assisted in setting up and launching its competitive business while he was on garden leave. The employer thus argued that Mr Imam-Sadeque had breached his employment contract and the compromise agreement, and was thus not entitled to the fund units. In response, Mr Imam-Sadeque argued, among other things, that the relevant provisions in the compromise agreement concerning the forfeiture were unenforceable by reason of the penalty doctrine: *Imam-Sadeque* at [3]–[6] and [186].

199 Popplewell J rejected Mr Imam-Sadeque's argument, finding that the penalty doctrine did not apply on the facts (at [204]). His first reason was that the compromise agreement "confer[red] upon [him] additional rights which he would not otherwise have had" (at [207]). This was an amendment to his existing rights under the bonus plans and was more advantageous to him. The additional rights were conditional upon the fulfilment of the condition of compliance with the relevant agreements, and were not acquired because these conditions were not fulfilled. Popplewell J's second reason was that any forfeiture was only in respect of contingent future interests in the fund units, which were not equivalent to the payment of a money sum by Mr Imam-

Sadeque upon breach so as to come within the penalty doctrine (at [210]). These rights were contingent upon Mr Imam-Sadeque being a "good leaver" or the vesting of the shares (at [211]).

200 Popplewell J further held that even if the penalty doctrine were applicable in principle, the "forfeiture" provisions of the compromise agreement were not penal so as to be unenforceable (at [233]). In making this finding, Popplewell J considered, among other things, the fact that the parties were both sophisticated and of comparable bargaining power, that the compromise agreement contained a variety of rights and obligations which had their individual commercial justifications and value which could not be easily expressed in monetary terms, and the commercial objectives of such deferred remuneration plans (*ie*, the bonus plans) which were commonplace and in accordance with industry practice (at [225]–[230]). Popplewell J concluded that this was not a case where "the value of the rights forfeited exceeds the greatest loss which could conceivably be suffered from the breach", and the true loss to the employer was likely to be impossible to establish and recover by a damages claim (at [228]). Instead, he expressed that "[i]t would be an injustice to [the employer] if Mr Imam-Sadeque could escape his bargain" by acting "in serious breach of his contractual duties as an employee, and yet still enjoy the benefits of the vested Fund Units" (at [229]–[230]).

201 While I am cognisant of the factual differences between the cases and certainly do not hastily conclude that they are identical in all material respects, I find the approach taken by Popplewell J in *Imam-Sadeque* (in particular, his first reason) to be largely instructive for the present purposes. In my view, this approach is also a generally sound one, although I prefer not to deal with the applicability of the penalty doctrine and the question of whether the relevant contractual provisions are penal as conceptually distinct or sequential inquiries.

202 In the present case, cl 8.3(a) of the Share Option Rules provides that any share option which is unexercised will "immediately lapse" once the participant "ceas[es] to be in the full-time employment" with Noble, "unless the [R&O] Committee, in its sole discretion, determines otherwise".[206] Because of this, the defendants' case is that Mr Leiman was already not entitled to the Share Options in the absence of the Settlement Agreement.[207]

203 Following from the decision in *Imam-Sadeque*, it will be helpful to examine the sequence of events pertaining to Mr Leiman's resignation and departure from NRL, the signing of the Settlement Agreement and the Advisory Agreement, and the attempts to exercise the Share Options.

204 According to Mr Leiman, sometime between July and September 2011, he informed Mr Rubin of his intention to resign and suggested that a replacement CEO be found. Unfortunately, the e-mail to Mr Rubin which set out Mr Leiman's intention to resign is not in evidence. That said, Mr Leiman asserts that he resigned sometime around the end of October 2011.[208]

205 The evidence of Mr Elman is different. In an e-mail dated 2 September 2011 exhibited in Mr Elman's affidavit of evidence-in-chief, Mr Leiman asked Mr Rubin to assist in finding a way forward to resolve the conflict between himself and Mr Elman. Mr Leiman presented four possible outcomes. His preferred outcome was that he be given a proper mandate to run Noble as its CEO with full executive powers. The last of the four outcomes was that he would exit Noble.[209] Mr Elman gave evidence that he asked Mr Leiman to leave

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206 AEIC of Mr Leiman, p 151.

207 See DRS, para 226.

208 PCS, para 15; NOE of 7 July 2017, pp 43–44; AEIC of Mr Leiman, para 19 and 22.

209 AEIC of Mr Elman, p 59.

sometime in late October 2011, and Mr Leiman eventually agreed to leave despite some initial reluctance.[210] Indeed, this is supported by an email dated 27 October 2011 from Mr Elman to NGL's board of directors informing them that Mr Elman was proposing that Mr Leiman be moved from the post of CEO to an advisory position with effect from 1 December 2011.[211]

206 On the whole, the evidence leads me to conclude that whilst Mr Leiman did raise the possibility of resignation in mid-2011, what eventually happened was that a mutual understanding was reached whereby Mr Leiman would leave Noble and take up an advisory position. This was followed by discussion on the terms of the Settlement Agreement and the Advisory Agreement.

207 The Settlement Agreement and Advisory Agreement were eventually entered into and dated 9 November 2011 (see [26] above). On the same date, a special NGL board meeting was held. It was recorded during this meeting that:[212]

(a) Mr Leiman had decided for personal reasons to step down as Director and CEO, and he had submitted his resignation on 9 November 2011; and

(b) Mr Leiman had agreed to remain as an advisor.

208 It will be recalled from [27]–[28] above that the Settlement Agreement sets out, *inter alia*, the following rights to Mr Leiman:

(a) his base salary from NRL through 1 December 2011 and for six months thereafter as notice period payments;

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210 AEIC of Mr Elman, paras 59–60.

211 AEIC of Mr Elman, p 61.

212 4AB, p 2347.

(b) entitlement to exercise the NGL share options vesting on 2 April 2012, provided he does so by 2 April 2013 and that he has not acted in any way to the detriment of Noble;

(c) entitlement to exercise the NGL share options vested but unexercised, provided he does so by 2 April 2013 and that he has not acted to the detriment of Noble;

(d) that the NGL restricted shares he holds would vest and become free of transfer restrictions in accordance with the terms of the grant, provided he does not act in any way to the detriment of Noble; and

(e) entitlement to be considered for the 2011 Bonus.

209 I accept that Mr Leiman could have exercised the Share Options which had already vested (at [208(c)] above) prior to his resignation or the termination of his employment, but the fact of the matter is that for some reason he did not do so.

210 I pause to note that the Settlement Agreement states that Mr Leiman would only cease to be employed by NRL on 1 December 2011, the effective date of the agreement. Whilst it may be that Mr Leiman was still an employee of NRL between 9 November and 1 December 2011, cl 8.4 of the Share Option Rules states that for the purposes of cl 8.3(a) (see [202] above), the grantee or participant is deemed to have ceased to be a full-time employee or executive at the date when the notice of his resignation or cessation is tendered or given to him unless the notice is withdrawn before its effective date.[213] On this basis, Mr

[213] AEIC of Mr Leiman, p 151.

Leiman was not entitled to the Share Options at the time he entered into the Settlement Agreement.

211 Hence, in the same vein as how Popplewell J construed the relevant provisions in the compromise agreement in *Iman-Sadeque*, I likewise regard cl 3(c) as conferring upon Mr Leiman additional benefits which he otherwise would not have had. But these additional benefits were, of course, subject to the condition that Mr Leiman did not act in a way detrimental to Noble (as determined by the R&O Committee).

212 Many of the considerations relied upon by Popplewell J in *Imam-Sadeque* at [200] above, in finding that the "forfeiture" provisions in the compromise agreement were not penal in nature, similarly apply here. Mr Leiman is an experienced businessman and had comparable bargaining power. The Settlement Agreement and Advisory Agreement were negotiated in detail over numerous e-mails in which individual terms (especially ones related to the duration of Mr Leiman's non-competition restrictions) were discussed and drafts were exchanged. It is not clear to me whether Mr Leiman obtained legal advice on these agreements, but he was at least alive to the need to do so.[214] In my view, this is a case where "the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach": *Cavendish* at [35]; *iTronic* at [177].

213 Like the compromise agreement in *Imam-Sadeque*, the Settlement Agreement contained a variety of rights and obligations with their own commercial justifications and value which could not be easily expressed in monetary terms. In my view, the secondary obligation stipulated in cl 3(c) (*ie*, "forfeiture" of the Share Options) was not "extravagant and unconscionable in

[214] 3AB, p 2260.

comparison with the greatest loss that could reasonably or proved to have followed from the breach": *iTronic* at [176], citing Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) at para 20-139. Or, to follow the phrasing used in *Cavendish* (at [32]), cl 3(c) does not impose a detriment on Mr Leiman that is out of all proportion to Noble's legitimate interest in ensuring that Mr Leiman did not compete against it or otherwise act to its detriment. Instead, it would be unfair to Noble if Mr Leiman were allowed to breach his obligations under the Settlement Agreement while still enjoying the benefits provided therein: see *Imam-Sadeque* at [229]–[230].

214 Given the reasons above, I am not satisfied that cl 3(c) is unenforceable for being a penalty clause.

215 For the avoidance of doubt, in the event I am wrong and the approach advocated in *Cavendish* is not applicable in Singapore, I make clear that I am in any case of the view that cl 3(c) is not void for being a penalty on the facts before the Court.

The remaining 5,652,421 shares

216 The fifth group of issues concerns the remaining 5,652,421 shares that were not expressly mentioned in the Settlement Agreement. The relevant questions are:

(a) Whether these 5,652,421 shares were covered by the Settlement Agreement, such that they should be treated in the same way as the rest of the Shares which were expressly mentioned?

(b) If not, is Mr Leiman entitled to these 5,652,421 shares under the terms of the AIP?

217 I note at the outset that cl 3(d) of the Settlement Agreement, which covers Mr Leiman's entitlement to the Shares and their accrued dividends (see [110] above), refers only to 17,276,013 shares. No mention is made of the 5,652,421 shares that are held by Mr Leiman himself and which were awarded to him on 4 May 2011 (see [48] above).

218 The plaintiffs nonetheless argue that the Settlement Agreement exhaustively covers all of the Shares that had been awarded to Mr Leiman, including the 5,652,421 shares awarded to Mr Leiman on 4 May 2011. They advance the following arguments in support:[215]

(a) The parties had intended this to be so, as evident from the negotiations leading up to the Settlement Agreement.

(b) There was no reason to forfeit these 5,652,421 shares just because shareholder approval had not yet been obtained. As Mr Chan himself recognised, there was no obstacle to seeking shareholder approval in due course.

(c) The defendants themselves took the position subsequently that Mr Leiman was not entitled to the 5,652,421 shares not because they had been given up, but because it had been determined that Mr Leiman had acted in a manner inimical to the interests of Noble.

219 In the event that the 5,652,421 shares were not covered under the Settlement Agreement, the plaintiffs' alternative argument was that Mr Leiman remains entitled to these shares on the terms of the AIP, as he did not forfeit them upon ceasing to be employed by NRL.[216]

215 PCS, para 108.

216 PCS, para 119.

220 I find that nothing in the negotiations leading up to the Settlement Agreement contradicts what cl 3(d) says on its face – that the Settlement Agreement only covers the 17,276,013 shares. In fact, I find that those negotiations further confirm what cl 3(d) states. By way of an email dated 24 October 2011, Mr Leiman requested information from Ms Konyn regarding his options and vested and unvested shares.[217] On that day, Ms Konyn replied with the statements requested.[218] Those statements showed that Mr Leiman held 17,276,013 restricted shares.[219] Ms Konyn also attached a copy of the 4 May 2011 share award letter under which Mr Leiman was awarded 5,652,421 shares as remuneration shares for 2010. Crucially, Ms Konyn stated in this e-mail that the 5,652,421 shares were not included in the statements, as they were subject to shareholders' approval. A week later, on 31 October 2011, Mr Alam, having checked with Noble's human resources department, e-mailed Mr Leiman stating that the number of restricted shares was 17,276,013.[220] In this e-mail, Mr Alam also told Mr Leiman to advise him if he had a different number. Mr Leiman did not dispute the number Mr Alam had provided. Instead, he replied and confirmed that the number of shares (*ie*, 17,276,013) seemed right.[221] He also forwarded the statements Ms Konyn provided, asking Mr Alam to revise and draft the final version of the Settlement Agreement.[222] All this was done on the basis that the Settlement Agreement would not cover the 5,652,421 shares.

221 The plaintiffs accept that the statements provided by Ms Konyn did not include the 5,652,421 shares, but pointed out that it would have been clear to

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217 3AB, pp 2248–2249.

218 3AB, p 2292.

219 3AB, p 2255.

220 3AB, p 2303.

221 3AB, p 2302.

222 3AB, p 2292.

Mr Alam that there was a separate lot of 5,652,421 shares. They say this because Mr Leiman had forwarded Ms Konyn's reply email of 24 October 2011 to Mr Alam, in which the share award letter of 4 May 2011 was attached. They submit that this would have made clear to Mr Alam that there was a separate lot of 5,652,421 shares.[223]

222 But just because it would have been clear to Mr Alam that there was a separate lot of 5,652,421 shares does not mean that that separate lot of shares would be included under the Settlement Agreement. Indeed, as earlier pointed out, Ms Konyn's reply email of 24 October 2011 stated clearly that this separate lot of 5,652,421 shares was not yet included in the statements, as they were subject to shareholders' approval. That the parties understood the Settlement Agreement to cover only the 17,276,013 shares was further confirmed at trial, where Mr Leiman accepted that Ms Konyn had openly told him that the statements did not include the 5,652,421 shares and the reason why that was so.[224] Mr Leiman also accepted that the "17,276,013" figure entered into the Settlement Agreement accorded with the number that was openly shared with him before he signed the Settlement Agreement, and which he himself had forwarded to Mr Alam to incorporate into that agreement.[225] I note Mr Leiman's testimony that he made a mistake signing the Settlement Agreement thinking that the 5,652,421 shares were included when in truth they were not. But I did not give much weight to this, as he had every opportunity to correct this mistake on his own accord in his correspondence with Ms Konyn and Mr Alam leading up to his signing of the Settlement Agreement, but did not do so.

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223 PCS, para 109(c).

224 NOE of 7 July 2017, p 109.

225 NOE of 7 July 2017, p 114.

223 This leads into the plaintiffs' second and third arguments (see [218(b)]–[218(c)] above), which can be dealt with together. It is common ground that shareholders' approval had not been obtained for the allotment of these 5,652,421 shares. The plaintiffs point to Mr Chan's testimony that Noble was supposed to seek shareholders' approval in due course and that there would be no difficulty in seeking such approval for Mr Leiman's 5,652,421 shares.[226] Yet, accepting, as the plaintiffs do, that a simple majority of votes was still needed to approve the award of these shares,[227] I note that no evidence was adduced to show how such a simple majority would have been obtained had the matter been tabled at the next annual general meeting. And in any case, given the circumstances, I find that Noble was not obligated to table any such request to begin with. Mr Chan had also testified that, having regard to the R&O Committee's decision in March 2012 to refuse the exercise of any options by Mr Leiman or Rothschild Trust on the basis that Mr Leiman had acted in a manner inimical to the interests of Noble, Noble would no longer submit those shares for shareholders' approval.[228] Moreover, as Mr Alam stated in his testimony, if an individual ceased to be employed, as was the case for Mr Leiman, shareholders' approval would not be sought.[229]

224 The plaintiffs also point to the fact that when Rothschild Trust queried whether the R&O Committee's decisions in March 2012 applied to the 5,652,421 shares,[230] Mr Alam's response of 26 April 2012 was not that these shares had been given up because they were not covered by the Settlement Agreement or because there would be no shareholders' approval obtained.

226 PCS, para 114–115.

227 PCS, para 115.

228 NOE of 28 July 2017, p 58.

229 NOE of 21 July 2017, p 47.

230 PCS, para 116 and 6AB, p 4060.

Instead, Mr Alam replied that the R&O Committee had decided not to approve the vesting because Mr Leiman had acted in a way that was inimical to Noble's interests.[231]

225 On its own, this reply might appear to support the position that the 5,652,421 shares had not been forfeited or given up at the time the Settlement Agreement was entered into. Yet, this reply has to be seen in light of all the other evidence that contradicts the position that the shares had not been given up. First, there is the fact that cl 3(d) expressly states the number of shares as 17,276,013 (see [217] above). Next, there is the fact that the negotiations leading up to the signing of the Settlement Agreement did not betray an intention that cl 3(d) should be construed in any other way. And finally, there is also the existence of an entire agreement clause in relation to the subject matter of the Settlement Agreement, as manifested in cl 10.[232] This clause, when read alongside cl 3(d), which states expressly that the Settlement Agreement covers only the 17,276,013 shares, gives strong support for the view that the 5,652,421 shares were not included under the Settlement Agreement. In the circumstances, I accepted Mr Alam's evidence that his response of 26 April 2012, which stated that the R&O Committee had denied the vesting on the basis that Mr Leiman had acted in a way inimical to Noble's interests, was indeed a mistake.[233]

226 In its alternative case, the plaintiffs submit that nothing in the Settlement Agreement says that Mr Leiman was giving up or forfeiting his right to the 5,652,421 shares, which he remains entitled to under the AIP regardless of whether he remains in NRL's employment. But this, I think, turns the matter on its head. The question is not about which shares were stated to be excluded from

231 6AB, p 4067.

232 5AB, p 2341.

233 NOE of 21 July 2017, p 55.

the Settlement Agreement; rather, it is about which shares are included under it. As stated above, I find that the effect of cl 3(d) read with cl 10 of the Settlement Agreement is clear – the 17,276,013 shares referred to under cl 3(d) exhaustively lays out the number of shares Mr Leiman was entitled to.

227 It may well be that under the AIP, shares are not *automatically* forfeited upon Mr Leiman ceasing to be employed by NRL.[234] But this has to be seen in light of the bargain that Mr Leiman subsequently struck with his employer in the form of the Settlement Agreement. Mr Leiman had every opportunity to specify in the final form of the Settlement Agreement whether the 5,652,421 shares ought to be included. They were not included in the end. The Court is therefore not in a position to find otherwise now.

228 Given my finding that the 5,652,421 shares are not covered by the Settlement Agreement, it is necessary to consider what rights, if any, Mr Leiman has to these shares outside of the Settlement Agreement. These shares were awarded to Mr Leiman under the AIP as distinct from the 2004 Share Option Scheme. Under the Employment Agreement, Mr Leiman was bound by the terms of the AIP. These include provisions on the consequences where an employee ceases to be an employee during the restricted period.

229 Clause 3 of these provisions states that if, the employee changes his status from that of an employee to that of a consultant, agent or advisor during the restricted period, then this change will not be considered a cessation of employment for the purposes of the AIP, provided that the change is made with the written approval of the CEO.[235]

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234 NOE of 21 July 2017, p 27.

235 1AB, p 571.

230 Clause 5 of these provisions states that if the employee acts or engages in conduct that is inimical or contrary to or against the interests of the Company, then the common stock held for the employee's account will be forfeited.[236]

231 It follows that Mr Leiman did not forfeit these shares simply because he had changed his position to that of an advisor of NRL. The problem, however, is cl 5. The restricted period for these shares was two years from the award date of 4 May 2011. Given my earlier finding that Mr Leiman had engaged in improper acts of competition (which were during the restricted period) it must follow that he had acted in a way which was inimical to Noble's interests such that the forfeiture provision applies.

The 2011 Bonus

232 The plaintiffs' pleaded case is that Mr Leiman is entitled to be considered for and be paid the 2011 Bonus (see [51(a)(iii) above]). I note that this plea raises two separate inquiries. First, there is the question of whether Mr Leiman is entitled to be *paid* the 2011 Bonus. Second, there is the question of his entitlement to be *considered* for the 2011 Bonus.

233 On the first question, the plaintiffs' initial case was that Mr Leiman was entitled to be paid the 2011 Bonus. This is seen in the references in their pleadings to Mr Elman's and Mr Rubin's purported assurances that Mr Leiman would receive the 2011 Bonus.[237] It is quite clear, however, that the plaintiffs themselves are no longer advancing this case. In their closing submissions, they have confined their case on the 2011 Bonus to the complaint that Mr Leiman was not considered for the 2011 Bonus.[238] In any case, they have not been able

236 1AB, p 572.

237 SOC, paras 13–14.

to point to any evidence to support their claim that Mr Elman and/or Mr Rubin had made any of those assurances. And this is in light of both Mr Rubin's and Mr Elman's evidence on the stand that no assurances were given to Mr Leiman about the 2011 Bonus.[239]

234 Moreover, the alleged assurance that Mr Leiman would receive the 2011 Bonus is wholly inconsistent with the Settlement Agreement which Mr Leiman entered into after negotiations. This is because cl 3(e) of the Settlement Agreement only provides that 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 [emphasis added]" (see [28] above). Clause 3(e) does not guarantee that Mr Leiman will be paid a bonus, but only that he will be considered for a bonus. It bears repeating that cl 10 of the Settlement Agreement sets out an entire agreement provision. In my view, it is far more likely that if Mr Elman or Mr Rubin had mentioned the 2011 discretionary bonus, all that was said was that he would be considered for the discretionary bonus in the normal manner.

235 In *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 ("*Latham Scott*"), the Court of Appeal held (at [72]) that unless the bonus (in an employment contract) had been expressed to be guaranteed, an employee could not claim to be legally entitled to a bonus, the granting and quantum of which are entirely at the discretion of the employer. Evidently, in such cases, much will turn on the construction of the particular provision on bonus payments to see whether the parties had intended the bonus to be guaranteed: see *Leong Hin Chuee v Citra Group Pte Ltd and others* [2015] 2 SLR 603 ("*Leong Hin Chuee*") at [147].

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238 PCS, paras 524–525 and 534.

239 NOE of 26 July 2017, p 30; NOE of 4 August 2017, p 71.

236 In *Latham Scott*, the relevant provision stated that "a bonus may be paid to you at the end of each calendar year, based on Company profitability and your performance during the year": at [56]. On that basis, the Court of Appeal in *Latham Scott* found (at [57]) that the decision to grant a bonus was entirely at the employer's discretion.

237 The heart of the dispute over the 2011 Bonus is therefore about whether Mr Leiman's bonus was in fact considered by NGL.[240] It is not disputed that the effect of cl 3(e) of the Settlement Agreement is to entitle Mr Leiman to at least have his claim to a bonus be considered.[241] It is also not disputed that the result may be that NGL decides not to award any bonus at all.[242] At the very least though, NGL had to consider the question of the 2011 Bonus.

238 The plaintiffs submit that the R&O Committee – and thus, NGL – did not even decide the 2011 Bonus (see [233] above), much less consider it rationally or in good faith.[243] They say this because:

(a) the defendants' own witnesses contradict one another on when the discussion on Mr Leiman's bonus would have taken place and the reasons for not paying Mr Leiman the 2011 Bonus; and

(b) the defendants have not produced documents evidencing the alleged discussions on the 2011 Bonus that were supposed to have taken place sometime around February or March 2012. All that exist are some emails that were exchanged in May 2012 after Mr Leiman had enquired about the 2011 Bonus, and in which Mr

240 See NOE of 4 July 2017, p 41–42; NOE of 7 July 2017, p 98–99.

241 NOE of 25 July 2017, p 99 lines 20–24.

242 NOE of 4 July 2017, p 42.

243 PCS, para 528.

> Rubin and Mr Alam attempted to construct reasons for not having paid Mr Leiman the 2011 Bonus.

239 In closing submissions, the plaintiffs cited the English High Court decision of *Rutherford v Seymour Pierce Ltd* [2010] IRLR 606 ("*Rutherford*") for the proposition that where an employee had not in fact been considered for a bonus (*ie*, there was simply no decision), the absence of a decision would amount to a breach of contract.[244] That was a case where the clause on the employee's bonus in the employment contract provided that the employee would be "eligible to participate in the company's discretionary bonus scheme" and that "[a]ny bonus payments … are at the discretion of the company": at [7]. Clearly, the employee's contractual entitlement in *Rutherford* did not go beyond anything more than merely having the question of his bonus considered by the company. There was certainly no guarantee that a bonus will be paid, much less the amount that would be paid if the employer in its discretion chose to declare a bonus. But because the employer had failed to even consider the question of the employee's bonus, the court found that there was a breach of contract for which the employer was liable to pay damages.

240 In reaching its decision, the court in *Rutherford* distinguished between two types of cases in this area: at [76]. On the one hand fell cases like *Nomura* (see [92] above) and *Keen v Commerzbank AG* [2006] EWCA Civ 1536, where the claimant employees sought higher bonuses than those that were declared by their employers. Whilst the employee in *Nomura* was awarded no bonus (*ie*, he was awarded a zero bonus), the point is that at least the matter of his bonus had been considered. Against this were cases like *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 ("*Horkulak*") and *Rutherford* itself, where the

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244 PCS, para 526.

employer had not even made a decision at all about its employee's bonus, whether that decision was to award a lower bonus than the employee had expected, or to award none at all.

241 The court in *Rutherford* stated (at [76]) that in the former class of case, the dissatisfied employee would have to show the perversity or irrationality of the employer's decision to declare a bonus that was (invariably) lower in quantum than what the claimant employee would be satisfied with. In the latter class of case, since there was no decision at all, there could be no question of perversity or irrationality of an existing decision to either award a bonus or none at all. If there is an obligation on the employer to consider the employee's entitlement to a bonus, then the employer would have been in breach of that obligation for not even making a decision regarding its employee's bonus. The court would then have to put itself in the employer's position and consider the employee's possible entitlement to the bonus.

242 Additionally, if an employer is obligated to exercise its discretion to consider the question of its employee's bonus, then in order not to render the contractual bonus provision otiose, when the employer does in fact exercise its discretion, it must do so rationally and *bona fide*.

243 In *Horkulak*, the bonus provision in the employment contract stated that the employer "may in its discretion, pay [the employee] an annual discretionary bonus … the amount of which shall be mutually agreed by [the employee], the chief executive of the company and the president of Cantor Fitzgerald Ltd Partnership, [although] the final decision shall be in the sole discretion of the President of Cantor Fitzgerald Ltd Partnership". That provision also stated that it was a condition precedent to the payment of the bonus that the employee shall "exercise best endeavours to maximise the commission revenue" and that he

should still be working for the employer: see [11]. In affirming the decision of the judge below, Potter LJ stated (at [46]—[47]):

> … the judge was correct … to hold that the claimant was entitled, had he remained in [the defendants'] employment, to a **bona fide and rational** exercise by [the employer] of their discretion as to whether or not to pay him a bonus and in what sum. It is correct … that the contractual discretion is drafted in wider terms than those employed in the earlier cases. The use and positioning of the word "may" attaches the discretion to the obligation to pay a bonus at all rather than to the assessment of the amount payable (cf *Clark v BET plc*) and it lays down no specific criterion of "individual performance" (cf *Clark v Nomura International plc*) and no prima facie formula for calculation (cf *Mallone v BPB Industries Ltd*) …
>
> It is of course the position that the contract in this case leaves at large the amount of such bonus or the rate at which it will be payable; there is no particular formula or point of reference for its calculation. It does however, provide for a process of attempted mutual agreement as between the employee, the chief executive and the president prior to the making of any final decision in the discretion of the president. This provision emphasises the obligation of [the employer] to consider the question of payment of a bonus (and amount) as a **rational and bona fide, as opposed to an irrational and arbitrary**, exercise when taking into account such criteria as [the employer] adopt[s] for the purpose of arriving at their decision. **Failure so to construe it would strip the bonus provision … of any contractual value or content in respect of the employee whom it is designed to benefit and motivate. It would fly in the face of the principles of trust and confidence which have been held to underpin the employment relationship.**
>
> [emphasis added in bold and internal citations omitted]

244 At first blush, the test of perversity or irrationality of an employer's exercise of discretion (see [241] above) may seem different from the requirement that the employer exercises its discretion rationally and *bona fide* (see [243] above). But I think they are ultimately both sides of the same coin, as evident from the quoted extract from *Horkulak* where Potter LJ juxtaposed at [47] the "rational and bona fide, as opposed to [the] irrational and arbitrary". This is also consistent with the UK Supreme Court's statement in *British*

Telecommunications at [37] that "a contractual discretion must be exercised in good faith and not arbitrarily or capriciously": see [112] above.

245 I pause to note that in such cases, the requirement to act rationally and *bona fide* (as opposed to irrationally, arbitrarily or *mala fide*) is not an application of any "good faith" doctrine as such. Whilst this is not a point on which the parties raised submissions, I make clear that this Court is aware that the existence of a doctrine of good faith in contract law has long been the subject matter of dispute and discourse. For example, in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518, the Court of Appeal, after reviewing the approaches taken in other common law jurisdictions, concluded at [44] that a duty of good faith could not be implied *in law* into an agency agreement. On the other hand, as the learned authors of *The Law of Contract in Singapore* (see [81] above) observed at para 6.074, this does not mean that a duty of good faith will never be implied in a contract based on the *particular factual matrix* of the case.

246 Indeed, I would add that it is also clear that terms closely related to the concept of good faith may be implied by law in appropriate areas. For example, the well-known and well-established duty of fidelity that is imposed on an employee (subject, of course, to qualification by express terms) has an obvious affinity with the concept of good faith. Nevertheless, as Quentin Loh J in *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 ("*Cheah Peng Hock*") observed at [45] and [46], the implied term of mutual trust and confidence or fidelity imposed on the employee and employer should not to be confused with a duty of good faith. As he explained, a duty of good faith was a more far-reaching concept which might impose positive duties, fetter parties' freedom to contract, and even conflict with written terms.

247 I also note in passing the decision of Lionel Yee JC in *Brader Daniel John and others v Commerzbank AG* [2014] 2 SLR 81 ("*Brader*"). In that case, the employer had announced that a minimum guaranteed pool had been established from which bonuses for the year 2008 would be paid out to employees. This was followed by a letter to the plaintiffs declaring that the bonus was provisionally awarded to them for 2008 and that the bonus would be reviewed if there were material deviations from the employer's earnings. Subsequently, the employees were informed that the bonus awards had been reduced by 90% *pro rata*. The plaintiffs brought an action for the balance 90% or damages. The primary argument was that the earlier announcement amounted to a legally binding contractual promise that there was a bonus pool with a guaranteed minimum that would be paid out regardless of the employer's financial performance. The alternative argument was that the failure to pay the bonus in full was a breach of the employer's duty to behave in a way that preserved the trust and confidence that an employee should have in its employer.

248 As can be seen, *Brader* concerned a case where the employer had declared a bonus. The main issue was whether this had the effect of being a contractually binding promise that could be enforced by the plaintiffs. Yee JC found that the declaration did amount to a binding contract that the employer would pay all or substantially all of the pool to the employees as bonus. As far as the alternative argument was concerned, the court in *Brader* found that on the facts there was no breach of the implied term of trust and confidence.

249 Whilst the facts in *Brader* are different from the case at hand, I note that the High Court accepted at [110] the proposition that there is a term implied *in law* that an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Yee JC

also cited *Wong Leong Wei Edward v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352 and *Cheah Peng Hock* (see [246] above) in support of this proposition (at [111] and [112]).

250 The short point is that *Brader* provides further support for the proposition that where the contract provides or confers on the employer a discretion to award bonus payments, the employee is entitled, at the very least, to be considered by the employer for such an award. Second, whilst the employer may well enjoy a very broad discretion in the decision reached, the decision should be made rationally and not arbitrarily or capriciously. As was said in *Horkulak* at [30], references to good faith in the context of the contract is as a "requirement necessary to give genuine value, rather than nominal force or mere lip-service, to the obligation of the party required or empowered to exercise the relevant discretion". The point is that "[w]hile, in any such situation, the parties are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion, it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational as opposed to an empty or irrational, exercise of discretion." Indeed, as Potter LJ stated in *Horkulak* at [47], failure to read in an obligation on the part of the employer to consider the question of an employee's bonus rationally and *bona fide* may very well "fly in the face of the principles of trust and confidence which have been held to underpin the employment relationship".

251 To this, I hasten to add that the requirement to act rationally and *bona fide* is not to be seen as an invitation for the court to question the employer's decision at every turn simply because the court would reach a different decision. In cases such as the present, the court is merely charged with enforcing that

entitlement and there is little scope for intensive scrutiny of the decision-making process: *Braganza* at [57].

252 I note that in *Tan Hup Thye v Refco (Singapore) Pte Ltd (in members' voluntary liquidation)* [2010] 3 SLR 1069 ("*Tan Hup Thye*"), Judith Prakash J (as she then was) held that the position in Singapore is different from that in the UK in so far as the question of an employer's duties in exercising its discretion to award bonuses is concerned. Prakash J took the view that whilst the English authorities seemed to be moving in the direction of fettering an employer's right to exercise its discretion in this regard, the Singapore position favoured the view that the employer's discretion is unfettered: at [69]–[71]. In particular, Prakash J held that she was bound by the decision of the Court of Appeal in *Latham Scott*. In that case, the contract stated that a bonus "may be paid" at the end of each calendar year based on profitability and performance (see [236] above). The Court of Appeal held that the employee (who had been dismissed) did not have a legal right to claim a bonus even if he had continued to be employed. The right to a bonus was not guaranteed, and the grant and the quantum of any bonus was held to be entirely a matter of the employer's discretion.

253 The High Court decision in *Tan Hup Thye* and the Court of Appeal decision in *Latham Scott* were not, however, raised in the closing submissions of the parties. Nevertheless, I observe that the question whether the employer might at least be required to make the decision on a rational and non-capricious manner was not a point specifically raised nor ultimately decided in *Latham Scott.* Further, I note Tan Siong Thye J's remarks in *Leong Hin Chuee* at [149] that:

> … [T]he implied term of mutual trust and confidence in employment contracts was not argued before the court in *Tan Hup Thye* and since that decision, the implied term of mutual trust and confidence has been accepted in Singapore as an

> implied term in law subject to express terms stating otherwise or the context implying otherwise (*Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [59]).

254 With due respect to the decision of the High Court in *Tan Hup Thye* and bearing in mind the Court of Appeal's decision in *Latham Scott,* I am of the view that the question, therefore, is not only whether NGL had considered the 2011 Bonus, but whether it had considered the question rationally and *bona fide*, bearing in mind that the court is not to overturn the employer's decision just because it disagrees with the outcome reached or the reasons cited for the employer's decision.

255 Having considered the plaintiffs' submissions on this, I conclude that their case fails on this issue. They point to Mr Alam's evidence that the 2011 Bonus was not considered at the 1 March 2012 or the 27 March 2012 meetings of the R&O Committee.[245] They also point to the fact that the R&O Committee's deliberations on employees' bonuses would typically entail a significant amount of paperwork, which shows that the R&O Committee had not considered the 2011 Bonus because such paperwork was never adduced in evidence.[246] They also relied on the discrepancies in the evidence of various of the defendants' witnesses concerning when the R&O Committee had considered the 2011 Bonus, as well as the reasons cited for refusing to grant the bonus.

256 But at the end of the day, the two common reasons cited for not granting the 2011 Bonus were Noble's poor performance in 2011 and Mr Leiman's misdeeds.[247] Indeed, Mr Leiman accepted in his testimony that 2011 was when Noble posted its first ever quarterly loss since it was listed on the Singapore

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245 PCS, para 529(a).

246 PCS, paras 530–531.

247 AEIC of Mr Elman, para 129; AEIC of Mr Rubin, para 69; AEIC of Mr Chan, para 35.

Exchange.[248] And by this time, Noble must have been aware that Mr Leiman had acted in competition against it (see [143] above).

257 Given these reasons, I find that Noble was acting *bona fide* and rationally in not awarding the 2011 Bonus. In fact, I find that either of the above reasons on its own would have stood as a reasonable ground for not awarding the 2011 Bonus. The plaintiffs point out that Mr Rubin changed his evidence on the stand when he stated that the decision not to award a bonus was based solely on Noble's poor performance and had nothing to do with Mr Leiman's alleged conduct.[249] But even then, I accept that Noble's poor quarterly performance alone was more than a sufficient basis for not awarding its top executives a bonus. This is especially so given that no bonuses were awarded to Mr Harry Banga (NGL's executive vice-chairman at the time) ("Mr Banga") and Mr Elman as well, which is a fact not disputed by the plaintiffs.[250]

258 The evidence supports the view that the R&O Committee had considered the issue of the 2011 Bonus and reached a determination that no bonus would be awarded to NGL/Noble's top management.[251] The plaintiffs submit, however, that the fact that Mr Banga and Mr Elman were not paid bonuses is "not a parallel" for the failure to pay Mr Leiman his bonus.[252] Mr Elman's situation is not a parallel because he never receives bonuses.[253] As for Mr Banga, it is not clear why the fact that he was under a "different scheme" as far as bonuses are concerned should affect the consideration that Noble's poor

248 NOE of 7 July 2017, pp 27–28.

249 PCS, para 533(c).

250 PCS, para 608.

251 DCS, para 381.

252 PCS, para 608.

253 PCS, para 608.

quarterly performance ought to result in no bonuses for its top executives. Nothing is known of what this different scheme is, save for the fact that, in Mr Rubin's testimony, "[Mr Banga] never got a discretionary bonus. He had a separate deal where he did get percentages".[254] Indeed, if even one who appears not to be under a discretionary bonus scheme never got a bonus because of Noble's poor quarterly performance, then I do not see why an employee in the position of Mr Leiman, whose entitlement is to be *considered* for a *discretionary* bonus, should be in any better a position. Further, I note that in an e-mail dated 11 May 2012 from Mr Alam to Mr Leiman, the only reason mentioned for not awarding the 2011 Bonus was in relation to Mr Leiman's alleged breaches of duties.[255] Again, if that was the only reason, I find that it was sufficient reason for not awarding Mr Leiman the 2011 Bonus.

259 In sum, I find that NGL had considered the question of the 2011 Bonus, and had acted rationally and bona fide in concluding that no bonus ought to be awarded to Mr Leiman.

The claims in conspiracy, inducement of breach of contract and unlawful interference

260 The plaintiffs have also brought claims against the defendants alleging conspiracy, inducement of breach of contract and unlawful interference. These claims must, of course, be assessed in view of my earlier finding that the R&O Committee's decisions are valid. I will deal briefly with each of these claims in turn.

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254 NOE of 26 July 2017, p 129.

255 6AB, p 4146; PCS, para 70.

Conspiracy

261 The elements of conspiracy were set out by the Court of Appeal in *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 at [150], and are not in dispute:

> (a) A combination of two or more persons and an agreement between and amongst them to do certain acts.
>
> (b) If the conspiracy involves lawful acts, then the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff. However, if the conspiracy involves unlawful means, then such predominant intention is not required; an intention to cause harm to the plaintiff should suffice.
>
> (c) The acts must actually be performed in furtherance of the agreement.
>
> (d) Damage must be suffered by the plaintiff.

The Court of Appeal further noted at [151] that "proof of conspiracy will normally be inferred from objective facts".

262 The plaintiffs' case is that the defendants conspired to cause injury, loss or damage to them by:[256]

> (a) Directing or causing the [R&O] Committee to make the Decisions unfairly and/or without due process, in bad faith, capriciously and unreasonably, and/or irrationally;
>
> (b) Directing, causing or otherwise manipulating the [R&O] Committee and NRL to make unfounded allegations against Leiman, calculated to and with the intention of interfering with the Plaintiffs' interests in the [Shares] and [Share Options] so as to cause loss and injury to the Plaintiffs;
>
> (c) Acting in concert to breach the [Settlement Agreement] so as to cause loss and injury to the Plaintiffs.

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256 PCS, para 538.

The plaintiffs then argue that the proof of conspiracy by unlawful means[257] can be inferred from the following acts of the defendants (through Mr Elman and Mr Alam):

(a) NGL commissioned Wolfe Associates and the PI to find potential wrongdoing by Mr Leiman. Mr Elman and Mr Alam then took steps to delay Rothschild Trust's attempts to exercise the Share Options, claiming that there was a trading ban when the real reason was that they had received information from Wolfe Associates and the PI about Mr Leiman's alleged misconduct and were making arrangements to place this information before the R&O Committee.[258]

(b) Mr Alam sought to influence the outcome of the investigations by Wolfe Associates by withholding relevant information, such as the fact that he knew about Mr Carlier's conviction and e-mails demonstrating such knowledge.[259]

(c) Mr Alam deliberately withheld from the plaintiffs details of the allegations that had been made against Mr Leiman, who was not placed in a position to respond to these allegations.[260]

(d) The R&O Committee made its decisions unfairly, without due process, in bad faith, capriciously, unreasonably and/or irrationally.[261] In particular, it had no basis to do so when it was aware of matters relating to Messrs Carlier and Ozeias. In the

257 PCS, para 585.

258 PCS, paras 545–558.

259 PCS, paras 581–584.

260 PCS, paras 561–563.

261 PCS, para 543(b).

alternative, Mr Alam and Mr Elman suppressed their knowledge about such matters from Mr Rubin and Mr Chan.[262]

(e) Mr Alam, as NGL's Group General Counsel, was present at the R&O Committee's meetings, advised the R&O Committee and was requested to convey the R&O Committee's decisions to Rothschild Trust. NRL assisted NGL in implementing these decisions and neglected to procure the withdrawal of the R&O Committee's decisions despite the plaintiffs' protests that the decisions are invalid.[263]

(f) Despite having received further information from Wolfe Associates regarding the knowledge of Mr Nascimento and others in Noble Brazil about the matters involving Messrs Carlier and Ozeias the R&O Committee did not convene a further meeting. Mr Alam did not share this information or the final version of the 2012 Wolfe Report with Mr Rubin or Mr Chan or discuss it with the R&O Committee.[264]

263 The defendants' preliminary objections are that the plaintiffs' pleaded conspiracy claim is devoid of particulars and that no suggestion of conspiracy was put to the defendants' witnesses.[265] But, as the plaintiffs point out, the court had already found that there were sufficient particulars when defendants unsuccessfully applied to strike out the conspiracy claim for a failure to disclose a reasonable cause of action. I also accept the plaintiffs' argument that the existence of a conspiracy is a legal conclusion, and it suffices that the

262 PCS, paras 559–560.

263 PCS, paras 543(d)–(e).

264 PCS, paras 564–580.

265 DCS, paras 346–357.

defendants' witnesses were asked questions about the process by which the R&O Committee made its decisions and on other material facts relied upon by the plaintiffs for the purposes of the conspiracy claim.[266]

264 With that said, I do not see any merit in the claim of conspiracy by unlawful means. As I have upheld the validity of the R&O Committee's decisions as not being arbitrary, capricious, made in bad faith or otherwise irrational, the plaintiffs cannot argue that any "unlawful means" were undertaken by the defendants. The plaintiffs' submissions do not characterise anything else as "unlawful means",[267] and in my judgment, none of the other acts complained of can conceivably amount to an unlawful act. I have also found at [116] above that there is no requirement for the R&O Committee to have informed Mr Leiman of the allegations made against beforehand, or to have given him an opportunity to be heard. I also found above that the R&O Committee's omission to convene a further meeting did not show that it had pre-judged the matter or otherwise acted improperly. As such, none of these arguments can support the plaintiffs' claim in conspiracy either.

265 Furthermore, I do not think that the defendants' acts that are complained of were intended to injure the plaintiffs or to cause them loss. NGL's engagement of Wolfe Associates and the PI was simply intended to ensure that Noble's interests were protected and that any breaches of contract or detrimental acts by Mr Leiman would be discovered. Mr Elman and Mr Alam's actions in delaying the exercise of the Share Options was only after they had received preliminary reports from Wolfe Associates and the PI, and it was entirely reasonable for them to have wanted to hold off the exercise until the R&O

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266 Plaintiffs' reply submissions ("PRS"), paras 358–364.

267 See PCS, para 585.

Committee convened to make a decision regarding Mr Leiman's entitlements, so as to protect the interests of Noble and its shareholders. The references in the correspondence between Mr Alam and the members of the R&O Committee about "play[ing] for time", "gathering … information" and "giv[ing] him enough rope"[268] must be understood in that light, as well as in the context of potential legal action against Noble. The defendants' actions therefore do not suggest that the defendants had an intention (much less a predominant one, which is required to prove lawful means conspiracy) to injure the plaintiffs, only to safeguard their own interests under the relevant contracts.

266 The only conduct that gives me pause is the fact that Noble knew about the matters involving Messrs Carlier and Ozeias, yet Mr Elman and Mr Alam did not inform the R&O Committee about such knowledge or the further information arising from the interviews with Mr Nascimento and others (see [183]–[184] above). This suggests that Mr Elman and Mr Alam were unduly eager to buttress the case against Mr Leiman before the R&O Committee. But even if it can be shown that the defendants had an intention to cause Mr Leiman loss, there would have been no actual damage suffered by Mr Leiman in any event, considering that the R&O Committee's decisions were valid on other independent grounds. Hence, I do not allow the plaintiffs' claim in conspiracy.

Inducement of breach of contract

267 For the claim for inducement of breach of contract to be established, according to the test as stated in *M + W Singapore Pte Ltd v Leow Tet Sin and another* [2015] 2 SLR 271 at [88], the plaintiffs must show that:

(a) NGL knew of the Settlement Agreement between Mr Leiman and NRL and intended for it to be breached;

[268] DCS, para 361.

(b) NGL induced the breach; and

(c) the Settlement Agreement was breached and damage was suffered.

268 It suffices for me to address this claim briefly. The plaintiffs' case is that NRL's breach arises from the R&O Committee reaching its decisions arbitrarily, capriciously, *etc*.[269] As I have already rejected this allegation and found no breach by NRL in this regard, the inducement claim cannot stand.

Unlawful interference

269 In view of my findings on the conspiracy and inducement claims, the claim in unlawful interference can be disposed of succinctly as well. According to the test set out in *Paragon Shipping Pte Ltd v Freight Connect (S) Pte Ltd* [2014] 4 SLR 574 at [83], in order to establish a claim of causing loss by unlawful means, which is also known as the tort of unlawful interference, the plaintiffs must be able to show that:

(a) NGL committed an unlawful act affecting a third party;

(b) NGL acted with an intention to injure the plaintiffs; and

(c) NGL's conduct in fact resulted in damage to the plaintiffs.

270 I have already found at [264] above that there was no unlawful act. Moreover, NGL's actions either were not intended to injure the plaintiffs or did cause damage to them (see [265]–[266] above). Hence, the elements of unlawful interference have plainly not been met.

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269 PCS, para 592.

The counterclaim

271 Finally, I turn to NRL's counterclaim for an account and repayment of all sums and benefits received by Mr Leiman under the Advisory Agreement and the Settlement Agreement.

272 Paragraph 41 of the amended defence and counterclaim pleads:

> It was an implied term of the Advisory Agreement that the 1st Plaintiff owed the 1st Defendant a duty of good faith and fidelity, which he breached by his conduct... The said term is implied as a matter of law and / or to give business efficacy to the Advisory Agreement and the Settlement Agreement and/or based on the legitimate and / or reasonable expectations of the parties and/or to reflect the objective intention of the parties.

273 The breaches relied upon relate to the same conduct complained of and said to provide the basis for the R&O Committee's decision not to allow Mr Leiman to exercise his Share Options and to forfeit the Shares. The essence of NRL's position is that Mr Leiman had, by the conduct complained of, acted to the detriment of Noble and/or had engaged in conduct that was inimical to the interests of Noble. The conduct complained of can, in brief, be organised into the following categories for convenience:

(a) engaging in acts that amounted to competition with Noble whilst he was still an advisor to NRL;

(b) approaching and soliciting senior management employees of Noble;

(c) using and/or disclosing confidential information belonging to Noble; and

(d) failing to disclose (or to disclose adequately) to Noble the issues that had arisen in respect of Messrs Carlier and Ozeias, Eximcoop and the related legal problems.

274 It will be recalled that the issue before this Court in respect of the plaintiffs' claim was whether the defendants were able to show that the R&O Committee had acted properly in exercising the contractual power to deny the exercise of the Share Options and to forfeit the Shares on the basis that Mr Leiman had acted to the detriment of Noble. I note that, strictly speaking, the R&O Committee was *not* making a decision as a matter of law that Mr Leiman had breached the non-competition obligation, the duty of confidence and duty of fidelity. Instead what was being decided by the R&O Committee was whether Mr Leiman had acted to the detriment of Noble or engaged in conduct inimical to the interests of Noble, even though the matters of concern before the R&O Committee concerned acts of competition and so on.

275 It follows that the Court, in evaluating whether the R&O Committee decision was valid, was not deciding as such whether Mr Leiman had breached his contractual duty of fidelity, non-compete obligations, *etc*. Whilst his contractual duties were of course relevant to the parameters of the enquiry, the key issue was simply whether the R&O Committee had acted properly (*ie*, not arbitrarily, in bad faith or in a capricious manner) in coming to the decisions it did.

276 On the facts, I found that there was a proper basis for the R&O Committee's decisions *viz* the evidence and material showing that Mr Leiman had engaged in acts of competition which exceeded mere preparatory steps. Further, I found in any case that the R&O Committee had further grounds in that Mr Leiman had made unauthorised use of Noble's confidential information

in the course of his acts of competition, even though the R&O Committee did not expressly rely on this.

277 For the avoidance of doubt, I make clear that I find that Mr Leiman was indeed in breach of his duty of fidelity and the contractual non-compete provisions discussed earlier. Further, I find that Mr Leiman was in breach of his duty not to misuse the confidential information of Noble in his approaches to Summa Capital and BTG Pactual: see [163]–[164] above.

278 The question that now arises for the counterclaim is whether NRL succeeds in its prayer for certain monetary relief.

279 NRL's case is that Mr Leiman is liable to account for and repay the following sums:[270]

(a) US$262,500, being the retainer fee that was paid to him under the Advisory Agreement; and

(b) the six months' base salary as notice period payment under cl 2 of the Settlement Agreement.

280 I pause to note that NRL in its closing submissions does not pursue any claim to damages for misuse of the confidential information, or indeed for any losses said to have been caused by Mr Leiman's breaches such as any losses said to arise from the alleged breach of duty in his hiring of Messrs Carlier and Ozeias. Nevertheless, for completeness, I add that it does not appear that any specific loss was caused by the misuse of the confidential information: see [170] above. Further, there is no evidence at all before the Court as to what losses if

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[270] DCS, para 409.

any were caused to NRL as a result of Mr Leiman's acts of competition whilst he was still an advisor of NRL.

281 NRL submits that an implied term or implied warranty exists in the Settlement Agreement and the Advisory Agreement that Mr Leiman had complied with his duties under the Employment Agreement. Its position is that it only entered into these agreements on the premise that Mr Leiman had complied with all the terms of the Employment Agreement.[271] However, Mr Leiman had in fact instead been in breach of his duty of fidelity and/or fiduciary duties given his failure to disclose to or warn Noble adequately or at all of the problems relating to Messrs Carlier and Ozeias, *etc*.

282 I am unable to agree with NRL's submissions. Whilst in hindsight it may have been desirable for NRL to have required such a warranty in the Settlement Agreement and Advisory Agreement, I do not see how the implication of such a term or warranty is "obvious" or necessary to give business efficacy to the agreements. Mr Leiman had been employed by NRL since 31 March 2006. During the course of his employment Mr Leiman had evidently performed well enough that he was chosen to be the new CEO of NGL on 1 January 2010. By this time, it will be recalled that Noble had already received the 2008 Wolfe Memo which indicated problems or issues concerning Messrs Carlier and Ozeias. Noble has internal legal counsel, human resource department managers and so on, and have engaged investigators before. They are clearly aware of the importance of conducting their own due diligence enquiries when engaging senior management level staff including the COO. It is also clear that Mr Elman as Chairman and former CEO was, as he described in his own words, "intimately involved" in the running of Noble even up until the time of the

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271 DCS, paras 407–408.

trial,[272] and he was a hands-on Chairman who ensured that he had direct lines of communication to his senior management staff.[273] For example, the Employment Agreement stated that Mr Leiman would report to and be subject to the direction of Mr Elman in the latter's capacity as CEO (see [12(a)] above).

283 It will be recalled that at the time the Settlement Agreement and the Advisory Agreement were being discussed, serious disputes had arisen between Mr Leiman and Mr Elman over management and other matters. Mr Elman was unhappy with Mr Leiman's conduct or performance as CEO (a position to which the latter had only relatively recently been appointed). In these circumstances, I find there is no implied term or warranty that Mr Leiman had complied with his duties under the Employment Agreement.

284 It follows that the counterclaim for return of the sums that Mr Leiman received under the Settlement Agreement and the Advisory Agreement must fail. It is not NRL's case that there has been total failure of consideration, and in any case it would be hard to see any basis for such an assertion. Whilst there was some suggestion that Mr Leiman did not perform adequately as an advisor in that he submitted very little by way of reports,[274] there is no claim made against Mr Leiman for breach or repudiation on that account. Instead, the claim for return of the sums paid to Mr Leiman appears to be founded simply on the submission that if NRL had known that Mr Leiman had breached his duties under the Employment Agreement, NRL would never have entered into the subsequent Settlement Agreement and Advisory Agreement and/or would have terminated his employment on the grounds of breach of warranty.[275] With respect, this is a submission I am unable to accept.

272 NOE of 3 August 2017, pp 5–7; see also NOE of 7 July 2017, p 68.

273 NOE of 6 July 2017, pp 50–51.

274 AEIC of Mr Alam, paras 86–90.

Conclusion

285 Given the numerous issues raised by the pleadings and submissions, I set out a summary of the main findings:

(a) *The locus standi issue*. I find that Mr Leiman does have *locus standi* to bring this suit for breach of the Settlement Agreement and the Advisory Agreement. I also find that Rothschild Trust has *locus standi* to bring this suit as NRL had agreed that the Adelaide Trust was entitled under the AIP and the Share Option Rules to the Shares and the Share Options.

(b) *The pleading issue*. I find that the plaintiffs' omission to expressly plead that the R&O Committee is an agent of NRL and/or NGL does not make their cause of action invalid.

(c) *The issue of whether the R&O Committee reached a final determination*. I find that the R&O Committee did in fact reach a final determination under the Settlement Agreement.

(d) *Whether the R&O Committee decisions were valid*. I find that the decisions were validly made for the reasons that were extensively set out earlier. These include the evidence and material relating to Mr Leiman's engaging in acts of competition against the interests of Noble as well as misuse of confidential information.

(e) *Whether cl 3(c) of the Settlement Agreement is void as a penalty.* I find that the clause is not void as a penalty.

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[275] DCS, para 408.

(f) *The 5,652,421 shares not expressly mentioned in the Settlement Agreement*. I find that these shares are not covered by the Settlement Agreement. The R&O Committee had a proper basis for forfeiting these shares under cl 5 of the AIP.

(g) *The 2011 Bonus*. I find that there was no breach by NRL in respect of the 2011 Bonus. The issue of the 2011 Bonus had been discussed and the decision reached was that none of the senior management would receive a bonus for 2011 because of the poor performance of NGL. Further, in the case of Mr Leiman, there were the problems arising from the perceived acts of competition, *etc*.

(h) *The economic torts*. I find that the claims for conspiracy, inducing breach of contract and unlawful interference fail.

(i) *NRL's counterclaim*. Whilst I find that Mr Leiman is in breach of his non-competition obligations and his duty of fidelity, there is no basis for NRL's claim to repayment of the retainer fee that was paid to Mr Leiman under the Advisory Agreement and the six months' base salary as notice period payment under cl 2 of the Settlement Agreement.

286 For these reasons, I dismiss both the plaintiffs' claim and NRL's counterclaim.

Costs

287 Finally, I turn to the issue of costs. It is a well-established principle that costs are generally to follow the event: O 59 r 3(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Order 59 r 6A then provides that "where a party has failed to establish any claim or issue which he has raised in any proceedings,

and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings, the Court may order that the costs of that party shall not be allowed in whole or in part".

288 Further, I note that in a situation where both the claim and the counterclaim are dismissed, the court will look to whether the subject matter of the counterclaim was identical to or part of the defence. This will determine whether there should be a substantial costs paid by the defendant in relation to the counterclaim or an apportionment of the costs: *Mok Kwong Yue v Ding Leng Kong* [2012] 1 SLR 737, citing *Medway Oil and Storage Co Ltd v Continental Contractors Ltd and others* [1929] 1 AC 88.

289 Whilst the defendants have substantially succeeded in defending the plaintiffs' claim, they did not succeed on all of the issues and points raised. In particular, I note that the defendants led an extensive amount of evidence relating to Eximcoop and Messrs Carlier and Ozeias, and their cross-examination of the plaintiffs' witnesses on this issue took up a considerable amount of time at the trial (totalling several days). As I found at [190] above, Mr Leiman's prior conduct in relation to Messrs Carlier and Ozeias was not a valid ground upon which the R&O Committee could have determined that he had acted in a way detrimental to Noble's interests.

290 I also note that the counterclaim was dismissed. Although NRL chose to abandon its prayers for an account and repayment of all payments received by Mr Leiman from the date of his breaches of fiduciary and contractual duties and the profits he received from the sale of NGL shares that had been given to him over the years, this was only communicated to the plaintiffs and the Court during closing submissions: see [53] above. I accept that the counterclaim in large part related to the issues in the main claim and evidence regarding Mr

Leiman's conduct and entitlements, but the focus in the main claim was on the evidence before the R&O Committee (to determine whether it had a valid basis to find that Mr Leiman had acted to Noble's detriment) whilst evidence of Mr Leiman's conduct subsequent to the R&O Committee's decisions was more relevant for the purposes of the counterclaim (to determine whether he had in fact breached his contractual and fiduciary duties). I am cognisant of the fact that the counterclaim was brought by NRL alone (having *locus standi* as Mr Leiman's formal employer and a party to the relevant agreements), but I see no reason to split hairs by making distinct orders as to costs for each of the defendants given their relationship and unified conduct in these proceedings.

291 Having considered the overall conduct and outcome of these proceedings, I am of the view that the defendants should be allowed to recover costs from the plaintiffs, but not in full.

292 I, therefore, order the plaintiffs to pay two-thirds of the defendants' costs in these proceedings. The quantum of the defendants' costs in these proceedings is to be agreed upon or taxed.

George Wei
Judge

Andre Francis Maniam *SC*, Liew Yik Wee, Sim Mei Ling, Joel Quek and Jeremy Tan (WongPartnership LLP) for the plaintiffs; Davinder Singh *SC*, Jaikanth Shankar, Tan Ruoyu and Srruthi Ilankathir (Drew & Napier LLC, instructed) and Kenetth Pereira and Jeremy Bay (Aldgate Chambers LLC) for the defendants.
