Mano Vikrant Singh *v* Cargill TSF Asia Pte Ltd
[2012] SGCA 42

Case Number	: Civil Appeal No 149 of 2011
Decision Date	: 07 August 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Andrew Ang J
Counsel Name(s)	: Philip Jeyaretnam SC, Mark Seah and Germaine Tan (Rodyk & Davidson LLP) for the appellant; Blossom Hing, Kimberley Leng, Mohan Gopalan and Justin Kwek (Drew & Napier LLC) for the respondent.
Parties	: Mano Vikrant Singh — Cargill TSF Asia Pte Ltd

Contract – Restraint of Trade

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 1 SLR 311.]

7 August 2012 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

1 This is an appeal against the decision of the judge ("the Judge") in *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd* [2012] 1 SLR 311 ("the Judgment").

2 The Judgment is a comprehensive one and (more importantly) is one with which (as we shall elaborate upon below) we agree – save in respect of just one (albeit crucial) issue ("the crucial issue"). Indeed, the Judge did proceed, on the *assumption* that he was *wrong* with regard to the crucial issue, to ascertain whether or not his decision (in favour of the Respondent) would have been otherwise. In this regard, the Judge held that he *would* have decided *otherwise*. Given our agreement with the Judge with all aspects of his decision *except for* his decision in relation to the crucial issue, we are of the view that the appeal ought to be allowed. However, before proceeding to give our reasons as to why we respectfully differ from the Judge with regard to the crucial issue, it would be appropriate to set out – in brief – the relevant factual background as well as a summary of the decision in the court below.

3 A final preliminary point might be in order. That the crucial issue has been characterised as such (*viz*, as "crucial") is, in our view, an understatement of no small measure. Given its importance not only in the context of the resolution of the present appeal but also with regard to its implications for the broader commercial context, it is apposite to set out the issue in its general form right at the outset: Is a clause forfeiting an employee's benefits when he competes with his ex-employer after the termination of his employment one that falls within the ambit or scope of the restraint of trade doctrine? With this in mind, let us now proceed to consider – in brief – the relevant factual background leading to the present proceedings.

Factual background

4 Cargill TSF Asia Pte Ltd ("the Respondent") is part of the Cargill group of companies ("the Group") which is privately owned and which runs 75 businesses worldwide. The Respondent is involved in the Group's "Trade & Structured Finance Business" ("TSF Business"). The TSF Business customises

financing arrangements for importer-exporters, profiting from the use of financial instruments in the process of commodities trading. The customisation is done both for importer-exporters owned by the Group, and for importer-exporters for non Group entities. [note: 1]

5 Mano Vikrant Singh ("the Appellant") was an employee of the Group from 23 October 2001 to 27 November 2008, when his resignation took effect, and was posted to Singapore from September 2003. He was a TSF Business coordinator at all material times. From June 2006 until 30 March 2007 when the employment contract (see [6(a)] below) was signed, the Appellant worked informally for the Respondent. [note: 2]

6 The Appellant executed the following documents, *inter alia*, on 30 March 2007, two days before formally commencing his employment:

(a) an "*Employment Contract*" set out in a letter from the Respondent to the Appellant dated 28 March 2007 ("the Employment Contract"). Under clause 1 of the Employment Contract, the Appellant's salary comprised a monthly salary of S$25,000 per month and an annual wage supplement equivalent to one month's salary; and

(b) a "*Non-Compete Agreement*" ("the NCA") agreeing, under clause 3, not to compete with the Respondent for *one year* after termination of his employment.

7 In addition, towards the end of every financial year, the Appellant was given a document headed "*Terms and Conditions of Incentive Award*". These terms and conditions ("T&Cs"), which were the same for both years, arose out of an "Incentive Award Plan" ("the Plan") only available to key senior staff (including the Appellant). Under the Plan, the Respondent declares a discretionary incentive award ("based on individual, team and business unit results [for that year]") for each participating employee *over and above their base salary*. This incentive award is split evenly – 50% is paid out as a "Cash Award" and the other 50% is retained by the Respondent as a "Deferred Incentive Award". The Deferred Incentive Award is then paid in stages, as follows:

Quantum of Declared Incentive Award	**Quantum of Deferred Incentive Award; Deferral period**
$ 74,999 and below	No Deferred Incentive Award
$75,000-$199,999	50% of declared incentive award, deferred for 1 fiscal year from grant date
$200,000-$399,999	50% of declared incentive award, deferred over 2 fiscal years from grant date (2 annual payments)
$400,000 and greater	50% of declared incentive award, deferred over 3 fiscal years from grant date (3 annual payments)

The T&Cs also provide that the Deferred Incentive Award earns compound interest at the one-year USD London Interbank Offered Rate, plus 1% per annum spread.

8 More significantly, the T&Cs set out a Forfeiture Provision. *It is this particular clause which lies at the heart of the dispute between the parties in the present proceedings, and not the NCA.* The Forfeiture Provision reads as follows:

FORFEITURE PROVISIONS

> Deferred Incentives that have been awarded but not yet distributed will be forfeited if the Participant (1) is Terminated for Cause, *or (2)(a) Separates from Service other than by reason of death or Disability, and (b) continues a career within the financial or commodity trading industry outside of the Company within a period of two years from the date of such Separation from Service (referred to as the "Two-Year Non-Compete Period").* Continuance of a career within the financial or commodity trading industry is defined as employment by, consulting with, establishing, or having a substantial ownership interest in any organization, which competes with the Company for employees, customers, clients, market share, or financial/commodity resources or deals.
>
> [emphasis added]

9 Under the T&Cs, before the Deferred Incentive Award can be processed for payment, the participant is required to sign his acknowledgement that "I have received, read and agree to these Terms and Conditions ... *I acknowledge that failure to execute this agreement will result in being removed from this program and receiving future awards*" [emphasis added]. [note: 3]

10 The Appellant's incentive award for the financial years 2006/2007 and 2007/2008 were US$400,000 and US$3.2 million, respectively. Half of these amounts were paid to him in cash, and half were deferred for a period of three years. Up to the hearing date, the Appellant had not received a total of US$1,741,894 (excluding interest), representing the outstanding portion of the Deferred Incentive Award for 2006/2007 and all of his Deferred Incentive Award for 2007/2008 (see the Judgment at [12]–[14]).

11 On 4 November 2008, the Appellant gave notice of his resignation. This was accepted by the Respondent via a letter on the same date informing the Appellant that his outstanding Deferred Incentive Award for the financial years 2006/2007 and 2007/2008 would be paid in a lump sum within 60 days after the expiry of the "Two-year Non-compete Period" (see [8] above). [note: 4] Soon after, the Appellant started using Xangbo Global Markets Pte Ltd ("Xangbo"), a company he had incorporated prior to his resignation, to engage in financial and commodities trading. The Appellant conceded in his affidavit that Xangbo is in the same primary business as the Respondent. [note: 5]

12 On 19 October 2010, the Respondent wrote to the Appellant seeking that he sign a statutory declaration confirming fulfilment of the conditions in the Forfeiture Provision before receiving his outstanding Deferred Incentive Award. [note: 6] The Appellant refused, taking the view that: [note: 7]

> ... under the [T&Cs of the Incentive Award Plan], participants are only required to "complete a statement to certify that they have successful [sic] fulfilled the Two-year Non Compete Period" in order to be eligible to receive payment of the Deferred Incentive awarded. There is no obligation to make a statutory declaration, nor is there an obligation to provide the information sought by the Statutory Declaration enclosed in your letter.
>
> ...
>
> In any case, I have taken advice on the provision for forfeiture of the Deferred Award and understand that it is in restraint of trade and void as being against public policy.

13 On 14 February 2011, the Appellant commenced Originating Summons No 103 of 2011

("OS 103/2011"), seeking the following reliefs:

(a) A declaration that the Forfeiture Provision is void for being a Restraint of Trade clause, and an order that it be severed from the T&Cs;

(b) Payment from the Respondent of the sum US$1,741,894, being the outstanding Deferred Incentive Awards for the financial years 2006/2007 and 2007/2008; and

(c) Contractual interest on the above sum, and costs.

14 Counsel for the Respondent, Ms Blossom Hing, had applied to convert OS 103/2011 into a writ on the basis that substantial disputes of fact were likely. The Judge did not convert OS 103/2011 into a writ action on condition that he would revisit the application to convert if there were genuine disputes of facts germane to the resolution of OS 103/2011. [note: 8] He was persuaded to do so by counsel for the Appellant, Mr Philip Jeyaretnam SC's ("Mr Jeyaretnam") acceptance, for the purposes of proceeding with OS 103/2011, of the Respondent's version of those facts which bore some evidential basis, [note: 9] namely that (see the Judgment at [18]):

(a) the Appellant had breached the Forfeiture Provision by incorporating Xangbo;

(b) the Appellant's role in the Respondent's TSF Business was that of "initiator" (one who brings in the business by identifying trading partners and financial institutions willing to participate) or "structurer" (one who creates the customised financing arrangement);

(c) the Respondent's TSF Business is non-generic, *ie*, is proprietary; and

(d) the Respondent's TSF Business involved financial institutions and trading partners all over the world.

The decision in the court below

15 In so far as the crucial issue was concerned, the Judge distinguished the Forfeiture Provision from a traditional restraint of trade clause. He held that it was a Forfeiture-for-Competition clause which provides for the forfeiture of certain benefits if the employee competes with the employer and is therefore not an outright prohibition on trade. He found that there was little to distinguish a Forfeiture-for-Competition clause from a Payment-for-Loyalty clause as both provided a *financial disincentive against competition*. Forfeiture-for-Competition clauses were thus not "indirect restraints", but were far more similar to Payment-for-Loyalty clauses.

16 The Judge considered the English Court of Appeal decision of *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793 ("*Wyatt*"), where an employer agreed to grant the employee a gratuitous pension payable by monthly instalments upon retirement on condition that he did not compete with the employer. He agreed with the critique of *Wyatt* to the effect that the decision in that case did not recognise that there was no impediment to the employee's liberty to act and the "restraint" was completely voluntary as the employee *chose* not to compete in order to receive payouts from the employer. He adopted, instead, the American Employee Choice Doctrine. This doctrine is premised on the assumption that an employee faced with a Forfeiture-for-Competition clause *still has a choice* as to whether or not he wants to compete, and is in fact expected to conduct a cost-benefit analysis before reaching his decision.

17 Applying the American Employee Choice Doctrine to the facts, the Judge held that the

Forfeiture Provision *was not in restraint of trade* as it did not prohibit the Appellant from competing with the Respondent. The Forfeiture Provision was *merely a financial disincentive* against competing. The Appellant had, in fact, the following choices:

(a) the choice not to sign the T&Cs which was distinct and separate from the Employment Contract; and

(b) the choice whether or not to compete with the Respondent, which choice he had exercised freely in setting up Xangbo.

Having done a cost benefit analysis as to whether it was more beneficial to compete (and not receive the Deferred Incentive Award) or not to compete (and receive the same), the Appellant had to be held to his choice and bear the consequences thereof.

18 The Judge considered that the individual's freedom to trade was to be balanced with an individual's right to contract freely. Applying this balancing exercise, the Judge held (see the Judgment at [61]) that "[t]o hold the Forfeiture Provision as in substance a restraint of trade would attach *unjustifiable weight to the right of freedom of trade at the expense of the equally important countervailing right of freedom of contract*" [emphasis added].

19 However, on the assumption that his decision on the crucial issue was wrong, the Judge also considered whether the Forfeiture Provision was reasonable. He found it was *not* as: (i) it exceeded the period stipulated in the NCA by a year and there was no compelling reason for such additional protection; (ii) it had no geographical limit (whereas the NCA was geographically limited); and (iii) it was not limited to the TSF Business. As for the issue as to whether the Respondent had a legitimate proprietary interest to protect, this was already conceded by Mr Jeyaretnam in the hearing of the application to convert OS 103/2011 into a writ action (see above at [14(c)]–[14(d)]).

20 The Judge also found that the doctrine of severance applied. This was premised on the finding that the Forfeiture Provision was not the whole or main consideration for the Deferred Incentive payments. Rather, the payment was for the Appellant's performance at work.

Summary of the parties' submissions on the crucial issue

21 The main thrust of the Appellant's argument is that the courts should look to substance over form when determining if an offending clause falls foul of the restraint of trade doctrine. The Forfeiture Provision (though masked as a substantial financial disincentive) has the purpose and effect of restraining the Appellant from seeking alternative employment with the *threat* of losing his money.

22 Next, the Appellant seeks to expose the American Employee Choice Doctrine as a fallacy, as it fails to take into account the following artificialities of choice:

(a) A substantial enough financial disincentive bars real choice, particularly when the forfeited monies are an entitlement for past work done;

(b) If the Appellant had not signed the T&Cs, he would not be eligible for any Incentive Awards (see the wording of the acknowledgement at [9] above); and

(c) The Forfeiture Provision covers all jobs that the Appellant is skilled in, such that his only choice is between not working and competing.

23 Finally, the Appellant submits that Payment-for-Loyalty clauses can be distinguished from Forfeiture-for-Competition clauses: The former is intended to retain the service of a valuable employee, whereas the latter is aimed at curbing competition.

24 In contrast, the Respondent supports the Judge's endorsement of the American Employee Choice Doctrine on the grounds that: (i) it is supported by US precedent; (ii) it better reflects commercial realities (employees are no longer as vulnerable to having onerous clauses imposed on them); and (iii) there are strong public policy reasons underpinning it (*viz*, the notion of freedom to contract and the need to preserve the sanctity of contracts).

25 The Respondent also avers that there is no need to apply the restraint of trade doctrine to the Forfeiture Provision because:

(a) the Respondent cannot obtain an injunction preventing the Appellant from competing and so the latter's liberty is not impinged on;

(b) the Deferred Incentive Award constitutes gratuitous payments *conditional* upon the Appellant not competing with the Respondent for two years following termination of his employment; and

(c) the Appellant freely signed the T&Cs. There is thus no unequal bargaining power requiring intervention of the restraint of trade doctrine to protect the vulnerable employee.

26 Finally, the Respondent agrees with the Judge's analysis that there is no good reason to distinguish between Payment-for-Loyalty and Forfeiture-for-Competition clauses. In both situations, the employee is incentivised not to leave the employer and he is free to choose whether or not to fulfil the conditions for payment. As Payment-for-Loyalty clauses have consistently been upheld by the courts in the UK and Australia, the same should be done for Forfeiture-for-Competition clauses. In fact, the former is arguably more onerous than the latter, as in the former case the employee would not even be able to work for non-competitors.

Our decision with regard to the crucial issue

What was the nature of the Forfeiture Provision?

27 The Forfeiture Provision is, on its face at least, different in nature from a traditional restraint of trade clause. A traditional restraint of trade clause is an outright prohibition imposed on the employee against competing with his employer. In contrast, the Forfeiture Provision causes the employee to forfeit certain benefits if he competes with the employer. This looks like a mere financial disincentive against competing, and in this respect is similar to Payment-for-Loyalty clauses. However, to stop at this comparison is to privilege form over substance. We do not consider that framing a clause to look like a disincentive should, *ipso facto*, shield it from the application of the restraint of trade doctrine. What needs to be considered is the true nature of the Forfeiture Provision: what the benefit was given for, as well as why and in what circumstances it could be withheld or taken away.

28 It is important to note, at the outset, that the Forfeiture Provision contemplates a situation where the Deferred Incentive Award was *already vested* in the Appellant *as a legal entitlement*. That this is so is clear both from the language of the Forfeiture Provision as well as its context. The monies under the Incentive Award were awarded to him *before* he signed the T&Cs, by way of an internal memo which stated, *inter alia*, as follows: [note: 10]

> [O]nce again TSF has performed exceptionally and this would not have been possible without your *hard work, long hours and commitment* to your job.
>
> *In recognition of* your commitment to our business and to Cargill, I am pleased to advise you that you will be receiving a bonus award…
>
> [emphasis added]

29 The frequency of these payments is virtually identical to that in the New South Wales Industrial Relations Commission ("the NSW Commission") decision of *Rick Lloyd v Commonwealth Bank of Australia Limited* [2006] NSWIRComm 129 ("*Rick Lloyd*"), where the employer had also paid the remainder of its bonus in three parts over three consecutive years. In *Rick Lloyd*, however, the bonuses were *not vested*, and the clause was treated, instead, as a Payment-for-Loyalty clause.

30 There are, indeed, key differences between *Rick Lloyd* and the present case. In *Rick Lloyd*, it was clearly stated in the letter which notified the employee of the bonus award that the deferred amounts were *not vested* and were subject to the employee's satisfactory performance and continued employment. The NSW Commission reasoned as follows (at [74]–[75]):

> In addition … the quantum of the applicant's deferred unvested portions of the bonuses was not based merely on the applicant's individual performance. The letter to the applicant dated 2 February 2001 advising him of the new remuneration arrangements in 2001 annexed attachment B which listed a number of factors behind the payment of performance-based deferred bonuses. These factors included the performance of the business with reference to external market remuneration levels. Once the bonuses were quantified, receipt of the deferred components was nevertheless contingent upon the applicant's continued satisfactory performance as well as his continued employment …
>
> … the applicant understood that prior to commencing employment with the respondent that receipt of any deferred bonus was contingent upon continuing employment.

31 The NSW Commission found that the employee had chosen to continue to work for the company on the basis that these monies were *unvested* and could be forfeited at any time. His remuneration package summary stated that the payment of his deferred award for the second and third years was "*not vested* and … *subject to satisfactory performance and continued employment* … to the date of payment" [emphasis added] (*Rick Lloyd* at [14]). By the time the dispute arose, the payments had been renamed "Above base Component", and the words "performance payment" were dropped. This was not a simple matter of form. The above base components were contingent on three factors: performance, risk and retention. 50% was paid out after the first year, 25% after the second, and 35% after the third. The total deferred award paid out was greater than the initial bonus award. The first 100% was paid out for a combination of all three factors. The last 10%, however, was effectively a straightforward payment for loyalty with no connection whatsoever to the employee's performance, as it was over and above what he would have earned based on a combined assessment of his performance, the business's performance, and his likelihood of long-term success in the company. In the present case, there were no additional sums awarded, nor was there a separate sum awarded specifically for loyalty. Indeed, the Forfeiture Provision expressly states that it relates to "Deferred Incentives [*viz*, the Deferred Incentive Award] that *have been awarded* but *not yet distributed*" [emphasis added]. The fact that interest would apply to these deferred awards further suggests that the money was the employee's and he had a right to collect the interest from the deferred sum. The Respondent's argument that the monies were merely being offered to the employee and were thus not vested cannot be reconciled with the wording and substance of both the letter announcing the bonus

award and the accompanying T&Cs. It is clear that the Forfeiture Provision pertains to monies which were *vested* at the time the bonus was declared by way of the internal memo.

32 Further, it is also expressly stated in the Forfeiture Provision that the Deferred Incentive Award would be "*forfeited*" if the Appellant, *inter alia*, "continues a career within the financial or commodity trading industry *outside of the Company* [the Respondent] *within a period of two years from the date of such Separation from Service* (referred to as the "Two-Year Non-Compete Period")" [emphasis added]. It bears repeating, in this regard, that the heading of the Forfeiture Provision reads – significantly, in our view – "*Forfeiture* Provisions" [emphasis added]. In our view, if the Deferred Incentive Award had not already vested in the Appellant, there would have been nothing to "forfeit" in the first instance. Put simply, the express words of the Forfeiture Provision *mean precisely what they say*, and one would have to be a linguistic contortionist, so to speak, to arrive at a different interpretation of this particular provision.

33 The appeal before us thus constitutes a clear case of vesting. We recognise that there will be cases which are on the borderline. *Rick Lloyd* was such a case. The payments in *Rick Lloyd* were integrated and it was not easy to distinguish which was a pure payment for loyalty and which was a payment for both performance and continued employment. In cases such as these, the juristic bases have not always been clear. There was some suggestion in *Rick Lloyd* that the decision had to do with vesting, as an unvested payment could not be the subject of a restraint of trade clause. However, there was also some suggestion that it was the employee's *acceptance* of the payments as unvested which allowed the clause to pass muster as a Payment-for-Loyalty clause without engaging the restraint of trade doctrine. As *Rick Lloyd* was primarily about the statutory fairness (or otherwise) of the impugned clause under s 106 of the Australian Industrial Relations Act 1996 ("the Australian Act"), the NSW Commission did not have to deal directly with the proper juristic basis for which side of the line (whether on the side of a Payment-for-Loyalty or Forfeiture-for-Competition clause) a mixed clause like the one in *Rick Lloyd* would have fallen. However, even assuming that *Rick Lloyd* dealt with the vested component of the bonus award, we find that there is another possible method of dealing with such borderline cases (see [56] below). In any event, we find that *Rick Lloyd* does point to a distinction between vested and unvested interests and is a useful contrast to the present case, where there is no ambiguity as to whether there was an unvested component. *A fortiori*, the clause before us in the present case deals with a fully vested clause.

34 If, as we have pointed out in the preceding paragraphs, the Deferred Incentive Award was *already vested* in the Appellant, this would shed significant (indeed, critical) light on the legal status of the Forfeiture Provision itself. Let us elaborate.

35 Given the fact that the Deferred Incentive Award was *already vested* in the Appellant, this would mean that the Appellant should, *in principle*, have been entitled to that award *even if he had decided to leave the employment of the Respondent forthwith at the end of his contract with the Respondent*. In the circumstances, to interpret – as the court below did – the Forfeiture Provision as still giving the Appellant the *choice* whether he wanted to continue in the employment of the Respondent, albeit subject only to the fact that he would forgo the Deferred Incentive Award should he decide not to, with respect, does not reflect *the actual situation which the Appellant faced*. It was not, in our view, a real choice. The Forfeiture Provision was akin to a sword of Damocles hanging over the Appellant's head – programmed to fall should the Appellant decide to leave the employment of the Respondent and join a competitor. *In point of fact, however, such a sword ought never to have been there in the first place* given the fact that the Deferred Incentive Award had *already vested* in the Appellant. Put simply, the Forfeiture Provision operated, *a fortiori*, to *restrain* the Appellant from leaving the employment of the Respondent to join a competitor, by way of *a threat* to *forfeit* a not insubstantial financial reward which had *already vested in the Appellant* should he (the

Appellant) in fact leave the employment of the Respondent to join a competitor. The fact that such a restraint was kept physically separate from the NCA does nothing to detract from its *substance* (which has just been set out).

36 The above analysis serves, in our view, to distinguish the Forfeiture Provision (and other Forfeiture-for-Competition clauses like it) from what have been termed as Payment-for-Loyalty clauses (bearing in mind the important fact that the result of each case will undoubtedly depend on its precise facts simply because a clause akin to the Forfeiture Provision in the present appeal might (and often would in fact) be worded differently). This is an important distinction, to which we will have occasion to return to below (at [41]–[45]). More generally, it should also be noted that the importance of *vested* rights referred to above is not only an extremely important one in the context of the facts of the present appeal but also in relation to the more general legal analysis that follows in the next part of the present judgment.

Does the doctrine of restraint of trade apply to the Forfeiture Provision?

37 It is important to note, at the outset, that the Forfeiture Provision occurs in an *employment* context. Had it been a traditional restraint of trade clause, there would have been no question whatsoever that the doctrine of restraint of trade would apply to it. Indeed, as this court observed in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") (at [45]), "[w]hilst [the court] would *not* go so far as to state that the doctrine of restraint of trade *always* applies in *every* contractual context, [the court notes] that its application in the context of *employment* is *well established*" [emphasis in original]. It has only been in novel situations, such as in the context of a solus agreement as was the case in the House of Lords decision of *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, where the court has found it necessary to re-examine the principles underlying the application of the restraint of trade doctrine. Given that the present appeal takes place in the well-established employment context, we see no need to engage in the process of reinventing the wheel.

38 However, as we have noted above, the Respondent has argued that the Forfeiture Provision does not come within the ambit of the doctrine in the first place because there is *no* "*restraint*" as such on the Appellant. This clause constitutes, instead, a *financial disincentive* to the Appellant should he (the Appellant) choose to leave the Respondent and compete with the Respondent.

39 Looked at in this light, the issue before this court is a straightforward one: Does the Forfeiture Provision impose a "*restraint*" on the Appellant's freedom to trade (in this instance, to set up a separate company, *viz*, Xangbo)?

40 It is important to note that what is before us is, strictly speaking, a threshold issue inasmuch as a holding by this court that the doctrine of restraint of trade applies to the Forfeiture Provision does *not automatically* result in that clause being rendered void and unenforceable. The clause might (assuming that the Respondent had a legitimate proprietary interest to protect (see *Man Financial* at [79]–[93]), which *was* the case here (see above at [14(c)]–[14(d)] and [19])) still be shown to be valid if it is *reasonable both* in the interests of *the parties and* of *the public*, *ie.* it is still subject to the twin tests of reasonableness enunciated by Lord Macnaghten in the seminal House of Lords decision of *Thorsten Nordenfelt (Pauper) v The Maxim Nordenfelt Guns and Ammunition Company, Limited* [1894] AC 535 ("*Nordenfelt*") (at 565) which has been endorsed in the local context (see, for example, *Man Financial* at [69]–[78] and *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386). However, having regard to the fact (as already noted) that we agree wholly with the Judge on all aspects of his decision except for his decision in relation to the crucial issue, a finding by this court that the doctrine of restraint of trade applies to the Forfeiture Provision would effectively result in

this appeal being allowed (hence, as noted above (at [2]), the characterisation of this particular issue as "the crucial issue").

41 We have, in fact, already set out our views on the nature of the Forfeiture Provision. In particular, we have found that, given that the Deferred Incentive Award was *already vested* in the Appellant and that the Forfeiture Provision operated to *restrain* the Appellant from leaving the employment of the Respondent to join a competitor, by way of a *threat* to *forfeit* a not insubstantial financial reward which had *already vested in the Appellant* should he (the Appellant) in fact leave the employment of the Respondent to join a competitor (see, especially, above at [35]), the Forfeiture Provision is, in our view, indeed a "*restraint*" that brings that clause within the ambit of the doctrine of restraint of trade (indeed, we pause to observe, parenthetically, that such a situation is no different, in substance, from that in the Australian Privy Council decision of *Stenhouse Australia Ltd v Marshall William Davidson Phillips* [1974] 1 AC 391 (the only difference, if at all, consisting in the fact that this last-mentioned case constituted an even more obvious situation since the commission sought to be forfeited pursuant to the clause concerned would in fact be earned *independently* by the former employee *post* employment)). What, however, is of concern to this court is the precise relationship between Forfeiture-for-Competition clauses such as the Forfeiture Provision and Payment-for-Loyalty clauses. To put it simply, if we were prepared to accept that the latter did *not* fall within the ambit of the restraint of trade doctrine, then, if there was in substance no distinction between the latter and the former, it would necessarily follow that the former (including, here, the Forfeiture Provision) would *also not* fall within the ambit of the restraint of trade doctrine. However, as we have already mentioned above (at [27]), there *is* a distinction between both these types of clauses. Because of the importance of this particular issue, it would be appropriate to elaborate in more detail why we have arrived at this conclusion and, in particular, why *Payment-for-Loyalty clauses* do *not* result in a "restraint" which brings them within the ambit of the restraint of trade doctrine.

42 Looked at contextually, there are two considerations that must be considered in the present appeal. First, the employee is *entitled to the bonus monies* (*ie*, the monies are *vested*). Second, any potential restraint takes place in the post-employment context.

43 We have already found that the Forfeiture Provision deals with monies that the employee is entitled to. Whilst it might be argued that Payment-for-Loyalty clauses have the *same result* as the Forfeiture Provision, this *might* be true *only if* one adopts the *most literal* approach inasmuch as the *result* of both such clauses would suggest that employees (such as the Appellant) would be *tempted (if not persuaded)* to continue in the employment of the employer (here, the Respondent). *However*, this similarity in *result* is only superficial, at best (hence, the appellation "might" in the preceding sentence). Put simply, the *result* concerned *cannot be divorced from* its *cause*. In ascertaining the *legal status* of the clause concerned, the court adopts *an integrated and holistic* approach which is based, in the final analysis, on *principle*. In this regard, the legal line between both types of clauses mentioned at the outset of the present paragraph, whilst not an easy one to draw, ought to be drawn if a *principled* distinction does indeed exist. In order to ascertain whether such a line ought to be drawn, the court ought, in our view, to have recourse to the integrated and holistic approach just mentioned.

44 It can immediately be seen that the respective *causes* of the Forfeiture Provision and a typical Payment-for-Loyalty clause are *quite different*. The *former*, as mentioned above, comprises a clause which *restrains* the employee concerned from leaving the employment of the employer *by withholding what had already been vested in him if he did in fact leave such employment and join a competitor*. The *latter*, on the other hand, contains – as the relevant case law emphasises – *no restraint* as such; a typical Payment-for-Loyalty clause simply provides that, if the employee concerned continues

in the employment of the employer, he or she will receive an *additional* payment for his or her loyalty. *It is of the first importance to note that the employee concerned has hitherto not done anything that entitles him or her to such payment and, hence, nothing is vested in him or her as such. There is therefore no restraint on the employee, who is free to choose whether he or she would like to continue in the employment of the employer in order to be entitled to such a (loyalty) payment*. This is, it ought to be emphasised, a straightforward *contractual* arrangement between the employee and the employer. It is also, presumably, *an entire contract* and, therefore, if the employee leaves prior to the period stipulated pursuant to the Payment-for-Loyalty clause concerned, then, absent an argument of substantial performance by the employee, there would, *ceteris paribus*, be a breach of contract by the employee which would disentitle him or her from claiming the payment stipulated in the clause.

45 Could it not, however, be argued that a Forfeiture-for-Competition clause could be *equally* characterised as a *contractual* arrangement as well? This is, at first blush at least, a persuasive argument, albeit couched in the form of a question. *However*, closer scrutiny of such an argument will reveal that, whilst it is true that such a clause does involve a contractual arrangement as well, it is *the content* of such a clause which renders it potentially contrary to public policy as being in possible restraint of trade. *Unlike* a Payment-for-Loyalty clause, a Forfeiture-for-Competition clause, as explained above, contains *a restraint*, whose foundation may be traced to the fact that the payment concerned would have *already vested* in the employee concerned, who is then *restrained* from leaving the employment of the employer to join a competitor because to do so would be *to give up a right which had already vested in him or her.* In *contrast*, the employee would, pursuant to a Payment-for-Loyalty clause, *not be giving up a right which had already vested in him or her* but would, rather, be entering into a contractual arrangement which *would result in a similar right vesting in the future*. Put simply, the *former* is a situation characterised by *restraint*, whereas the *latter* is a situation characterised by *incentive*. It is important, at this juncture, to reiterate that, whilst the *former and latter might result* in a *similar* action on the part of the employee concerned (*viz*, continuing in the employment of the employer), the respective *causes* are *quite different*. In the situation involving a Payment-for-Loyalty clause, the *incentive* is precisely that, whereas in the situation involving a Forfeiture Provision, the so-called "incentive" is *not* really an "incentive" as such, except in so far as the Forfeiture Provision promises (by its very heading as well as language) to *take away* a right or entitlement that has *already vested* in the employee concerned and, hence, constitutes a *restraint* that militates against the very policy underlying the legal proscription against clauses that are in *unreasonable* restraint of trade.

46 The word "unreasonable" in the last sentence of the preceding paragraph is important: In accordance with the principles laid down under Singapore law, the clause concerned, whilst *prima facie* void, might be shown to be valid if it passes the twin tests of reasonableness (see above at [40]). In other words, there is *no blanket* rule as such which proscribes clauses that fall within the restraint of trade doctrine. Hence, if the Forfeiture Provision falls within the restraint of trade doctrine, that clause is *not automatically* rendered unenforceable, but may still be enforceable if it is reasonable in the interests of the parties and of the public.

47 In finding that the restraint of trade doctrine applies to Forfeiture-for-Competition clauses characterised by the deprivation of *vested rights*, it must be noted that we are not ignoring the need to balance freedom of trade with freedom of contract. We find, however, that the appropriate place for this balance to be struck in the employment context is at the reasonableness (as opposed to the threshold) stage. We have already noted (at [37]) that the doctrine is assumed to apply in the employment context where the relevant clause is substantially a restraint (and is similar to a classic restraint of trade clause). The restraint of trade doctrine essentially protects only one policy objective: the freedom to trade. In deciding that it should apply, there is no balance to be struck

because the restraint of trade doctrine says nothing (at this threshold stage) about freedom of contract. It is only *after* the doctrine is found to be applicable that the twin tensions of freedom of contract and freedom of trade can be mediated and balanced (assuming that the employer can establish a legitimate proprietary interest to begin with) via the twin tests of reasonableness (noted above at [40] and [46]).

48 We should add that the approach we have adopted also provides employers with sufficient flexibility inasmuch as it preserves the many permutations of schemes which they can set up. For example, schemes involving straightforward loyalty payments would not constitute a *restraint* as such. Neither would loyalty payments which constitute a percentage of, and are in addition to, bonus payments, nor a deferred bonus scheme which is not tied to a non-compete clause. Employers could even choose to maintain the *same structure* as that adopted in the present case and such a scheme would *still* pass muster *if it is reasonable*. The concept of vesting is thus no more than a reiteration of the accepted concept that an individual's freedom to trade cannot be constrained, except in accordance with the twin tests of reasonableness referred to in the preceding paragraph. It does not dictate to employers what they should do in order to retain their top talent.

49 Lest it be thought that the concept of whether or not a right had *already vested* is a novel one, it is important to point out that such a concept has also been applied in other decisions. For example, in the English High Court decision of *Finnegan v J & E Davy* [2007] IEHC 18, the plaintiff employee was given a bonus by the defendant stockbroking firm in the calendar year 1997 amounting to £100,000, with £60,000 being paid first and the remaining £40,000 being deferred for one year. If the plaintiff left the defendant's employment, he would not receive the £40,000. In the calendar year 1998, the bonus amount was £200,000, albeit with a one-third split imposed upon the plaintiff – a split which the plaintiff objected to as he was in effect being required to work for the defendant for an additional two years before he could receive and have possession of money which he felt that he had already earned. In September 2000, the plaintiff left the defendant to work for another stockbroking firm. He requested the monies retained from the bonuses. The defendant refused payment and the plaintiff consequently brought an action against the defendant, claiming £65,000 in respect of bonuses due from the year ended 31 December 1998 and £140,000 in respect of bonuses due from the year ended 31 December 1999. Smyth J held that the plaintiff was entitled to the amounts claimed, holding (in the process) that the deferral or retention provision in the contract between the plaintiff and the defendant not only fell within the scope of the restraint of trade doctrine but also failed to pass muster under that particular doctrine. More importantly (for the purposes of the present appeal), the learned judge made the following pertinent observations (which are entirely consistent with the approach adopted in the present appeal):

> *If, as I understand the notion of an incentive, is something that incites to action, then I have great difficulty in understanding how following one's own money in order to recover it and to ensure it is not forfeit or lost falls within the concept*. I can well understand a bonus earned and paid in full would be an incentive to future performance.
>
> I found the analogy of Mr. McLaughlin [the overall head of the defendant employer's Equities Division] between a share option scheme – a right conferred dependent on or which would only vest upon a future event (a known condition subsequent to the conferring of the option) and *a bonus already earned declared and set aside in a specific account as a result of past endeavours which had vested and notwithstanding that vesting became conditional upon future commitment to other endeavours in the future*, quite unconvincing.
>
> ...

> [T]he real purpose (which I find as a fact) of the deferral or retention of the elements of the bonus was *to create a financial and practical restriction on employees who wished to continue to act as stockbrokers going to another firm of stockbrokers*. Furthermore the fact that such employees as left the employment of [the defendant] when outstanding elements of bonuses had not been paid, but did not go into competition, were paid such outstanding monies gives point to the notion and submission that if in effect the provision was as part of a contract it was a contract in restraint of trade. The evidence, I am satisfied, bears out the contention that the Defendant paid all outstanding bonus entitlements to persons (other than the Plaintiff) who left the employment of the Defendant between the period 1996 and 2001 who did not go into another stockbroking firm.
>
> The question as to whether a bonus was discretionary or otherwise was agitated by the parties. I find as a fact that *over a period of years the Plaintiff could have had* ***a legitimate and reasonable expectation*** that if the firm thrived and his efforts were fruitful a bonus would come to him as it did to a number of other employees. It was *certainly discretionary as to amount because each year's trading would differ and there had to be an assessment of his success or otherwise in each year*, but I am satisfied that *the Plaintiff could* ***reasonably expect*** *as a matter of principle built up from a number of years of consistent conduct in the payment of bonuses and the matter of discretion never having been mentioned to him at any stage that some bonus would be payable – the amount only dependent on the trading activities of the firm and his own performance.*
>
> [emphasis added in italics and bold italics]

50 We turn now to consider *Wyatt*, where the court applied the restraint of trade doctrine. That case involved the payment of a pension to the employee upon retirement. The letter informing him of the pension stated that he was "at liberty to undertake any other employment, or enter into any business on [his] own account, except in the wool trade". The employer sought to rescind this payment and the employee sued the employer, alleging, *inter alia*, that "the firm… [had] contracted *as a matter of law* to pay him a pension, and that the firm [had] *no power* to withdraw that pension" (*Wyatt* at 803) [emphasis added]. In effect, the employee claimed that he was *legally entitled* to the payment of the pension, an argument in substance that the pension was vested. The majority assumed that the employee was *contractually entitled* to the pension before proceeding to apply the restraint of trade doctrine (Scrutton LJ, on the other hand, was of the view (agreeing with Macnaghten J in the court below) that no contractual obligation had arisen between the parties in the first place). One possible interpretation of that case is that the employee had thereby attained a *vested right* to the pension which the employer had paid him for some nine years (from 1923 (when the employee retired) till 1932) before withdrawing it owing to the financial difficulties that it (the employer) found itself in. If so, then the court's application of the restraint of trade doctrine is consistent with the approach from vesting adopted above. Put simply, the assumption by the court in *Wyatt* that the doctrine of restraint of trade applied can be justified on the basis that, once the payment of the pension was found to be an *entitlement*, the clause had the same effect as a classic restraint of trade clause as it meant *forfeiting a right to which the employee was entitled* in the event that he competed and thus *restrained* his freedom to trade (and, to this extent, at least part of the critique in a learned note referred to in the court below (see (1933) 49 LQR 465, especially at p 466) might not be as persuasive). Slesser LJ, when considering the substantive effect of the contract granting the pension, opined (*Wyatt* at 809) that:

> The public policy which has to be considered, the interest of the community, seems to be affected quite as much by an agreement that a person will *give up* a benefit which he would otherwise receive if he enters into a particular trade, as it is by a direct agreement by him not to

enter into that trade. [emphasis added]

The characterisation of the contract by Slesser LJ was not that of a disincentive, despite later characterisations of *Wyatt* to that effect, but of a benefit which was to be *given up* which would otherwise have been received as the employee's *entitlement*. The word "entitlement" was picked up by Jonathan Sumption QC in the English High Court decision of *Marshall v N M Financial Management Ltd* [1995] 1 WLR 1461 ("*Marshall*"), where he observed (at 1468) that the agent was not "*entitled* to any commission after termination" under the relevant clause. However, even assuming that the plaintiff's rights in this case were not in fact vested, there is another possible method of explaining the result arrived at by the court (which is explored briefly below at [61]).

51 We also note that, in *Marshall*, although the issue of vesting was not expressly discussed and the court applied *Wyatt* in holding that the clause concerned (which provided that no renewal commission would be payable if, within one year after the date of termination of his contract, the independent contractor becomes an independent intermediary or becomes an appointed representative of any company or organisation which may directly or indirectly be in competition with the employer) was within the scope of the restraint of trade doctrine, it would appear, even from the judgment itself (*Marshall* at 1468), that the employee concerned was *entitled* to receive the renewal commission in question. The defendant employer accepted and used the language of entitlement; its arguments and affidavits disputed whether the independent contractor was *entitled* to commission in respect of clients who were serviced by the contractor prior to the termination of his contract. When the Court of Appeal in *Marshall v N M Financial Management Ltd* [1997] 1 WLR 1527 ("*Marshall (CA)*") (at 1531) applied *Wyatt* (albeit in a different context), it also used the word "entitlement" to describe the employee's claim to the pension monies. When the court held that the impugned clause was in unreasonable restraint of trade but applied the doctrine of severance, it was effectively achieving the result that the employee was *entitled* to post-termination commission. It should also be noted that the only issue on appeal related to the application of the doctrine of severance (see *Marshall (CA)*, especially at 1530). However, even this last-mentioned decision suggests that the renewal commission concerned had already *vested* in the employee (see *Marshall (CA)* at 1534). This must be right, as the plaintiff in *Marshall* was an independent contractor whose remuneration was entirely by way of commission. This commission had two components: an initial commission and a renewal commission. The disputed renewal commission, by the defendant's own admission, consisted of commission in respect of clients serviced by the independent contractor prior to the termination of his agency. The renewal commission was hence an integral part of the plaintiff contractor's remuneration *for work already done*. It was thus clearly distinguishable from pure payments for loyalty as it concerned *vested* commissions to which the plaintiff contractor was *entitled*.

52 A similar interpretation could, in our view, also possibly be taken of another English High Court decision, *viz*, *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 ("*Sadler*"). Although the court in that case characterised *Wyatt* and subsequent decisions following it as situations of mere financial incentive, the *substance* of *Sadler* dealt with commissions to be paid to an employee, a life insurance agent, out of the premiums paid by the insured persons introduced by the employee *prior to his termination*. Like *Marshall*, the employee's remuneration consisted entirely of commissions. It was a feature of life assurance contracts that the premium was payable over a number of years. The commission to be paid to the employee was accordingly deferred over the same number of years that this premium was paid. At the time the employee left employment, there would thus be a number of policies which would have been effected by the employee during his term of employment and was thus *entirely owing to the employee's work done during employment*, the commissions of which would not yet have been paid to him. The question arose as to whether these unpaid commissions could be withheld by the employer without falling foul of the restraint of trade doctrine. In finding that this was in restraint of trade, the court acknowledged (*Sadler* at 392) that the substance of the impugned

clause was to deprive the employee of monies which had *already* been earned by him during his appointment as agent. This is thus a clear case of *vested monies* to which an employee was entitled.

53 However, we recognise that legal entitlement or vesting might not be the only basis for holding that the restraint of trade doctrine applies, and there may be other situations (that fall short of legal entitlement or vesting) that might nevertheless prompt the court to hold that the doctrine of restraint of trade ought to apply to the clause(s) in question. As this particular issue is not directly before this court (there having been clear legal vesting of the bonus monies in the Appellant), we would merely proffer a few tentative views, utilising a few of the more salient decisions cited to this court as a platform for discussion and illustration until such time when the issue comes squarely for decision before the courts.

54 The doctrine of restraint of trade was, for example, applied in the English High Court decision of *Bull v Pitney-Bowes Ltd and Others* [1967] 1 WLR 273 ("*Bull v Pitney-Bowes*"), which did not directly involve a vesting of legal rights in the employee as such.

55 The contested scheme in *Bull v Pitney-Bowes* consisted of a non-contributory pension fund, the assets of which were vested in the trustees. Rule 16 of the fund prohibited any retired member from engaging or being employed in "any activity or occupation which is in competition with or detrimental to the interests of the company", and gave the employers the right to "cancel all [the employee's] rights and benefits under the rules" should he choose to compete even after being given notice not to do so. The employee voluntarily retired to join a competing company and was warned that his rights and benefits under the pension fund would be forfeited if he chose to compete. He applied for a declaration, *inter alia*, that rule 16 was an unreasonable restraint of trade and was void and unenforceable. Even though the employee had contributed to the fund for 16 years under the (prior and now superseded) 1940 pension scheme, rule 3 of the new scheme required employees who were members of the 1940 pension scheme to renounce their rights and benefits under that scheme. This rule was not challenged and it could not be said that the rights had become legally vested in the employee by virtue of his contribution to the fund. The employers argued that the employee was *not entitled to* the pension as rule 16 was about defining the class of persons who were to benefit from the fund and not about imposing conditions on the accrual of rights and benefits under the fund. In effect, this was an argument that the rights were *not vested*. Thesiger J found that there was no distinction in principle between a covenant not to take up certain skilled work and the discontinuance of a pension if one does choose to take up that work as both were *inducements* (and not mere incentives) not to trade. The learned judge proceeded on the assumption that the employer's argument (that rule 16 merely defined the class of persons who were to benefit from the fund) was *wrong*. The inducement under rule 16 was an "inducement of a *continued* pension" (*Bull v Pitney-Bowes* at 282) [emphasis added]. The use of the word "continued" contains an assumption that the employee *already had an existing entitlement* to the pension under the new scheme which was not founded on the basis of legal vesting (unlike (at least arguably) in *Wyatt* and in the present case). The basis for the employee's entitlement to the pension was, however, uncertain. Nevertheless, this suggests that an employee may acquire an entitlement to payments despite the fact that they have not been legally vested in him. There is thus some flexibility in the notion of entitlement which permits gradation based on the facts.

5 6 *One possible* approach that might be adopted to explain why rule 16 in *Bull v Pitney-Bowes* ought to fall within the scope of the restraint of trade doctrine despite the absence of legal vesting is as follows. If the facts are such as to result in a *reasonable expectation* on the part of the employee that he or she would be entitled to the benefit concerned, then the clause which seeks to forfeit such a benefit would therefore still come within the scope of the restraint of trade doctrine. In this regard, it should be noted that the concept of reasonable expectations, first mooted by Lord Steyn in

an extralegal context (see Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433) has been endorsed judicially by our courts. In the decision of this court in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407, for example, it was observed by Yong Pung How CJ (delivering the judgment of the court) thus (at [40]):

> [T]he function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed.

Reference may also be made to the decision of the Singapore High Court in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 (at [151]–[152]) as well as the decisions of this court in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 (at [111]); and *Tan Jin Sin and another v Lim Quee Choo* [2009] 2 SLR(R) 938 (at [20]).

57 However, one possible difficulty with the adoption of such an approach is that the concept of reasonable expectations is precisely that – a *concept*. It is *not* a *doctrine* as such. Nevertheless, if it is utilised only as an underlying rationale to ascertain whether or not the clause concerned comes within the scope of the doctrine of restraint of trade, such a difficulty might not be an insuperable one. That having been said, the concept itself is still – potentially at least – relatively broad and somewhat amorphous. This could, in turn, give rise to no small uncertainty in the sphere of application. It is true that each fact situation does generate some uncertainty. However, such uncertainty might be exacerbated by the relatively broad parameters contained within the concept of reasonable expectations. To this end, a *more specific and stricter conception of the concept of reasonable expectations* might be more appropriate. Put simply, if the concept of reasonable expectations is *premised upon* the satisfaction of *the criteria* that govern the doctrine of *equitable (or promissory) estoppel*, this might constitute a more satisfactory and workable approach towards the concept of reasonable expectations in the context of the issue as to whether or not the doctrine of restraint of trade ought to apply in a given fact situation.

58 In *Hairman v FileNET Corporation Pty Limited* [2001] NSWIRComm 318 ("*Hairman v FileNET*"), for example, the NSW Commission found (at [92]–[93]) that the employee had been aware that commission might be lost but was nonetheless prepared to accept it and could not thus complain. The agreement was commercially fair, as the consequence of upholding the relevant clause was that the employee did not get a benefit which he had no legitimate expectation of getting in the first place. This was essentially an estoppel argument. The employer was *not estopped* from withholding the commission because there had always been *a mutual expectation* that the commission would be *lost in the event of* the employee competing; both parties had proceeded on this basis and the employee had not detrimentally relied on the employer's undertaking. In fact, the employee, Mr Hairman, had benefitted from the way the scheme was set up. He had no enforceable legal or equitable right to the commission. Not only was the commission scheme "directed, structured and operated, not just to pay participants such as Mr Hairman for sales which they achieved, but also in order to achieve other objectives" (see *Hairman v FileNET* at [121]), Mr Hairman also knew and understood these aims, and could not have had a reasonable expectation of receiving these commissions.

59 The NSW Commission applied the same reasoning in *Rick Lloyd*. We have already observed that that fact situation involved *unvested* rights. However, even if they did not, it is clear that the NSW Commission also looked to the reasonable expectations of the employee in deciding that he was *not entitled* to the benefits under the impugned clause. The NSW Commission reasoned that not only had the clear wording of the letters offering the "Above base component" notified the employee that the commissions were unvested, industry practice also showed that the employee must have known that the *unvested portion of his performance based bonuses* would not be paid to him if he left

employment. The reason for distinguishing cases like *Hairman v FileNET* and *Rick Lloyd* from cases such as *Bull v Pitney-Bowes* was that the employees in *Hairman v FileNET* and *Rick Lloyd* had *no reasonable expectation* of being able to retain the benefit of the financial incentive being given under the impugned clause. There was thus no representation on which they could have (or had in fact) detrimentally relied on.

60 Contrastingly, in *Bull v Pitney-Bowes*, it might be argued that by making contributions to the pension fund for 16 years *instead of* saving privately for his post-retirement needs and subsequently continuing to work for the employer instead of seeking a refund for these contributions, the employee had detrimentally relied on the employer's express representation that a pension and life insurance benefit would be provided. This equitable right was not taken away by rule 3 of the new Pension Scheme which provided that "such rights or benefits [which] are preserved by these rules" need not be renounced. The use of the word "right" clearly evinces an intention even under the new scheme that the employee was to be *entitled* to the pension monies even though there was no clear legal basis for such entitlement; these were not merely benefits which could be denied at the employer's discretion. Even if the pension monies were not legally vested in the employee, the employee had an equitable right to them as the employer was estopped from withholding those monies and only paying the employee on condition that the employee did not compete with his ex-employer after retirement. An equitable right of estoppel *may* provide the flexibility needed to maintain a gradation in deciding whether, on its facts, a clause is in restraint of trade.

61 Turning to the decision in *Wyatt*, we have already opined above (at [50]) that the fact situation in that case involved a legal vesting. Even if it were not, it is clear, in our view, that there was – *at the very least* – a *reasonable expectation* on the part of the employee that he would continue to receive his pension in return for his promise not to be involved in the wool trade. In particular, the employee in this case not only entered (as the majority of the English Court of Appeal at least assumed) into a binding contractual relationship with the employer to this effect but had also received the pension concerned for some nine years before the employer wrote to the employee, informing him that it was discontinuing payment of the pension. Also, given the fact that the employee had entered the employment of the employer's predecessors in 1876 and had served throughout right up to 1923 (when he retired), there was a strong case that the elements of equitable estoppel might apply *vis-à-vis* the employer based on the totality of the facts as viewed in their context, which would (in turn) have supported the argument that the employee had a reasonable expectation which ought to have resulted in the clause concerned being subject to the doctrine of restraint of trade.

62 From these cases, we are able to extract certain guiding principles. The first is that a representation must be made by the employer. In *Bull v Pitney-Bowes* and *Wyatt*, such representation was clear through the payment of monies into the pension fund in the former case and through the letter sent to the employee along with the payment of the pension for nine years in the latter case.

63 Secondly, this representation must have induced the employee to enter or continue in employment in reliance on that representation. In *Bull v Pitney-Bowes*, the employee had paid monies into the pension fund for 16 years before the scheme was changed in the expectation that he would get a pension from this fund as represented. An employee could not both be granted a return of the monies paid to the pension fund under the superseded scheme as well as a pension. Rule 7(b) gave him two choices: either resign or be dismissed and have his contributions returned, or stay until retirement, forfeit the monies paid into the superseded pension fund and get a pension under the new scheme instead. The employee in *Bull v Pitney-Bowes* chose the latter and the learned judge found (at 280) that, by voluntarily staying on till retirement and completing 15 or more years of pensionable service, he had qualified himself under rule 7(b) to receive the pension he was "entitled to" while

forfeiting a return of the contributions paid to him under the superseded scheme. Rule 7(b) circumscribed the employee's choices and constituted an inducement to stay in the employer's employment *in order to* be paid a pension. Once the employee had made this choice in reliance of the new pension scheme rules, and in particular rule 7(b), it would be inequitable to have withdrawn the represented benefit when the employee's previous choice could not now be rescinded. The learned judge opined thus (*Bull v Pitney-Bowes* at 282):

> From the public point of view there is every justification for the plaintiff's argument in this case that the employer cannot achieve by *the inducement of a continued pension* that which he could not achieve by obtaining a direct promise in return for particular wages or salary. [emphasis added]

The fact that the employer's behaviour amounted to an *inducement to continue in employment* (rather than to have the employee take back his contribution to the superseded fund under rule 7(b) and leave the employer to join a competitor) was clearly a factor in the learned judge's mind, and we find that this is right in principle. Where the employee's choices have been circumscribed or a particular choice induced by the employer, it hardly lies in the employer's mouth to deny the very representation leading to the (now intractable) situation which the employee finds himself in.

64 By way of clarification, we should note that inducement to the employee to choose a certain course of action is quite different from the American Employee Choice Doctrine, which we have found at [81] below to be unsound as a matter of general principle. In the American Employee Choice Doctrine, what constitutes the focus is the employee's choices made at the point of contract. The notion of inducement, in contrast, focuses on the effect of the employer's representation on the employee's actions. Put simply, the American Employee Choice Doctrine says that an employee can give up his right to trade in exercise of his freedom to contract. The question of whether the employee was induced to continue to work for his/her employer asks whether the employer's words and actions were a restraint on the employee's actions at the material time, regardless of the conditions under which this had been given up (*viz*, whether in exercise of his freedom to contract or not). The questions asked are subtly different and the latter exists within the broader framework of *reasonable expectations*.

65 In contrast to *Wyatt* and *Bull v Pitney-Bowes*, in *Rick Lloyd* and *Hairman*, the NSW Commission went out of their way to emphasise that there had been no reliance, particularly no detrimental reliance, on any representation which could have been made by the employer. In *Rick Lloyd*, for example, the NSW Commission observed (at [78]) that:

> The applicant was *aware of and understood* all of these workplace practices as part of the work environment or the employment culture within which he operated. The applicant chose to continue to work for some years under a regime where forfeiture of the unvested portion of his performance based bonuses was the consequence if he resigned. [emphasis added]

In other words, the applicant had chosen to continue to work not because of any representation by the employer but *in spite of* the employer's representations to the contrary.

66 It follows that the third requirement is that there must be some sort of inequity arising from the reliance on this statement. The most tangible form of inequity is detriment arising from reliance. There was clearly a detriment in *Bull v Pitney-Bowes* in so far as the employee could have gotten his pension contribution back under rule 7(b) had he chosen the route not involving the payment of a pension, or he could have saved enough for his retirement such that he would not have been left high and dry after he retired. The representations made inducing him to choose a certain course of conduct which

could not later be rescinded landed the employee in a situation where he would have had nothing to retire on. This would have been a detrimental and inequitable situation. In *Wyatt*, the pension had been paid over nine years and Wyatt would have planned for the future in reliance on the continued payment of the pension and thus incurred a detriment. It would accordingly have been inequitable for the pension to suddenly be withdrawn. In contrast, in *Hairman*, there had not only been no detriment, the NSW Commission had in fact observed (at [121]) that Mr Hairman had benefited from this scheme.

67 We would conclude this part of the judgment by noting one further (and related) issue that might also merit further inquiry in future decisions, *viz*, the relationship between the doctrine of equitable (or promissory) estoppel on the one hand and the concept of reasonable expectations on the other in the context of the doctrine of restraint of trade – particularly given the fact that equitable estoppel is a *doctrine* whilst reasonable expectations centre on a *concept*. A few preliminary observations will suffice for present purposes. As alluded to above (at [56]), what we suggest ought to be applied in order to ascertain whether or not a clause in a given fact situation ought to come within the scope of the doctrine of restraint of trade in the first place is the concept of reasonable expectations. However, the application of this concept alone is too broad and might therefore generate unnecessary uncertainty. What was therefore suggested was that, in order to ascertain whether or not the employee's reasonable expectations were such as to result in the doctrine of restraint of trade applying, the court should have regard to the *criteria* that govern the *doctrine* of equitable estoppel. Technically speaking, it is *not* the *doctrine* of equitable estoppel that is applied but, rather, its *criteria or elements* (as to which reference may be made to the excellent overview as well as analysis in Lee Pey Woan, "Consideration" in ch 4 of Andrew Phang Boon Leong (Gen Ed), *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*Lee*") at pp 227–252). This is an important point, not least because it is, as yet, unclear as to whether or not the doctrine of equitable estoppel can be used as a sword (or independent cause of action) (see, for example, *Lee* at pp 238–245) so that, in such a situation, it might at least arguably be the case that the *doctrine* of equitable estoppel might not, strictly speaking, be applicable in its entirety. However, the criteria as stated in [62]–[66] above do furnish, in our view, ample parameters which would enable the concept of reasonable expectations to be applied in order to determine whether or not the doctrine of restraint of trade applies in the situation at hand. Put simply, the successful invocation of the relevant criteria relating to the doctrine of promissory estoppel in *this* particular context merely opens the door, so to speak, for the court to apply the law relating to the doctrine of restraint of trade to the clause concerned. However, it bears reiterating that the application of such criteria would, in our view, furnish the requisite specificity as well as appropriate constraints on what would otherwise become an excessively fluid (and, more importantly, relatively uncertain) process. Nevertheless, as already emphasised, these are but tentative observations as this – as well as other related – issues were not directly before this court.

68 It is important to emphasise, at this juncture, that the approach just considered *sets a high threshold* before the court concerned will hold that a restraint exists, which restraint would (in turn) attract the doctrine of restraint of trade. Indeed, the doctrine of promissory estoppel itself is – by its very nature – an exceptional doctrine. Hence, the mere fact that the employee concerned has agreed to the scheme in question would *not*, *ipso facto*, result in the court applying the concept of reasonable expectations in order to hold that the doctrine of restraint of trade applies. It is clear from our discussion of decisions such as *Wyatt* and *Bull v Pitney-Bowes* that what the courts are looking for is some equity *despite* the fact that the employee may have agreed to the scheme concerned. And such an equity would, in the nature of things, only exist – as the cases just mentioned amply demonstrate – in exceptional circumstances. We have attempted to define the shape of this equity with the requirements listed above at [62]–[66]. These requirements circumscribe the situations where a restraint will be found and, as already mentioned, constitute a high threshold to cross.

69 Finally, and not unimportantly, we note that the concept of reasonable expectations does *not* apply with respect to a Payment-for-Loyalty clause in the *same* manner as it does with respect to a Forfeiture-for-Competition clause. In so far as the former is concerned, the *only* reasonable expectation engendered in the employee concerned is that he or she would obtain the extra payment *only if* he or she remains in the employment of the employer for the stipulated period (hence the attribution of the appellation "Loyalty" to such a clause; see [58]–[59] above and the English Employment Appeal Tribunal decision of *Peninsula Business Services Limited v Mr J Sweeney* (2003) EAT/1096/02/SM ("*Sweeney*") (see below at [71])). Put another way, the employee *reasonably expects* that he or she will *not* receive the extra payment if he or she leaves the employment of the employer *before* the stipulated period has expired. And this is only just and fair. In such a situation, the reasonable expectation is *wholly coterminous* with the precise contractual obligations entered into between the parties, which obligations involve no form of restraint (whether in substance and/or form). Where a payment is purely for loyalty (for example, the extra 10% in *Rick Lloyd* paid above the performance bonus), there is no vesting or reasonable expectation which could give rise to a legitimate claim on the part of the employee to the benefit.

70 Returning to the present case, it is, in our view, one involving clear legal vesting. The reality is not simply that the Appellant is being deprived of an opportunity to acquire a new right to the monies by virtue of staying in employment. In order to acquire the bonus monies, the Appellant had to subject himself to restrictions so that he could *no longer do elsewhere what he was doing before*, or *lose a right to monies* he was *entitled* to. The deprivation of the employee's legal right to *vested* monies is *a fortiori* a restraint of trade. However, we leave open the question of which situations outside of legal vesting may also give rise to an entitlement which *ought not to be forfeited*.

71 The second consideration is that Forefeiture-for-Competition clauses like the Forfeiture Provision purport to contractually govern what happens after the employee has left his employment. These may be distinguished from Payment-for-Loyalty clauses, which do not provide for the post-employment situation. The employee who leaves under a Forfeiture-for-Competition clause may still be entitled to the benefit if he does not compete. The employee who leaves under a Payment-for-Loyalty clause forfeits the benefit completely, even if he subsequently chooses not to compete. In the post-employment context, the relevant question would be whether there was, in purpose and effect, a restraint on trade after the employee has left his employment. The relevant time frame under a Payment-for-Loyalty clause is thus narrower than that of usual employment constraints. It is in this context that the Forfeiture-for-Competition clauses may be distinguished from the Payment-for-Loyalty clauses. Whilst a Forfeiture-for-Competition clause purports to govern what happens post-employment, the Payment-for-Loyalty clause ignores what happens post-employment. It was observed in *Sweeney* (at [42]) that:

> We do not consider it seriously arguable that the commission penalty that Mr Sweeney suffered on resignation arose under a contractual term involving an unlawful restraint of trade. His employment contract did not impose any restraint on him as to whom he might work for, or what he might do, *after leaving Peninsula*. [emphasis added]

72 The proposition in *Sweeney* that a clause should seek to govern the employees' ability to work *after* leaving in order to fall within the restraint of trade doctrine was cited with approval in *Tullett Prebon PLC and others v BGC Brokers LP and others* [2010] EWHC 484 (at [267]), where the English High Court found:

> The provisions which provide for the repayment of signing or retention payments where the employee does not serve out the full term are not provisions in restraint of trade. They do not affect the employees' ability to work *after leaving*. They are substantial sums paid to highly paid

employees as a reward for loyalty.

73 This is unlike the garden leave situation, which is concerned with negative covenants during employment, rather than post employment. As Alistair McGregor QC, "Garden Leave & Post Termination Restraints: Their Interaction and the Legal Problems Generated" (available online at http://www.11kbw.com/articles/docs/PostTermsandGardenAMcG.pdf (accessed on 6 August 2012)) explains (at [15]):

> That distinction is that during the currency of an employment contract, there is in existence an implied duty of fidelity on the employee that can be enforced by injunction restraining him working for rivals irrespective of the existence of any express contractual term to that effect. Once the contract comes to an end, however, that duty of fidelity or good faith disappears. Any post termination restraint must then satisfy the doctrine of restraint of trade as drawn and properly construed.

Post termination employment restraints are thus not assessed with the same level of flexibility as garden leave provisions. Where it comes to post termination restrictions, we find that the relevant question is whether, how, and what effect the forfeiture provision has on the actions of the employee and his ability to exercise his skill and contribute to the market *post employment.*

74 In the present case, ex-employees' post-employment behaviour is still governed by the Forfeiture-for-Competition clause. The Appellant would not be able to receive his deferred bonus monies under the Forfeiture-for-Competition clause if he joined a competitor. He has three options whereby he would be able to receive some economic benefit: (i) he could stay with the Respondent and continue to draw his deferred bonus monies each year while accumulating more of the same; (ii) he could leave the Respondent, join a non-competitor or take a two-year holiday, and receive the deferred bonus at the end of the two years as due compensation for not competing; and (iii) he could leave the Respondent and join a competitor if the economic benefit from competing might outweigh (or at least equal) the monies that he would have gained had he left and not competed. In contrast, if the clause was more narrowly worded as a Payment-for-loyalty clause, he would only be able to receive some economic benefit from option (i) but not options (ii) or (iii) as the economic benefits are narrowly and inseparably tied to whether he remains with the employer. This is due to the fact that, once he has left his employment, the benefits that he would otherwise have received would immediately be forfeited, and there would be no economic incentive for the Respondent either to move to a trade in which he was not skilled or to take a holiday.

75 In the English decisions of *Sweeney* and *Tullet*, the tribunal and court were influenced by the fact that there was no legal restraint imposed on the individual post employment. The lack of any provision for the post employment situation is unique to the Payment-for-Loyalty clause. The real purpose and effect of the Forfeiture Provision is to restrain the Appellant's activity post employment. In so far as the tribunal in *Sweeney* stands for the proposition that a financial disincentive *alone* is *in*sufficient to justify placing a clause within the doctrine of restraint of trade, we find that this is sound in principle. The way in which the clause is drafted, the area it seeks to influence, and the way it seeks to influence the employee, are all important factors to be taken into account in assessing purpose and effect. We also note that *Sweeney* is in tension with *Wyatt*, which lays down the sound principle that disincentives may also be in restraint of trade if they have the effect of restricting the employee's ability to exercise his skills in trade. This was raised in *Tullet*, but was not dealt with by the High Court. Neither *Tullet* nor *Sweeney* provided any reason for departing from the principle in *Wyatt*, a decision made by a higher court. We do not consider that *Tullet* and *Sweeney* are of much help to the Respondent.

The American Employee Choice Doctrine

The American Employee Choice Doctrine

76 The only issue that remains to be considered is the applicability of the American Employee Choice Doctrine, which is a uniquely US concept. With respect, we are of the view that the US doctrines of restraint of trade and employee choice are not relevant in the Singapore context. There has, in the first place, been no uniformity in the way in which the doctrine of restraint of trade has been treated in the US. Some cases view the restraint of trade from an anti-trust perspective, applying the rule of reason approach under the Sherman Act (15 USC § 14) (see, for example, *O'Regan v Arbitration Forums, Inc*, 121 F3d 1060 (7th Cir, 1997)). However, other cases involve a straightforward application of state law (see, for example, *Ralph S Harris v Myron R Bolin* 310 Minn 391 (Minnesota Supreme Court, 1976)). Yet other cases apply the common law approach of restraint of trade with reference to the competing policy arguments of freedom of trade and freedom of contract (see, for example, *Lucente v International Business Machines Corporation* 310 F.3d 243 (2nd Cir, 2002) ("*Lucente*")). The application of the restraint of trade doctrine in the US is thus diverse, and its assumptions and subsidiary doctrines must therefore be approached with no small measure of caution.

77 It is in the context of the last-mentioned doctrine (*viz*, the restraint of trade doctrine) that the American Employee Choice Doctrine is most commonly (albeit not exclusively) found. The idea behind the American Employee Choice Doctrine (briefly referred to earlier in this judgment in the context of the Judge's decision in the court below (see above at [16]–[17])) is that, if the employee has made the free and informed choice to leave the company to compete and forfeit certain benefits, the clause which made provision for such forfeiture should be enforced. The court in *Lucente*, for example, opined thus (at 254):

> New York courts will enforce a restrictive covenant without regard to its reasonableness if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture). … This "employee choice doctrine" assumes that an employee who elects to leave a company makes an informed choice between forfeiting a certain benefit or retaining the benefit by avoiding competitive employment.

78 We find that the American Employee Choice Doctrine is an analogue of the doctrine of freedom of contract. The court in *Lucente* essentially preferred the employee's freedom to contract over his freedom to trade at a stage *prior to* that of reasonableness. An application of the American Employee Choice Doctrine in its entirety is simply to privilege freedom of contract over freedom to trade without more.

79 We have already observed (at [47] above) that, assuming that the restraint of trade doctrine applies in the employment context, it does *not* ignore the need to mediate between the twin tensions of freedom of contract and freedom to trade. We do not consider that it is appropriate to consider these policies at the threshold stage or at a stage prior to the application of the twin tests of reasonableness (assuming that the employer can demonstrate that it has a legitimate proprietary interest to begin with). The restraint of trade doctrine covers a special area of public policy that *may* render a clause void and unenforceable depending on the *degree of harm done* to the freedom to trade. The threshold question as to whether the doctrine applies ought not, in our view, take into account matters of *degree*. Neither ought an additional stage be added prior to the application of the relevant legal principles pertaining to the doctrine of restraint of trade, which stage involves preferring absolutely one freedom over another. It follows that the application of the legal principles just mentioned (in particular, the twin tests of reasonableness) is the *only appropriate occasion* for mediating between these two tensions and thus deciding what *degree of harm* necessitates the rendering of a clause in restraint of trade void and unenforceable. It also bears reiterating that, just

because a Forfeiture-for-Competition clause is subject to the doctrine of restraint of trade, it does *not necessarily* follow that that clause is *automatically* rendered void and unenforceable. Assuming that the employer can demonstrate a legitimate proprietary interest which requires protection, that clause might still pass muster pursuant to the twin tests of reasonableness (as to which, see above at [40] and [46]).

80 We therefore do not consider that the American Employee Choice Doctrine is applicable to restraint of trade cases in Singapore, and the concerns underlying this doctrine are amply provided for by actually applying the relevant legal principles within the framework of the doctrine of restraint of trade (in particular, the twin tests of reasonableness).

81 Indeed, we would add that, even from the perspective of *general principle and logic*, there is, in our view, little – or no – reason to apply the American Employee Choice Doctrine in the Singapore context. By its very *definition and nature*, the American Employee Choice Doctrine involves a *choice* on the part of the employee. However, as Mr Jeyaretnam has persuasively put it in the Appellant's written case, [note: 11] the (contractual) acceptance by an employee of a traditional restraint of clause *equally* involves a *choice* on the part of the employee. Indeed, we pause to observe that the doctrine of restraint of trade *nevertheless* applies in a situation involving a traditional restraint of trade clause *not* because of a choice made by the employee in agreeing to it but, rather, because of *the restraint* contained in such a clause that ought, *pursuant to public policy grounds (in particular, the need to safeguard freedom of trade), be subject to the twin tests of reasonableness (assuming that the employer can demonstrate that it has a legitimate proprietary interest to protect in the first place). Therefore, the crucial issue*, in our view, does *not* centre on the concept of choice but, rather, on the question as to *whether the content of a Forfeiture-for-Competition clause* (such as the Forfeiture Provision in the present appeal) involves *a restraint*. Put simply, the question as to whether or not *a restraint* is present *cannot* be resolved merely by determining whether or not the employee concerned had exercised *a choice* in agreeing to the Forfeiture-for-Competition clause in question. Such an employee could, quite conceivably, have *chosen* to agree to such a clause *just as* he or she could have *chosen* to agree to *a traditional restraint of trade clause* (which (and this is indeed the key point) *necessarily* involves *a restraint*). And if, indeed, a restraint was involved, then (as already emphasised above) considerations of *public policy* would *require* that the clause concerned be subject to the twin tests of reasonableness pursuant to the doctrine of restraint of trade (assuming, of course, that the employer can demonstrate that it has a legitimate proprietary interest to protect in the first place).

Conclusion

82 We can understand why the Respondent would feel aggrieved by the Appellant's conduct. However, given our decision on the crucial issue and, given the fact that we agree with the Judge's analysis (which, because of his decision on the crucial issue, was rendered only by way of *obiter dicta*) in the court below to the effect that he would have found the Forfeiture Provision unenforceable as being in restraint of trade had he found that clause to have been within the ambit or scope of the restraint of trade doctrine, we allow the appeal with costs. The usual consequential orders will apply.

[note: 1] 1st Affidavit of Ross Forde Hamou-Jennings (Director of the Respondent) dated 7 April 2011 in Record of Appeal Vol 3 Part A ("3RA Part A"), pp 95–98 at [7]–[14].

[note: 2] 1st Affidavit of Mano Vikrant Singh dated 14 February 2011 in 3RA Part A, p 6 at [5][6].

[note: 3] Appellant's Core Bundle Vol 2 ("2ACB"), p 24.

[note: 4] 3RA Part A, pp 7981.

[note: 5] 1st Affidavit of Mano Vikrant Singh dated 14 February 2011 in 3RA Part A, p 17 at [32]; 1st Affidavit of Ross Forde Hamou-Jennings dated 7 April 2011 in 3RA Part A, p 120 at [81][82].

[note: 6] *Ibid*, pp 8388.

[note: 7] *Ibid*, p 90.

[note: 8] Notes of Argument recorded by the Judge, 3RA Part C, p 204 at lines 2326.

[note: 9] *Ibid*, p 203 at lines 1821, p 208 at line 29 and p 209 at lines 110.

[note: 10] 2ACB, p 25.

[note: 11] See the Appellant's Case, especially at para 117.