IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 119

Civil Appeal No 37 of 2019

Between

(1) Denka Advantech Private Limited
(2) Denka Singapore Private Limited

… *Appellants*

And

(1) Seraya Energy Pte Ltd
(2) YTL PowerSeraya Pte Limited

… *Respondents*

Civil Appeal No 38 of 2019

Between

Seraya Energy Pte Ltd

… *Appellant*

And

(1) Denka Advantech Private Limited
(2) Denka Singapore Private Limited

… *Respondents*

Version No 2: 30 Dec 2020 (11:30 hrs)

Civil Appeal No 100 of 2019

Between

(1) Denka Advantech Private Limited
(2) Denka Singapore Private Limited

… *Appellants*

And

(1) Seraya Energy Pte Ltd
(2) YTL PowerSeraya Pte Limited

… *Respondents*

Civil Appeal No 101 of 2019

Between

Seraya Energy Pte Ltd

… *Appellant*

And

(1) Denka Advantech Private Limited
(2) Denka Singapore Private Limited

… *Respondents*

In the matter of Suit No 1328 of 2014

Between

Seraya Energy Pte Ltd

… *Plaintiff*

And

(1) Denka Advantech Private Limited
(2) Denka Singapore Private Limited

… Defendants

And

YTL PowerSeraya Pte Limited

… Third Party

JUDGMENT

[Contract] — [Breach]
[Contract] — [Discharge] — [Breach]
[Contract] — [Remedies] — [Liquidated damages]
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v
Seraya Energy Pte Ltd and another and other appeals

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Court of Appeal — Civil Appeals Nos 37, 38, 100 and 101 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA,
Tay Yong Kwang JA and Steven Chong JA
4 March 2020; 17 July 2020

15 December 2020 Judgment reserved.

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

Introduction

1 For almost a century, the law relating to contractual penalties (hereafter the "Penalty Rule") was regarded as being very well-established across the Commonwealth. The leading statement of principles was that famously laid down by Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 ("*Dunlop*"); indeed, these principles have been described as having "been treated in Australia as holy writ for over 100 years" (see N C Seddon & R A Bigwood, *Cheshire & Fifoot Law of Contract – Eleventh Australian Edition* (LexisNexis Butterworths Australia, 2017) at p 1230). This was in 1914. Nearly a century later, in 2012, the High Court of Australia, in *Andrews and others v Australia and New Zealand Banking Group Limited*

(2012) 247 CLR 205 ("*Andrews*"), extended the *scope* of the law in this area in a rather radical fashion (specifically by holding that a breach of contract was no longer a prerequisite to the application of the Penalty Rule). Shortly thereafter, in 2015, the UK Supreme Court, in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("*Cavendish Square Holding*"), not only disagreed with *Andrews* but also *restated* the *substantive criteria* (previously laid down in *Dunlop*) for ascertaining whether a particular clause was a penalty clause. The present appeal affords this court the opportunity of considering these developments in the context of the Penalty Rule in *Singapore*.

2 Not surprisingly, much academic ink has been spilt on the Penalty Rule in recent years – in particular, with regard to both *Andrews* and *Cavendish Square Holding*. In addition to the numerous articles and case notes, both the aforementioned cases have also been considered in two learned (and recent) treatises (see Roger Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018) ("Halson") and Nicholas A Tiverios, *Contractual Penalties in Australia and the United Kingdom – History, Theory and Practice* (The Federation Press, 2019) ("Tiverios")). Indeed, the first treatise comes from the pen (or, perhaps more appropriately in these more modern times, keyboard) of a leading contract scholar whilst the second is based on a doctoral thesis (which is, in the nature of things, the scholarly fruit of many years of extremely focused academic labour (see also, by the same author, Nicholas A Tiverios, "A Restatement of Relief Against Contractual Penalties (I): Underlying Principles in Equity and at Common Law" (2017) 11 J Eq 1 and "A Restatement of Relief Against Contractual Penalties (II): A Framework for Applying the Australian and English Approaches" (2017) 11 J Eq 185)).

3 What is interesting, in our view, is that the various academic views have in fact diverged (often quite radically). Hence, whilst these views are useful in

setting out as well as illustrating the various controversies and arguments, we are best served by going back to first principles. In this regard (and as we shall see), we will need to examine not only the past in terms of the history of the Penalty Rule but also the present in relation to the logic and coherence of the (doctrinal) rules and principles proffered in the various cases. Finally, we will also need to consider the theoretical underpinnings of the aforementioned rules and principles which (by their very nature) transcend both space and time. All three aspects (also present in the sub-title of Tiverios) reflect the interactive elements of the law in general and the Penalty Rule in particular. The *historical* aspect is particularly important in the context of ascertaining the *scope* of the Penalty Rule, whilst the *doctrinal* and *theoretical* aspects are of special importance in ascertaining the *content* of that rule.

4 However, before proceeding to set out the issues as well as our decision on what ought to be the applicable law in relation to contractual penalties in the Singapore context, it should be noted that the present appeal presents an issue of whether or not there had been a ***breach*** of contract by the defendants in the first place. This particular issue becomes especially crucial if we reject the approach adopted in *Andrews* (which, it will be recalled, permits the invocation of the Penalty Rule even in the absence of a breach of contract). Accordingly, after setting out the legal principles applicable to the Penalty Rule, we deal with that particular issue first before considering the second issue which relates to the remedies (if any) that are available to the plaintiff (including whether or not the relevant contractual clauses are penalties). In order to deal with these issues, we need to turn, first, to the factual background as well as the decision in the court below.

5 Given the number of issues (and sub-issues) involved in the present judgment, it is helpful to set out a table of contents for reference:

6 A glossary of key terms and their abbreviations used in this judgment is also annexed after the end of this judgment.

The factual background

7 The present appeals arise from the consolidated trial below of HC/S 1328/2014 and HC/S 1329/2014 ("the Suits"). The plaintiff in the Suits is Seraya Energy Pte Ltd ("Seraya"). It is a retailer of electricity and a wholly owned subsidiary of YTL PowerSeraya Pte Ltd ("YTL"), an electricity generator. Together, Seraya and YTL form what is known as a "gentailer", which refers to the vertical integration of a generation company and its corresponding retailer chiefly for the purpose of mitigating the group's exposure to price fluctuations. YTL is the third party to the counterclaims in the Suits.

8 The defendants in the Suits are Denka Advantech Pte Ltd ("DAPL") and Denka Singapore Pte Ltd ("DSPL"). DAPL and DSPL are customers of Seraya. As many of the claims and arguments are common to both entities, we refer to the two defendants simply as "Denka" where it is not important to differentiate between them.

9 Seraya commenced the Suits against DAPL and DSPL, claiming Denka's repudiatory breach of three electricity retail agreements ("ERAs"). Seraya claimed damages under the liquidated damages ("LD") clause contained in each ERA, or common law damages in the alternative.

10 To understand the issues in contention, it is necessary to set out briefly the structure of the electricity market and the context in which the parties entered into the ERAs. As most of these facts are comprehensively set out in the decision of the High Court judge ("the Judge") below, we detail only the facts that are essential to the appeals.

The structure of the electricity market

11 All electricity in Singapore is bought and sold through the National Electricity Market of Singapore ("NEMS"). NEMS is regulated by the Energy Market Authority, which facilitates market transactions through the Energy Market Company Pte Ltd ("EMC"). The electricity market is divided into two sections: the *wholesale* market in which generation companies operate, and the *retail* market in which retailers operate.

12 In the wholesale market, electricity generators such as YTL are required to sell electricity to NEMS. Every half hour, generation companies submit bids to NEMS for the quantity and price of electricity they are able and willing to supply. Based on supply and demand, NEMS's computer model generates a fixed price known as the Uniform Singapore Energy Price ("USEP"). The USEP represents the weighted average of all the nodal prices of nodes from which electricity is deemed to be withdrawn in that half hour. All bids that do not exceed the USEP are accepted, and generators whose bids are accepted will be called upon to supply electricity and are paid at the USEP.

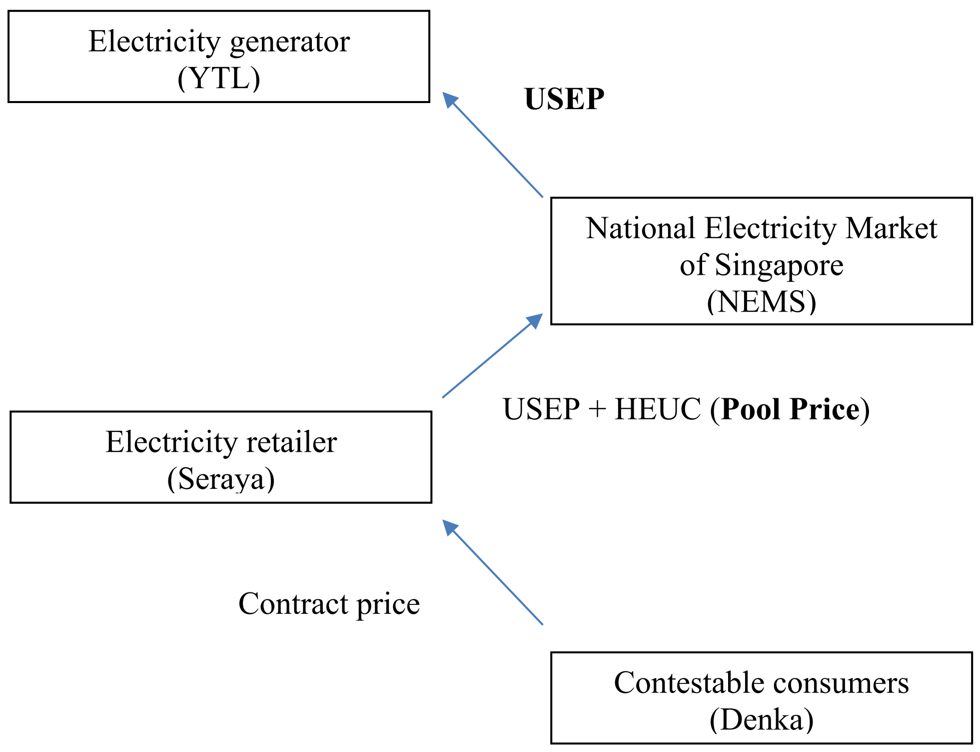
13 In turn, NEMS sells electricity to energy retailers such as Seraya. The price of electricity sold to retailers is known as the Pool Price, which is derived, in the main, by adding an Hourly Energy Uplift Charge ("HEUC") to the USEP.

14 In turn, energy retailers may only sell electricity to contestable consumers such as Denka. Contestable consumers are consumers with a high average electricity consumption of at least 2,000 kWh per month and are typically commercial or industrial entities.

15 If a contestable consumer does not wish to purchase electricity from a specific retailer, it may also purchase from the wholesale market, either from

the Market Support Services Licensee ("MSSL"), *ie*, SP Services Ltd, at the Pool Price, or as a direct market customer registered with the EMC. Purchasing from one retailer, however, allows the parties to fix the price of electricity or peg the price to a different index, instead of being subject to fluctuations in the USEP and the Pool Price.

16 As between YTL, NEMS, Seraya and Denka, the pricing relationship between them is illustrated as follows:



(Diagram 1 – Pricing relationship in the gentailer structure)

17 We pause to note Seraya's submission that in a gentailer, it is common for parties to enter into a contract for differences to enable the group as a whole to mitigate its exposure to the fluctuations of the USEP and Pool Price. YTL and Seraya had a Contract for Differences dated 1 April 2012 ("the CFD") under which YTL bore most of the risk from Seraya's contracts with its customers. Should Seraya suffer losses from its contract price being lower than the Pool Price, the CFD provided for YTL to pay the difference to Seraya. Conversely, if Seraya made a profit from its contract price being higher than the Pool Price, Seraya would pay a portion of the excess of the contract price over the Pool Price to YTL. We return to this point later as it assumes some significance in analysing Seraya's remedies for breach of contract.

18 With this context in mind, we turn to the specifics of the parties' contractual relationships.

The Steam Supply Agreement

19 Denka first became customers of Seraya in May 2005, although they did change electricity retailers from time to time. In 2012, DSPL also entered into a steam supply agreement dated 16 January 2012 ("the SSA") with PowerSeraya Limited, who novated the contract to YTL with effect from 1 April 2012.

20 DSPL had two core obligations with regard to its purchase of steam under the SSA. These were:

(a) to take or pay ("TOP") a certain minimum volume of steam from YTL each month ("the TOP Volume"); and

(b) to ensure that DSPL's steam consumption for the duration of the contract did not:

(i) fall below the Minimum Acceptable Flow Level ("Minimum Flow") of 6.0 tonnes per hour; or

(ii) exceed the Committed Capacity of 10.5 tonnes per hour ("Committed Capacity"), which was the maximum amount of steam that YTL was obliged to supply to DSPL on an hourly basis.

21 These obligations for the supply and consumption of steam were to take effect from the Commercial Operation Date under the SSA, which was initially scheduled for 1 February 2012 but was eventually delayed to 1 September 2012.

22 Sometime in June 2012, DSPL requested to reduce the amount of steam that it was obliged to buy under the SSA. It sought a reduction of the Minimum Flow and Committed Capacity, which in turn affected the TOP Volume. YTL agreed to discuss the request and this resulted in negotiations over July 2012.

23 By a letter dated 7 August 2012, YTL offered DSPL a concession of the original terms of the SSA ("the Concession Offer") on the terms and conditions set out in the letter ("the Concession Terms"). The Concession Terms provided, *inter alia*, that:

(a) the Committed Capacity and TOP Volume would be reduced;

(b) that "DSPL shall execute or procure the execution of any ancillary supplemental agreement(s) prepared by [YTL] to record the parties' agreement in respect of the Concession Terms as set out in this letter"; and

(c) that "DSPL shall … *execute an electricity retail agreement with [Seraya] on [Seraya's] standard terms and conditions for the supply of electricity to all of DSPL's premises in Singapore, for the period commencing from 1 September 2012 to 31 January 2021* ..." [emphasis added].

DSPL accepted the Concession Terms by counter-signing on the acceptance slip on 14 August 2012.

24 As it turned out, the ancillary supplemental agreement ("ASA") referenced in the Concession Terms could not be finalised and executed by 1 September 2012 because the parties had yet to agree on the scope of modification works needed to accommodate the reduced steam supply. In an e-mail on 30 August 2012, YTL proposed to DSPL additional terms to the earlier Concession Offer ("Additional Concession Terms"), including that YTL would not be liable for any non-delivery of steam prior to the completion of any modification works on Denka's end. DSPL accepted those additional terms.

25 The parties began implementing the SSA, as amended by the Concession Terms and the Additional Concession Terms, on 1 September 2012. YTL began supplying steam to DSPL pending agreement on the modification works to be done to DSPL's premises.

The Electricity Retail Agreements

26 Since YTL's offer of the Concession Terms on 7 August 2012, Seraya had also been negotiating separately with Denka on the standard terms of

the ERAs for the supply of electricity to all three of Denka's plants in Singapore. Seraya began supplying electricity under the ERAs on 1 September 2012, although the ERAs were only signed between 4 September 2012 and 9 November 2012. In total, Denka and Seraya entered into three ERAs, as follows:

(a) ERA 2012/099 between Seraya and DSPL, as later amended by a supplemental agreement dated 1 November 2013 ("ERA 99");

(b) ERA 2012/100 between Seraya and DSPL, which was later superseded by an updated agreement signed on or about 21 February 2014 ("ERA 100") and which is the relevant agreement for present purposes; and

(c) ERA 2012/101 between Seraya and DAPL, as later amended by a supplemental agreement dated 1 November 2013 ("ERA 101").

27 The parties agreed that the pricing plan under the three ERAs would be based on a formula which took into account the prevailing High Sulphur Fuel Oil prices and Foreign Exchange rates. This was referred to in the ERAs as the Index Price Plan. Nevertheless, Denka also had the right to request Seraya to fix the price of electricity for a period of three years, at any point during the duration of the ERAs. As contemplated in the Concession Terms, the ERAs were for a duration of 101 months and were due to expire only on 31 January 2021.

28 Finally, as alluded to in our introduction, the ERAs each contained an LD clause. These LD clauses were tied, among other things, to Seraya's express contractual right to terminate the ERAs under various scenarios, but most notably for any breach by Denka of its obligations under the ERAs. This

point will assume central importance in our analysis of the enforceability of the LD clauses later in this judgment.

Events leading to the termination of the ERAs

29 On 23 July 2014, representatives from YTL and Denka met. At that meeting, Denka's General Manager, Ms Chia Miaw Ling ("Ms Chia"), mentioned that Denka wanted to "get out" of the ERAs as the price under the ERAs was significantly higher than the prevailing market conditions at the time. Denka had recently completed a round of steam testing and discovered that Denka's steam usage across all three plants was close to 10.5 tonnes per hour. Accordingly, Ms Chia stated that Denka no longer required the steam reduction under the Concession Terms and desired to return to the original terms of the SSA, and at the same time cease the operation of the ERAs. Denka followed up on the meeting with an e-mail to YTL with presentation slides "outlining Denka's effort to revert back to the original SSA T&C and hence *redeem [themselves] from the electricity contract* [*ie*, the ERAs]" [emphasis added].

30 Discussions continued between the parties, as evidenced by a proposal attached to an e-mail from YTL on 11 August 2014. YTL proposed that in exchange for an increase in the TOP Volume and Committed Capacity to 6.0 tonnes per hour and 10.5 tonnes per hour respectively (*ie*, the original TOP Volume and Committed Capacity envisioned under the SSA (see [20] above)), YTL would grant Denka certain reductions in the price of electricity under the ERAs. Denka indicated that it would consider this proposal.

31 On 20 August 2014, however, DSPL wrote to YTL stating that after some consideration, it was unable to take up YTL's proposal. The letter went on to state:

> In the circumstances, *the supply of steam and electricity shall cease* under the temporary measures of the Concession Offer dated 7 Aug 2012 *and the Electricity Retail Agreements that were part of the Concession Offer with effect from 1 September 2014* ("the cessation date"). If you wish to discuss any other points please let us know … [emphasis in original omitted; emphasis added in italics]

32 YTL and Seraya regarded this letter as evidence of Denka's intention to repudiate the ERAs. In relation to the SSA, YTL agreed to return to the original terms of the SSA, without amendment. But where the ERAs were concerned, YTL wrote back on 25 August 2014 to state that:

(a) YTL regarded DSPL's unilateral termination of the ERAs as a repudiatory breach of ERA 99 and ERA 100.

(i) For ERA 99, YTL gave notice of the repudiation and requested DSPL to perform its obligations under ERA 99 within ten calendar days (failing which Seraya was entitled to terminate the contract immediately under cl 8.2.2 of ERA 99).

(ii) For ERA 100, YTL accepted the repudiation and stated that it would transfer DSPL's account to MSSL with effect from 2 September 2014.

(b) As ERA 101 was between Seraya and DAPL, YTL sought written confirmation that DAPL likewise wished to cease its supply of electricity under the ERA.

33 On 28 August 2014, DSPL wrote back to YTL on behalf of the Denka companies, strongly denying any allegations of repudiation or other breaches of the ERAs. Denka stated that the Concession Offer was "subject to contract", namely the execution of the ASA. Since the ASA was never signed, under the original terms of the SSA, Denka was only required to purchase steam and not electricity under the ERAs.

34 Further correspondence was exchanged between YTL, Denka and Seraya in the ensuing months. Eventually, each of the ERAs was terminated as follows:

(a) ***ERA 100***: By way of a letter dated 28 August 2014, Seraya accepted DSPL's cessation of ERA 100 and indicated that the effective date of termination was 1 September 2014.

(b) ***ERA 99***: On 4 September 2014, Seraya wrote to DSPL and again gave notice to the latter to perform its obligations under ERA 99. DSPL was invited to reconsider its cessation of the contract, and to confirm its position by 11 September 2014. DSPL responded on 7 October 2014 to confirm its intention to cease performing *both* ERA 99 and ERA 101, and contended that it was only required to pay for electricity based on the open market rates charged by MSSL after 1 September 2014. ERA 99 was terminated by Seraya with effect from 15 October 2014.

(c) ***ERA 101***: Notwithstanding DSPL's reply to YTL on DAPL's behalf (see [33] above), Seraya wrote to DAPL on several occasions between 4 September 2014 and 13 October 2014 to further confirm DAPL's position on whether it would cease performing its obligations under ERA 101. DAPL did not reply. Eventually, Seraya gave notice of termination of ERA 101 with effect from 14 November 2014.

Seraya claimed LD under all three ERAs. For ERA 99 and ERA 101, Seraya additionally claimed payment for electricity supplied up to their respective dates of termination.

35 It also bears mentioning that in a letter dated 3 September 2014, Denka offered to continue purchasing electricity under the three ERAs while the dispute was being determined by the court ("the Mitigation Offer"). This was, as Denka added, "to protect [its] rights". Seraya did not accept the Mitigation Offer.

36 On 19 December 2014, Seraya commenced the Suits against DAPL and DSPL for breaches of their respective ERAs and sought LD or common law damages in the alternative. YTL was joined as a third party to Denka's counterclaims in the Suits. The Suits were eventually consolidated by consent of the parties.

The parties' cases below

37 Seraya argued that Denka was liable for breaching all three ERAs. Seraya's primary claim against Denka was for LD due to the wrongful termination of the three ERAs. Alternatively, Seraya sought common law damages.

38 Denka denied liability for wrongful termination of the ERAs on several bases. It also advanced several counterclaims against Seraya and YTL. As against Seraya, Denka counterclaimed, *inter alia*, for (a) damages in respect of the extra electricity charges which Denka had to pay Seraya from the latter's delay in transferring its accounts to MSSL after issuing its notice of termination; and (b) damages for the amounts which Seraya received by calling on the three bank guarantees that covered Denka's obligations under the ERAs. As against

YTL, Denka sought a declaration of non-liability under the three ERAs, or for YTL to indemnify and/or pay damages to Denka for breach of contract and/or fraudulent or negligent misrepresentation.

39 The question of liability turned on whether Denka was in breach of the ERAs. Denka advanced a number of arguments as to why its termination of the ERAs did not amount to a breach of contract. First, Denka argued that the ERAs contained no obligation for Denka to purchase a minimum volume of electricity from Seraya each month. Consequently, it was not obliged to purchase electricity from Seraya at all. Second, Denka submitted that its letter of 20 August 2014 stating that Denka did not wish to continue purchasing electricity under the three ERAs did not amount to either a termination or repudiation of the ERAs. Finally, Denka argued that the ERAs were not standalone contracts, but were entered into only in exchange for YTL's grant of the steam concessions and entry into the ASA. The parties did not execute the ASA in the end and Denka was thus free to walk away from the ERAs as well ("the package deal argument"). Denka claimed misrepresentation and estoppel in respect of this last "package deal" argument. In the alternative, a term ought to be implied into the ERAs that the signing of the ERAs was contingent on the parties' entry into the ASA, the failure of which would allow Denka to stop purchasing electricity under the ERAs.

40 On the issue of remedies, Denka argued that Seraya was not entitled to claim LD. Noting that the law in Singapore remained the test in *Dunlop* ([1] *supra*) but that the UK Supreme Court had adopted a new test for the Penalty Rule in *Cavendish Square Holding* ([1] *supra*), Denka submitted that on either test, the LD clauses in the ERAs would amount to penalties and were unenforceable. Seraya was also precluded from claiming common law damages under ERA 99 and ERA 101 because of express provisions therein stating that

neither party would be liable for "any indirect or consequential loss … including any loss of profits".

41 In any case, even if Seraya was entitled to either LD or common law damages, Denka contended that Seraya had a duty to mitigate its loss, which it had failed to do when it rejected Denka's Mitigation Offer.

The decision below

42 The Judge's main judgment on liability is contained in *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)* [2019] SGHC 02 ("*Seraya Energy (No 1)*"). His supplementary judgment on liability is published as *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)* [2019] SGHC 18 ("*Seraya Energy (No 2)*"). Finally, there is a further supplementary judgment on costs and disbursements (see *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd and another suit (YTL PowerSeraya Pte Ltd, third party)* [2019] SGHC 100 ("*Seraya Energy (No 3)*")).

43 The Judge held in Seraya's favour on the question of liability and found that Denka was in repudiatory breach of the ERAs. The Judge found – contrary to Denka's submissions – that the ERAs imposed a positive obligation on Denka to buy electricity exclusively from Seraya notwithstanding that there was no minimum quantity specified in the contracts (see *Seraya Energy (No 1)* at [69]). The ERAs were clearly binding contracts and the parties had in fact proceeded on that basis (see *Seraya Energy (No 1)* at [73]–[74]).

44 The Judge dismissed the package deal argument run by Denka. While he accepted that the agreement to amend the SSA was subject to a condition subsequent, namely, the entry into the ASA, no such similar condition was

attached to the ERAs (see *Seraya Energy (No 1)* at [92] and [100]). The Judge found that there was no representation made by YTL that Denka could pull out of the three ERAs if the ASA was not signed, and there was no basis to imply a term to that effect into the ERAs (see *Seraya Energy (No 1)* at [118]). Accordingly, DSPL's 20 August 2014 letter constituted repudiatory conduct (see *Seraya Energy (No 1)* at [121]). Nonetheless, the Judge found that not all the three ERAs were terminated by Seraya's acceptance of this repudiation. The Judge held that Seraya validly terminated the ERAs in the following ways:

(a) For ERA 100, Seraya relied on its common law right of termination based on Denka's repudiation (see *Seraya Energy (No 1)* at [132]);

(b) For ERA 99, Seraya exercised its right to terminate pursuant to cl 8.2.2 for Denka's failure to remedy its breach of the contract (*ie*, its repudiation) within ten days (see *Seraya Energy (No 1)* at [137]); and

(c) For ERA 101, Seraya exercised its right to terminate the contract in November 2014 pursuant to cl 8.2.1 for Denka's failure to make payment for electricity under an October 2014 invoice (see *Seraya Energy (No 1)* at [143]).

Consequently, the contractual provisions for LD in each of the three ERAs were also engaged (see *Seraya Energy (No 1)* at [144]).

45 The question then turned to what remedies Seraya was entitled to. The Judge first concluded, in respect of the Mitigation Offer given by Denka to Seraya, that it was not a reasonable one and that Seraya had *not* acted unreasonably in rejecting it (see *Seraya Energy (No 1)* at [156]).

46 The Judge then considered that while *Cavendish Square Holding* ([1] *supra*) has been said to have reformulated the Penalty Rule in *Dunlop* ([1] *supra*), it did not do away completely with the principles contained in the latter case (see *Seraya Energy (No 1)* at [159] and [162]). As a matter of *stare decisis* in Singapore, he was nevertheless bound to apply the principles in *Dunlop*. On the basis of those principles, the Judge found that the LD clauses in each of the ERAs were *not* a genuine pre-estimate of Seraya's damage (see *Seraya Energy (No 1)* at [194]). According to the Judge, the formula "was plucked from the air" and used "without distinguishing between the differences in each contract". Thus, the LD clauses in each of the ERAs were unenforceable penalty clauses (see *Seraya Energy (No 1)* at [200]–[208]). Even under *Cavendish Square Holding*, Seraya had failed to plead any legitimate interest as a reason for requiring Denka to pay LD (see *Seraya Energy (No 1)* at [188], [190] and [192]). In any event, Seraya had failed to establish any legitimate interest on the facts. Seraya did not have any legitimate interest in Denka's continued performance of the ERAs other than financial loss (see *Seraya Energy (No 1)* at [192]).

47 The Judge held that Seraya was not precluded by the relevant clauses in ERA 99 and ERA 101 (see [40] above) from claiming common law damages since that was a claim for loss of profits, which loss was a *direct* result within the reasonable contemplation of both sides (see *Seraya Energy (No 1)* at [213]–[214]). In computing the appropriate quantum of common law damages that ought to be awarded, the Judge proceeded on the following premises: (a) the CFD between YTL and Seraya was to be taken into account for the calculation of common law damages since Denka is liable to Seraya as it finds Seraya (see *Seraya Energy (No 1)* at [218]–[219]); (b) the benefit of accelerated payment (from Seraya's call on the bank guarantees *vis-à-vis* Denka's

performance of the ERAs) was to be taken into account (see *Seraya Energy (No 1)* at [223]); and (c) Seraya's expert's figures for Denka's future monthly electricity consumption, had the ERAs not been terminated, were to be used (see *Seraya Energy (No 1)* at [224]–[225]). Therefore, the Judge directed that parties attempt to agree, *inter alia*, on the quantum for Seraya's loss of profit based on the above premises.

48 Subsequently, the Judge issued *Seraya Energy (No 2)*, calculating the quantum of damages payable by taking into account (see *Seraya Energy (No 2)* at [2]–[5]):

(a) Loss of profit for Seraya in the amount of $390,853 as agreed by the parties;

(b) The unpaid amounts due and owing by Denka to Seraya for electricity supplied until the dates of termination was to be calculated at the contractual rate under the ERAs; and

(c) The fact that Seraya had already received a total of $1.85m pursuant to a call on three bank guarantees on 22 December 2014.

49 Pursuant to the parties' agreement, the Judge ordered DAPL to pay $77,911.72 to Seraya, with interest at 5.33% per annum from the date of the writ to the date of full payment (see *Seraya Energy (No 2)* at [5]–[6]). Seraya was also liable to pay $1,097.72 to DSPL on the counterclaim in respect of the amount which Seraya had received under the bank guarantees (see *Seraya Energy (No 2)* at [13]) .

50 Finally, after receiving further arguments, the Judge issued another supplementary judgment on costs in *Seraya Energy (No 3)*, setting aside his

earlier decision on costs and disbursements. Taking into account that an offer to settle ("OTS") had been made by Denka to Seraya, the Judge thus ordered Seraya to pay Denka 90% of the costs of the action on a standard basis from the date the OTS was served. This was fixed at $390,000 (see *Seraya Energy (No 3)* at [27]). The Judge did not award costs to Seraya for the period between the filing of the writ and the service of the OTS (see *Seraya Energy (No 3)* at [18]).

The issues

51 The parties' arguments on the appeals and cross-appeals largely track those taken below and will be explored in greater detail when each issue is addressed below. In CA/CA 38/2019 ("CA 38"), Seraya appeals against two main issues on damages. First, whether the LD clauses under each of the ERAs are indeed penalties and are thus unenforceable. Second, *even if* the Judge was correct that the LD clauses are unenforceable penalties, whether the CFD between Seraya and YTL is to be taken into account in the assessment of common law damages for Seraya's loss of profit.

52 In addition, in CA/CA 101/2019 ("CA 101"), Seraya also appeals against the Judge's decision on costs in *Seraya Energy (No 3)* on the basis that Denka's OTS should *not* be taken into account, and that costs should follow the event and thus be awarded to Seraya.

53 In CA/CA 37/2019 ("CA 37"), Denka cross-appeals against the Judge's decision on both liability and damages. On liability, Denka argues that it did not repudiate the ERAs. On damages, it argues that Seraya acted unreasonably in rejecting the Mitigation Offer and, even if the ERAs were repudiated by Denka, the quantum of damages payable to Seraya should *not* be pegged to the

contractual rates in the ERAs and Seraya would not be entitled to statutory interest on those sums as well.

54 Finally, in CA/CA 100/2019 ("CA 100"), Denka appeals against the Judge's decision in *Seraya Energy (No 3)* to award it only 90% of the costs of the action on a standard basis.

55 The appeals and cross-appeals engage a number of issues, which can be summarised as follows:

(a) whether Denka breached the ERAs and is thus liable for wrongful termination of the same;

(b) if Denka breached the ERAs, whether the LD clauses in the three ERAs are enforceable;

(c) if the LD clauses are unenforceable because they are penalties, what common law damages are payable by Denka to Seraya;

(d) whether Seraya was justified in rejecting Denka's Mitigation Offer;

(e) whether Denka was required to pay for the additional electricity supplied to it after 20 August 2014 at the higher contractual rate under the respective ERAs or at the open market rate;

(f) Seraya's entitlement to statutory interest on the damages awarded; and

(g) the various issues relating to costs as between the parties.

56 As already alluded to at the outset of the present judgment, the *first* substantive issue (see [55(a)] above) is whether Denka has ***breached the contracts*** between the parties (hereafter referred to as "***Issue 1***"). Put simply, it deals with the issue of (contractual) *liability* as between the parties.

57 The *second* substantive issue arises only if Issue 1 has been decided in the affirmative, *ie*, that Denka had in fact breached the contract between the parties. As also alluded to at the outset of this judgment, this particular issue is *remedial* in nature (hereafter referred to as "***Issue 2***"). Issue 2 is, in turn, divided into Issue 2(a) (see [55(b)] above), Issue 2(b) (see [55(c)] above), Issue 2(c) (see [55(d)] above), Issue 2(d) (see [55(e)] above) and Issue 2(e) (see [55(f)] above). In this regard, the focus is on ***the Penalty Rule***. Given the legal developments in other major Commonwealth jurisdictions as described briefly above, it is necessary to, *inter alia*, analyse those developments as well as clarify what the precise legal position is in the *Singapore* context.

58 Finally, we deal with the various issues relating to costs as between the parties (hereafter referred to as "***Issue 3***").

59 Let us now turn to consider the applicable legal principles – beginning with the well-established principles on discharge by breach of contract before focusing on the Penalty Rule.

The applicable legal principles (with a focus on the Penalty Rule)

Breach of contract

60 The applicable legal principles in so far as the law relating to discharge by breach of contract in Singapore are found in the decision of this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007]

4 SLR(R) 413 ("*RDC Concrete*"). Before proceeding to set out a summary of the principles laid down in that case, it is important to note that those principles deal with the circumstances under which an innocent party to a breach of contract is entitled to elect to treat the contract concerned as discharged. Indeed, if it is not so entitled to elect and nevertheless does so, the innocent party would *itself* be in *breach* of contract. All this does not, however, detract from the fact that the innocent party is *always entitled* to claim *damages* at common law *as of right* if it can establish that the other party has in fact been in *breach* of the contract concerned. Such a claim to damages will, of course, be subject to the relevant legal limitations such as adducing sufficient evidence of damage to begin with (see, for example, the decisions of this court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") and *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] 2 SLR 199 ("*Biofuel Industries*")) as well as the doctrines of remoteness of damage (see, in particular, the decisions of this court in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363) and mitigation of damage. Indeed, this last-mentioned doctrine (*ie*, mitigation of damage) does figure in the present appeal as well.

61 Returning to the issue as to whether or not the innocent party is entitled to elect to treat itself as discharged from the contract, as already mentioned, the relevant statement of principles is set out in *RDC Concrete*, where this court discussed (at [90]–[113]) the various tests (*viz*, the "condition-warranty approach" and the "*Hongkong Fir* approach") as well as how they are to be applied, summarising the legal position in tabular/diagrammatic form (at [113]). In the subsequent decision (also of this court) 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, a similar summary in *non*-tabular/diagrammatic form (at [153]–[158]) was provided, as follows:

> 153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party (here, the appellant) to elect to treat the contract as discharged as a result of the other party's (here, the respondent's) breach.
>
> 154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).
>
> 155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).
>
> 156 The *third* ("Situation 3(a)") is where the term breached (here, Clause C.1) is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.
>
> 157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach.*
>
> 158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):

> If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach). [emphasis in original]

[emphasis in original]

62 Before we turn to consider the applicable legal principles in relation to the Penalty Rule, an important point of legal interface should be noted here – the (*further* (and possible)) relevance of the principles laid down in *RDC Concrete in relation to the Penalty Rule* will be *contingent upon* this court's determination of the *scope* of the Penalty Rule. This includes a consideration of whether the Penalty Rule applies to situations *regardless* of a *breach of contract* (which is the current Australian position, but *not* that in the UK). If that is the case, then the determination of the court that there was a breach of contract will be relevant *only* with regard to the (potential) right of the plaintiff to elect to treat the contract as discharged as well as the right to claim damages at common law *but* will have no bearing on the operation of the Penalty Rule. *Conversely*, if this court determines that the *scope* of the Penalty Rule is narrower and is triggered *only* if there is a *breach of contract*, then the principles relating to discharge by breach of contract as summarised above are *also relevant* in the context of the operation of the Penalty Rule – although it is important *not* to *conflate* both these areas of the law of contract, each of which has its respective sphere of operation as well as attendant legal consequences (a point to which we shall return below).

63 Finally, it bears noting that in so far as Situation 1 of *RDC Concrete* is concerned, "its *basis* is founded on giving effect to the parties' intention by way of a termination clause that may *not necessarily* involve a ***breach of contract*** *but nevertheless has the legal effect (in substance) of a condition* (pursuant to

the condition-warranty approach)" [emphasis in italics in original; emphasis added in bold italics] (see this court's decision in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 ("*Sports Connection*") at [53]; see also this court's decision in *Fu Yuan Foodstuff Manufacturer Pte Ltd v Methodist Welfare Services* [2009] 3 SLR(R) 925 at [33]). Leaving aside for the moment the possible ramifications (or perhaps potential complications) from a *remedial* perspective, the issue as to whether or not a contract was terminated pursuant to Situation 1 of *RDC Concrete* might become relevant (indeed, crucially relevant) if this court decides – contrary to the approach taken in *Andrews* ([1] *supra*) (and consistently with the approach taken in *Cavendish Square Holding* ([1] *supra*)) – that a *breach of contract* ***is*** indeed a prerequisite before the Penalty Rule applies.

The Penalty Rule

Recent developments in the Penalty Rule

64 We turn now to consider the applicable legal principles in relation to the Penalty Rule. As already mentioned, because those principles have been in a relative state of flux across the Commonwealth (especially due to developments in the apex courts of Australia and the UK), the task of this court is to consider these developments before deciding what the position in *Singapore* should be. To situate the discussion that follows, it is helpful to first outline, in very broad strokes, the recent developments surrounding the Penalty Rule.

65 We begin with the 1914 case of *Dunlop* ([1] *supra*), which until recently was the seminal case on the Penalty Rule in the common law universe. There, the House of Lords was concerned with the LD payable on the respondents' breach of contract. The House of Lords held that the clause was a valid and enforceable LD clause. In Lord Dunedin's words, "the essence of liquidated

damages is a genuine covenanted pre-estimate of damage" whereas "[t]he essence of a penalty is a payment of money stipulated as [*in terrorem*] of the offending party" (see *Dunlop* at 86). Whether a sum stipulated is a penalty or LD is a question of construction to be decided upon the terms and circumstances of each particular contract, judged at the time of the making of the contract. In this regard, the expressions used by the parties are indicative but inconclusive (see *Dunlop* at 86–87).

66 To assist the court's construction of the contract, Lord Dunedin posited four principles, which became the leading statement of the law on penalties for most of the last century: (a) that the provision would be penal if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach; (b) that the provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum; (c) that there was a rebuttable presumption that the provision would be penal if the sum stipulated for was payable on a number of events of varying gravity; and (d) that the provision would *not* be penal because of the impossibility of precise pre-estimation in the circumstances of the true loss (see generally *Dunlop* at 87−88). We will return to these principles in greater detail when discussing the criteria applicable to the Penalty Rule below.

67 Then came the decision of the High Court of Australia in *Andrews* ([1] *supra*) in 2012. In a radical departure from the position in *Dunlop*, the court held that the Penalty Rule's scope of application was ***not*** limited to clauses purporting to take effect *only* upon a *breach* of contract (see *Andrews* at [46]). This was premised on the court's survey of the historical development of the Penalty Rule, and its conclusion that it is a rule of *equity* rather than the *law*. In doing so, the court made two key observations. First, equitable relief against

penalties, which first arose in cases involving conditional defeasible bonds, was available in respect of payments and detriments activated by various events, and relief was not limited to obligations activated by breach of contractual duty (see *Andrews* at [45]). Second, the equitable jurisdiction had not been supplanted by the introduction of the Judicature system (see *Andrews* at [61]–[63]).

68 The High Court of Australia defined a penalty in this way (see *Andrews* at [10]):

> In general terms, a stipulation *prima facie* imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, *upon the failure of the primary stipulation,* imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation. [emphasis added]

The crux of this formulation is that a penalty is a *collateral* or *accessory* stipulation to a primary stipulation, which imposes an additional detriment on one party upon the failure of the primary stipulation. Importantly, this primary stipulation *may*, but *need not necessarily*, amount to a contractual obligation that is breached upon the promisor's failure to perform.

69 The next major development was the UK Supreme Court's decision in *Cavendish Square Holding* ([1] *supra*) in 2015. In that case, having undertaken their own historical analysis of the penalties doctrine, the court parted ways with *Andrews* and maintained that the scope of the Penalty Rule in English law was limited to situations involving a *breach* of contract (see *Cavendish Square*

Holding at [41]–[43]). But where the substantive test as to what constituted a penalty was concerned, the court expressed dissatisfaction inasmuch as the real inquiry had, in their view, become lost in a mechanical application of Lord Dunedin's principles in *Dunlop* (at [31]):

> In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. … *The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss.* These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. *The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal.* … [emphasis added]

70 Moving away from Lord Dunedin's principles in *Dunlop* ([1] *supra*), Lord Neuberger of Abbotsbury and Lord Sumption in their leading judgment reformulated the Penalty Rule in this way (at [32]):

> *The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to* ***any legitimate interest*** *of the innocent party in the enforcement of the primary obligation.* The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. … [emphasis added in italics and bold italics]

Although their Lordships presented this new formulation as a restatement of the principles on penalties in *Dunlop*, it did not escape academic attention that the decision had fundamentally reformulated the substantive test for the Penalty Rule in English law (see, for example, Halson at para 2.38).

71 The next year, the High Court of Australia again had occasion to consider the Penalty Rule, although its focus this time around was on the

substantive criteria rather than the scope of the rule. In *Paciocco and another v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 ("*Paciocco*"), which arose out of the same set of facts as *Andrews* ([1] *supra*) (the court having earlier remitted the case to the lower court after addressing the scope of the penalties jurisdiction), the High Court agreed in substance with the "legitimate interest" formulation of the Penalty Rule in *Cavendish Square Holding*, adopting it as the new test for penalties in Australia (see [122]–[123] below).

72 Having traced, at a general level, the developments surrounding the Penalty Rule, we turn now to examine its scope and the applicable criteria in more detail.

The scope of the Penalty Rule

73 The first key issue for our consideration is the proper scope of application of the Penalty Rule. In particular, the question is this: should the Penalty Rule be confined only to clauses that impose obligations upon one party's breach of contract? To answer this, we must begin – as both *Andrews* and *Cavendish Square Holding* ([1] *supra*) did – with an appreciation of the historical roots of the penalty jurisdiction.

(1) The extension of the rule in *Andrews*

74 As a matter of historical fact, it is clear that the Penalty Rule originated in *equity* and that, as originally conceived, it was a rule that granted relief from the strict enforcement of *penal bonds* (a point accepted by both *Andrews* and *Cavendish Square Holding*). That *very specific* historical point of origin constitutes the basis for the decision in *Andrews* that the Penalty Rule was *not* – and (more importantly) *ought not* – to be confined to situations relating to

breach of contract. A leading historical essay in this regard is by Prof Simpson (see A W B Simpson, "The Penal Bond with Conditional Defeasance" (1966) 82 LQR 392 ("Simpson")), which is referred to in both *Andrews* and *Cavendish Square Holding* (other interesting historical accounts include William H Loyd, "Penalties and Forfeitures" (1915) 29 Harv L Rev 117 ("Loyd") and Joseph Biancalana, "Contractual Penalties in the King's Court 1260−1360" [2005] CLJ 212; reference may also be made, most recently, to ch 2 of Tiverios). What should be noted, though, is that Prof Simpson also observes that the penal bond "has long since ceased to be the normal business practice" (see Simpson at 393). Indeed, this learned essay attempts, *inter alia*, "to give some explanation of *the decline* in the bond as a contractual institution, and … [to] say something of the relationship between this *decline* and the rise of the action of assumpsit" [emphasis added] (see Simpson at 393). As the learned author observes, it was, in fact, "the evolution of the modern rules governing penalties [that] led to a decline in the use of bonds" (see Simpson at 412; see also at 415). We will return to this point in a moment (see below at [86]).

75 A brief explanation of the historical use of conditional bonds may be necessary for context. The conditional bond was a written instrument which recorded one party's unilateral promise to do something by a set date, *unless* an accompanying condition was satisfied. An example in Prof Simpson's article best illustrates the operation of the conditional bond (see Simpson at 395):

> Suppose [A] proposes to lend [B] £100. [B] will execute a bond in favour of [A] for a larger sum, normally twice the sum lent, thus binding himself to pay [A] £200 on a fixed day; the bond will be made subject to a condition of defeasance, which provides that if he pays £100 before the day the bond is to be void.

76 The reason that the bond recorded promises in this "topsy-turvy way" was to evade the prohibition on usury (see Loyd at 119; Simpson at 411). The

form of the conditional bond favoured the obligee, who could easily obtain judgment on the debt evidenced on the face of the bond. It was for the obligor, as the defendant, to plead the satisfaction of the condition (*viz*, his payment of £100) as a defence to the enforcement of the bond. This put an onerous burden on the defendant, especially if for any reason the defendant had failed to obtain written proof that the condition was satisfied. In response, in or around the 17th century, equity developed certain criteria for when it would grant relief against the strict enforcement of the conditional bond (see Tiverios at pp 27–29). Notably, if a purported penalty was characterised as being in the nature of a *security* or *collateral* to ensure the debtor's performance of a legal duty or fulfilment of some other condition, equity intervened to grant the debtor relief from the penalty, provided that the debtor pay damages, interest and costs for the non-fulfilment of the condition (see *Sir Harry Peachy v Duke of Somerset* (1721) 24 ER 255 at 256 ("*Peachy v Duke of Somerset*"); *Sloman v Walter* (1783) 28 ER 1213 at 1214). The basis for equitable intervention, as Prof Simpson explains, was that "the exaction of penalties was inequitable where it was possible to compensate the obligee for the loss suffered through default" (see Simpson at 418).

77 By way of the Statutes of William and Anne adopted around the turn of the 18th century (see the Administration of Justice Act 1696 (8 & 9 Will 3 c 11) (UK) and the Administration of Justice Act 1705 (4 & 5 Anne c 16) (UK)), the common law also came to adopt equity's approach of granting relief from penal bonds. As a result, it became unnecessary for litigants to proceed first to the Court of Chancery for relief from the penalty and then to the common law courts for assessment of the true loss suffered (see also *Andrews* ([1] *supra*) at [53]–[54]). From then on, the development of the Penalty Rule took place almost entirely at common law. Eventually, the

common law came to develop the notion that the Penalty Rule was a rule relating to *remedies*, beginning in all likelihood with the unreported decision of *Elsey & Co Ltd v Hyde* (9 June 1926, Divisional Court) (UK), where Salter J opined that the question of whether a stipulation was a penalty only arose "in cases where the person who is to pay has *broken a contract* with the other or done something which entitles the other to damages against him" [emphasis added]. It is said that that proposition was wrong, and that the introduction of the breach of contract requirement into the Penalty Rule was an accident of history (see Tiverios at p 57; J D Heydon, M J Leeming & P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) at pp 554–555). Regardless of how it came to be, the notion that the Penalty Rule is a rule to prevent the imposition of a payment disproportionate to the amount of loss suffered upon contractual breach has since persisted in the case law (see, for example, the judgment of Lord Roskill in the House of Lords decision of *Export Credits Guarantee Department v Universal Oil Products Co and others* [1983] 1 WLR 399 at 402–403).

78 It will be seen that the explanation at [76] above of the early Penalty Rule in equity is very close to the manner in which the High Court of Australia explained the scope of the rule that was ultimately adopted in *Andrews*. In that case, the court reached its decision on the scope of the Penalty Rule by reasoning from two interlinking premises. First, referring to the structure of the conditional bond, the court emphasised that the equitable rule that gave relief from such bonds did *not* depend on a *breach of obligation*. Although the purpose of the bond was obviously to secure the performance of the condition, the real promise extracted from the obligor was to pay the penalty, *unless* the stated condition was fulfilled (see *Andrews* at [36]–[37]). Non-fulfilment of the condition was not itself a breach of any obligation; the

condition could easily be an event independent of any act or omission by the obligor (see *Andrews* at [39]).

79 Building on this historical premise, the second strand of reasoning in *Andrews* was that the jurisdiction to grant relief from penal collateral stipulations even in modern times remained the (wider) *equitable* jurisdiction. The development of the Penalty Rule at law in the last century did not supplant the equitable jurisdiction; neither did the fusion of law and equity through the Judicature system affect the existence of separate equitable doctrines. In sum, in Australia at least, the equitable rule remains available even where the situations engaging the impugned clause did not involve a breach of contract. In line with equity's response to penalty clauses, if the clause is indeed found to be a penalty, the court will enforce the clause, but only to the extent that compensation can be made for the non-fulfilment of the primary stipulation (see *Andrews* at [10], excerpted at [68] above; see also *Andrews* at [11], citing *Peachy v Duke of Somerset* ([76] *supra*)).

80 Both strands of reasoning in *Andrews* were heavily criticised by the UK Supreme Court in *Cavendish Square Holding* ([1] *supra*). Lord Neuberger and Lord Sumption, though agreeing with the shape in which the Penalty Rule had developed over centuries, disagreed with the premises and conclusion reached in *Andrews*, stating as follows (see *Cavendish Square Holding* at [42]):

> … In the first place, although the reasoning in the *Andrews* case was entirely historical, it is not in fact consistent with the equitable rule as it developed historically. *The equitable jurisdiction to relieve from penalties arose wholly in the context of bonds defeasible in the event of the performance of a contractual obligation. It necessarily posited a breach of that obligation.* Secondly, if there is a distinct and still subsisting equitable jurisdiction to relieve against penalties which is wider than the common law jurisdiction, with three possible exceptions *it appears to have left no trace in the authorities since the fusion of law and equity in 1873.* … [emphasis added]

81 Whilst historical fact and context are often important in legal analysis, their role in respect of the legislative sphere on the one hand and case law on the other are quite different. Because the former concerns specific legislative text, the historical materials are often (albeit not invariably) of substantial assistance. The development of case law, on the other hand, is somewhat different. Whilst the courts ought not to be "mini-legislatures", their remit in relation to the development of the rules and principles of common law and equity is quite flexible – provided that such development is premised upon sound logic, doctrine and (in limited circumstances) policy. And this is the approach that we adopt, particularly in the light of the different historical approaches that have hitherto been considered. That the High Court of Australia in *Andrews* ([1] *supra*) on the one hand, and the UK Supreme Court in *Cavendish Square Holding* on the other, adopted quite *different* historical approaches was remarked upon by James Allsop CJ in an extra-judicial lecture (see James Allsop, "The Doctrine of Penalties in Modern Contract Law" (2018) 30 SAcLJ 1 ("Allsop") at 3−13). And there is much to be said for the following (and very perceptive) observations by Allsop CJ (see Allsop at 13):

> I do not intend to be disrespectful if I say that this kind of historical debate [between the aforementioned courts] is ***an unsatisfactory point of distinction*** for a doctrine *so vital to modern commerce that regulates the performance of contracts*, in particular when the essence of ***a reformed modern doctrine*** is *so necessary*. [emphasis added in italics and bold italics]

82 Returning to *Andrews*, the court had held that the Penalty Rule, which was a rule of *equity*, ought *not* be limited to situations of breach as the latter requirement only developed at *law* (this is now the established legal position in Australia (see, for example, the High Court of Australia decision of *Paciocco* ([71] *supra*) and the New South Wales Court of Appeal decision of *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* (2016) 93 NSWLR 231)). Instead, the Penalty Rule would cover *any* collateral or accessorial obligation meant to

secure the performance of a primary obligation (see *Andrews* at [10]). The removal of the breach requirement appears attractive at first blush. With respect, however, whilst the Penalty Rule originally developed in the context of equity, it was developed in relation to a *very specific* situation (*viz*, that relating to the enforcement of *penal bonds*). Why then, as *Andrews* appears to suggest, should the Penalty Rule in *equity*, in the form as developed in the penal bonds cases, apply in the same manner to all modern contracts, *in the absence of sound reasons that would undergird such an extension* (*cf* also Sarah Worthington, "The Death of Penalties in Two Legal Cultures?" in *The UK Supreme Court Yearbook 2015–2016* vol 7 (Daniel Clarry ed) (Appellate Press, 2016) ("Worthington") at pp 136–137)? On the *contrary*, any extension of the Penalty Rule in the manner just described would vest in the courts a discretion that is at once both ***wide as well as uncertain***. Just as importantly, such a discretion would permit the courts to review a wide range of clauses on ***substantive*** (and *not* merely procedural) grounds, thus constituting a general, uncertain and significant legal incursion into the *freedom of contract* that hitherto existed between the parties concerned. We would respectfully endorse the concern of Lord Neuberger and Lord Sumption that the approach taken in *Andrews* "[transforms] a rule for controlling remedies for breach of contract into a jurisdiction to review the content of the substantive obligations which the parties have agreed" (see *Cavendish Square Holding* at [42]). Given that freedom of contract is the rule rather than the exception in the context of the law of contract, this would – in and of itself – be *an insuperable objection* to such an extension of the Penalty Rule. And it certainly could not be argued that such a discretion is sound because it is one that originates in equity for that would, with respect, be a circular argument.

83 As a learned commentator has perceptively observed, the court in *Andrews* did *not*, in fact, go *further* and canvass the broader grounds of principle and policy both for as well as against the *extension* of the Penalty Rule from its historical origins as a legal control mechanism in the enforcement of penal bonds to the much broader application to contracts *generally* (see Sirko Harder, "The Scope of the Rule Against Contractual Penalties: A New Divergence" in *Divergences in Private Law* (Andrew Robertson & Michael Tilbury eds) (Hart Publishing, 2016) ch 8 at pp 140–141; see also Anthony Gray, "Contractual Penalties in Australian Law After *Andrews*: An Opportunity Missed" (2013) 18 Deakin LR 1 ("Gray") at 17). Indeed, this line of argument has been developed very fully by five leading contract scholars in a joint article (see J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst, "Contractual Penalties: Resurrecting the Equitable Jurisdiction" (2013) 30 JCL 99 ("Carter *et al*")). They are of the view that the court in *Andrews* "treats the penal bond cases as shaping the modern law of contract" and has, in the process, ignored "well over 100 years of case law" (at 104 and 105). The learned authors observe thus (at 109):

> No thought appears to have been given by the High Court [in *Andrews*] to the elementary proposition that, today, the penalties doctrine is simply an ingredient of the law of *contract*. The historical analysis is not tested against the law. If doctrine is all that is relevant (which is what the High Court's analysis suggests) modern doctrine ought to have been considered. Decisions reached under the forms of action – *before the existence of the law of contract as we know it today* – cannot provide a reliable basis on which to determine the current scope of any area of *contract law*. [emphasis added]

84 And later on in the same article, the learned authors observe thus (see Carter *et al* at 131):

> [W]hat the High Court sought to do in *Andrews* was to turn back time by resurrecting precedents which have long since ceased to be reliable guides to the scope of the penalties

> doctrine. The fact that there may have been some 'golden age of equity', in which freedom of contract was curtailed even in relation to payments not activated by breach, has no contemporary relevance.

85 It might be argued, however, that the argument just set out takes as its starting point the *law of contract*, which is a *common law* doctrine. Whilst the law of contract is *not*, strictly speaking, a common law doctrine only, even if we assume for the sake of argument that that is the case, this raises the related (yet no less important) question as to whether or not it was within the power of the courts at common law to develop the Penalty Rule along the lines of contractual breach – an issue to which our attention now turns. Before proceeding to do so, we should note that the authors of the article presently considered also emphasise the fact that the approach in *Andrews* ([1] *supra*) did not furnish an adequate and contemporary justification for adhering to a set of rules that had their origin in penal bonds. In their words (see Carter *et al* at 132):

> Every major principle of the modern law of contract must have a basis in policy and doctrine. It is ***the policy and doctrine of the 21st century*** *against which the High Court, as the guardian of the common law of Australia, should be testing the principles of contract law*. When major principles are reconsidered, and a fortiori when the law is changed, the decision *must be **a response to current conditions***. *What matters is the coherent application of contract doctrine to **give effect to public policy concerns of Australia today**. **That includes respect for – though not uncritical deference to – the objectives of those who enter into commercial contracts***. [emphasis added in italics and bold italics]

86 Although the decision in *Andrews* has also had its academic defenders, the arguments in this particular regard have, with respect, been pitched at a rather general level of abstraction (see, for example, Nicholas A Tiverios, "Doctrinal Approaches to the Law of Penalties: A Post-Andrews Intention-based Defence of Relief against Fixed Contractual Penalties" in *Contract in Commercial Law* (Simone Degeling, James Edelman & James Goudkamp eds)

(Lawbook Co, 2016) ch 20; (for an article that in fact pre-dated *Andrews* and which relied similarly on the specific historical context, see William Newland, "Equitable Relief Against Penalties" (2011) 85 ALJ 434)). They do not address directly the argument that, in extending the Penalty Rule along equitable lines, the court in *Andrews* did not give specific reasons in principle and policy as to why that extension was *justified*. Instead, we are brought back, full circle, to the counter-argument that the courts ought not to have developed the Penalty Rule along the lines of the common law (specifically in the context of the law of contract). However, such a counter-argument merely repeats what needs to be justified and, in particular, does not really address the need for sound *justification(s)* rooted in principle and (where applicable) policy (see [81] above). This is *even more* needful given that the *original* equitable jurisdiction (in relation to penal bonds) was not only a *very specific* one, but had (as we noted at [74] above) already ***declined***, particularly in the light of the development of the Penalty Rule as we know it today.

87 Before turning to the *common law* in general and the development of the Penalty Rule thereunder in particular, we pause to consider what is probably the most systematic and powerful scholarly defence of the approach adopted in *Andrews* to date. It is to be found in Tiverios (at ch 3), where the learned author raises three main reasons as to why the approach in *Andrews* is to be preferred.

88 The first main reason proffered by the learned author is that *Andrews* has a firm historical basis. We have already dealt with this point in some detail above, addressing not only the inadequacy of a purely historical analysis as a foundation for modern doctrine, but also the fact that arguments of principle and policy that could have justified the extension of the scope of the Penalty Rule were not canvassed in *Andrews* itself. On the contrary, there were, in fact,

specific arguments of both principle as well as policy that militated against the approach adopted in *Andrews* (see [82]−[85] above).

89 The second main reason proffered by the learned author is that the approach adopted in *Cavendish Square Holding* ([1] *supra*) was not developed from appropriate legal principle and that the introduction of the breach requirement into the Penalty Rule was "an accident of history" (at p 57). That, again, relates to the issue of historical analysis and, regardless of whether the first cases to articulate a requirement of breach in the Penalty Rule at law had done so on a misunderstanding of history, the more important question remains whether the breach requirement as subsequently entrenched in common law can in fact be justified on principle and policy − a question which we have answered in the affirmative (see further [92]–[93] below).

90 The third main reason proffered by the learned author justifies the approach in *Andrews* ([1] *supra*) on a few bases: that it creates a counter-factual test which can be used to determine whether or not the impugned clause is punitive, and "imposes a principled wider area of operation pursuant to which a court can limit consent-based contractual punishments" while ensuring that the Penalty Rule "no longer benefits only those who have first committed a breach of contract" (see Tiverios at p 84). These sub-arguments are, with respect, not persuasive. As we will explain, the statement of principles set out by Lord Dunedin in *Dunlop* furnishes sufficient legal guidance for determining whether a given clause is a penalty. The wider reach of the Penalty Rule does in fact (as we have observed above at [82]) vest in the courts a discretion that is at once both wide as well as uncertain and which would lead to interference with clauses based on substantive (as opposed to merely procedural) grounds. And, apart from our view that the prerequisite of a breach of contract can indeed be justified on principle and policy, the Penalty Rule does not exist to *benefit*

wrongdoers (*cf* Lord Denning in *Bridge v Campbell Discount Co Ltd* [1962] AC 600 ("*Bridge*") at 629). The mischief that the Penalty Rule ultimately seeks to prevent is the imposition of a remedy that is clearly disproportionate to the loss suffered as a result of the breach. Put another way, the purpose of the Penalty Rule is simply to *avoid unfairness* to the defaulting party when apportioning the extent of their contractual liability. We continue this analysis below.

(2) Justifications for the requirement of breach

91 Turning, then, to the *common law*, in our respectful view, it was clearly within the power of the courts to develop the Penalty Rule such that it was confined to situations involving *breach* of contract. More importantly, perhaps, the development of the breach requirement at common law would ***not*** have been *inconsistent* with how the Penalty Rule originated in equity in the context of the penal bonds cases. It seems to us that the only objection to the former (*viz*, common law) development would be because there existed in equity a *more logical and principled* development that would permit the Penalty Rule to operate *regardless* of whether there was a breach of contract. ***However***, as we have noted above, such a development did ***not*** exist. If so, why, then, could not equity and common law then flow in a ***common*** *stream or channel* (which legal flow would embrace the requirement that, in order for the Penalty Rule to be triggered, a *breach* of contract was a legal prerequisite)? In this regard, there is a sense in which the original distinction between common law and equity can be overstated. What is ideal is for there (as far as it is possible) to be an *integrated* development of both common law and equity (a point which we have made, albeit in a slightly different context, in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199, especially at [96]).

92 At this juncture, it is important to emphasise that while we have not seen any persuasive reason in logic and principle as to why the Penalty Rule should operate *regardless* of whether there was a breach of contract, there ***are*** (in contradistinction) persuasive reasons in logic and principle as to why the prerequisite of a *breach* of contract is to be preferred. In essence, the concept of a *breach* of contract means that the Penalty Rule is *confined to the sphere of* ***secondary*** *obligations* ***only*** – specifically, the obligation on the part of the defendant to *pay* ***damages*** to the plaintiff. In this regard, ***primary*** *obligations* between the contracting parties are ***not*** *interfered with at all*, unlike in the broader equitable jurisdiction mooted in *Andrews*. This distinction between primary and secondary obligations is vital to the way our modern contract law has developed. In *Cavendish Square Holding*, it was observed thus (at [13]):

> … There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, *the courts do not review the fairness of men's bargains either at law or in equity*. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves. … [emphasis added]

93 The prerequisite of a breach of contract, apart from being a *practically enforceable* limit on the penalties doctrine, is also *normatively sensible* given a common law court's reluctance to intervene in the *contents* of the parties' contractual bargain. Although it is said that a clause stipulating remedies for breach of contract is as much a part of the parties' bargain as other obligations (see Tiverios at p 81), the greater judicial intervention in this area is justified on the basis that secondary obligations, which are traditionally imposed by operation of law, are the province of the courts. To the extent that the parties' agreed remedies are intended only as a convenient substitute for the court's determination of the appropriate extent of compensation, such clauses are

necessarily subject to judicial scrutiny. Further, the broad policy underlying an award of contractual remedies must always be to compensate, and not to punish; this creates another limit on the parties' freedom to agree on their remedial obligations.

94 These ideas were succinctly summarised by the New Zealand Court of Appeal in *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] 2 NZLR 790 ("*Honey Bees (NZCA)*"), where in upholding the requirement for a breach of contract, the court reasoned as follows (at [40]):

> The doctrine of penalties arose because ***it has always been the courts' function to resolve the consequences of breach***. *A grossly extravagant penalty with the predominant effect of punishment*, rather than protection of a legitimate interest, *offended the court's conscience in its remedial jurisdiction*. The courts undertake no general review function to revise ill-assessed bargains, in the absence of equitable unconscionability or undue influence, common law duress, or a statutory jurisdiction to revise. *It follows that the jurisdictional premise for the prohibition has been breach of contract.* [emphasis added in italics and bold italics]

The decision of the New Zealand Supreme Court in *127 Hobson Street Ltd v Honey Bees Preschool Ltd* (2020) 20 NZCPR 840 ("*Honey Bees (NZSC)*") at [56] has since confirmed that in New Zealand, the Penalty Rule only applies to clauses stipulating consequences for a breach of contract.

95 We acknowledge that the threshold of a breach of contract may be thought of as being too easy to circumvent by clever drafting (see in this regard, similar acknowledgement in *Cavendish Square Holding* ([1] *supra*) at [14]–[15] and [43]). In our view, this does not justify *removing* the prerequisite of breach altogether, given our conception of the Penalty Rule as a doctrine to regulate party autonomy in the sphere of remedial obligations. The problem of drafting is dealt with in the way that courts have always dealt with problems of

construction – by prioritising substance over form, bearing in mind all the circumstances of the case in line with the contextual approach to contractual interpretation (see, in particular, this court's recent observations in *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 ("*Ricardo Leiman*") at [99]–[101]).

96 Seen in this light, an argument to the effect that the prerequisite of a breach of contract constitutes an "arbitrary" limit (see Tiverios at p 73) is, with respect, not persuasive. The distinction between primary and secondary obligations in the Penalty Rule's scope of operation also has a *crucial* effect on another important issue which we deal with in the next part of this judgment – what ***legal criteria*** ought to be applicable in guiding the courts in applying the Penalty Rule.

97 We turn briefly to a *possible alternative* approach to the extension of the Penalty Rule to situations outside of breach of contract. The Penalty Rule does have as one of its underlying rationales the concept of unconscionability (*cf* Jonathan Morgan, *Great Debates in Contract Law* (Red Globe Press, 3rd Ed, 2020) ("Morgan") at pp 254−255). There is also the *doctrine* of unconscionability and we note that, in the *Australian* context, that doctrine is relatively broad in nature (as exemplified by the leading High Court of Australia decision of *The Commercial Bank of Australia Limited v Amadio and another* (1983) 151 CLR 447 ("*Amadio*")). This raises, in turn, the issue as to whether or not the broad doctrine of unconscionability in *Amadio* could have been utilised ***instead of*** *extending* the Penalty Rule in *Andrews* ([1] *supra*). Indeed, one learned commentator goes further to suggest that the Penalty Rule in Australia could be *subsumed* within the (broad) doctrine of unconscionability (see Gray, especially at 22).

98 Whilst the doctrine of unconscionability in *Amadio* admittedly relates to *procedural* fairness whereas the Penalty Rule in *Andrews* relates to *substantive* fairness, the line between both is often a fine one, especially in the context of LD clauses. In any event, there is often an overlap as well as interaction between procedural fairness on the one hand and substantive fairness on the other (see, in particular, the observations in *Honey Bees (NZSC)* ([94] *supra*) at [82]–[90]). This means that the broad doctrine of unconscionability in *Amadio* could, at the *very least*, constitute a viable *alternative* approach that would *complement* the Penalty Rule and that the need to *extend* the Penalty Rule to situations *other than breach* of contract would not have been so necessary. We pause to note that, in the *Singapore* context, only a *narrow* doctrine of unconscionability obtains (see the decision of this court in *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM v BOK*") at [142]). This in turn reflects a judicial approach of minimal intervention in contractual bargains, consistent with a more limited conception of the Penalty Rule (*viz*, one confined to situations relating to *breaches* of contract).

99 For the reasons set out above, we would respectfully decline to follow *Andrews* on the scope of the Penalty Rule. Like the UK Supreme Court in *Cavendish Square Holding* ([1] *supra*), we are of the view that the Penalty Rule applies *only* where there has first been a ***breach*** *of contract* (see also generally Sirko Harder, "The Relevance of Breach to the Applicability of the Rule against Penalties" (2013) 30 JCL 52). In this regard, it is important, in our view, to note that *in so far as a particular fact situation falls within **<u>Situation 1</u>** of RDC Concrete* ([60] *supra*), *the Penalty Rule would **<u>not necessarily</u>** apply since the contract in that particular situation might have been discharged for reasons **<u>other than</u>** a **breach** of contract* (a point which we have already referred to at [63] above). Much would depend on the precise language and scope of the

contractual termination clause itself and the Penalty Rule would only apply if the discharge of the contract concerned involves (as we have just held) a ***breach*** *of contract.*

100 By way of brief coda to this part of the judgment, we note that Lord Neuberger and Lord Sumption did, in their joint judgment in *Cavendish Square Holding* (at [42]), suggest that even having regard to the original situation in equity where the Penalty Rule was applied to the enforcement of *penal bonds*, that situation *did* in fact also relate to one of *breach*. There appears to be some (albeit not conclusive) force in this suggestion. Whilst the claim would be one that is brought in debt rather than *assumpsit*, it is at least arguable that such a claim would be, in *substance*, one that has its origins in a *breach* by the defendant concerned (where, for example, the principal obligation undertaken by the defendant has not been strictly performed). Indeed (and as we have already elaborated upon above), the utilisation of breach of contract as a prerequisite is not a mere arbitrary drawing of a legal line but is related to the objective of the Penalty Rule in regulating ***secondary*** (and *not* primary) obligations. That having been said, an action in *debt* does *not* result in an award of *damages* as such and, to that extent, the enforcement of a *bond* may be said to be unlike a claim for damages for breach of contract. Perhaps, it may (as the court in *Andrews* suggested) be argued (and quite persuasively, in our view) that whilst a bond might involve a condition that is promissory in character and therefore involve something equivalent to a *breach* of contract, this might ***not necessarily*** be the case for *every* situation involving a bond. However, it is unnecessary for us to deal with this point in the light of our analysis set out above (see also Allsop at 13, excerpted at [81] above). We turn now to consider the ***applicable legal criteria*** in relation to the Penalty Rule.

The applicable legal criteria in relation to the Penalty Rule

(1) The case law

101 What legal criteria should be utilised in ascertaining whether the Penalty Rule applies? As noted earlier, the leading statement of principles was originally to be found in the judgment of Lord Dunedin in *Dunlop* ([1] *supra*). However, in *Cavendish Square Holding*, the UK Supreme Court extended the applicable legal criteria. In essence, whilst *Dunlop* focused on the concept of compensation by holding that the determinative question is whether the clause concerned provided a genuine pre-estimate of the likely loss, *Cavendish Square Holding* held that there could be "legitimate interests" that go *beyond* compensating the plaintiff. Let us elaborate.

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102 We begin with *Dunlop*, the facts and holding of which are as follows. The appellants were manufacturers of motor tyres and accessories, and supplied these to the respondents, who were dealers of those goods. The contract contained certain provisions to protect the appellants' brand, one of which was a resale price maintenance clause that provided that the respondents could not sell or offer the goods to any customers at less than the appellants' list prices. The contract also stated that if the dealer breached any of its obligations, it was bound to pay the sum of £5 for every item sold. In breach of contract, the respondents sold a tyre cover below the list price and the appellants commenced an action claiming LD.

103 The following tests were famously espoused by Lord Dunedin to assist the court in the construction of a given clause (see *Dunlop* at 86–88):

> 1. Though the parties to a contract who use the words ‘penalty’ or ‘liquidated damages’ may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party*; the essence of liquidated damages is a genuine covenanted pre-estimate of damage* ([*Clydebank Engineering and Shipbuilding Company, Limited and others v Don Jose Ramos Yzquierdo y Castaneda and others* [1905] AC 6 (“*Clydebank*”)]).
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, *judged of as at the time of the making of the contract, not as at the time of the breach* ([*Commissioner of Public Works (and as such representing the Colonial Government) v Hills* [1906] AC 368 and *Rowland Valentine Webster v William David Bosanquet* [1912] AC 394 (“*Webster*”)]).
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
>> (*a*) It will be held to be penalty if the sum stipulated for is *extravagant and unconscionable in amount in comparison with the greatest loss* that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in [*Clydebank*])
>>
>> (*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ([*Kemble v Farren* (1829) 6 Bing 141]). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel M.R. in [*Wallis v Smith* (1879) 21 Ch D 243]—is probably more interesting than material.

> (*c*) There is a *presumption* (but no more) that it is penalty when 'a *single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events*, some of which may occasion serious and others but trifling damage' (Lord Watson in [*Lord Elphinstone v The Monkland Iron and Coal Company, Limited, and Liquidators* (1886) 11 App Cas 332]).

> On the other hand:

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

> [emphasis added]

104 Lord Dunedin expressly acknowledged that in this case, a single lump sum was stipulated on the occurrence of a variety of breaches under the agreement. But the mischief that the agreement sought to prevent was an indirect one – to prevent damage to the appellants' trade *as a whole*, which was carried out entirely through distributors. Thus, "though damage as a whole from such a practice would be certain, yet damage from any one sale would be impossible to forecast" and it was therefore reasonable for parties to agree to estimate the damage so long as the figure arrived at was not extravagant (at 88).

105 Lord Atkinson's analysis in *Dunlop* ([1] *supra*) also merits some attention, not least since the court in *Cavendish Square Holding* ([1] *supra*) relied on it in developing the "legitimate interest" test. In upholding the LD clause, Lord Atkinson reasoned that the real and singular object of the manufacturers in making the agreement was to prevent disorganisation of their trading system, and that such interest was on the whole not incommensurate with the sum agreed to be paid. He reasoned as follows (at 92–93):

> It is, I think, quite misleading to concentrate one's attention upon the particular act or acts by which, in such cases as this, the rivalry in trade is set up, and the repute acquired by the former employee that he works cheaper and charges less than his old master, and to lose sight of the risk to the latter that old customers, once tempted to leave him, may never return to deal with him, or that business that might otherwise have come to him may be captured by his rival. *The consequential injuries to the trader's business arising from each breach by the employee of his covenant cannot be measured by the direct loss in a monetary point of view on the particular transaction constituting the breach.* [emphasis added]

106 It is apropos here to briefly consider the earlier House of Lords decision of *Clydebank Engineering and Shipbuilding Company, Limited and others v Don Jose Ramos Yzquierdo y Castaneda and others* [1905] AC 6 ("*Clydebank*"), which was itself referred to in *Dunlop*. In *Clydebank*, the Spanish government had contracted with the appellants for the building of four torpedo boats. The boats were delivered late and the contracts stipulated that the penalty for such a breach shall be at the rate of £500 per week for each vessel. The House of Lords allowed the claim of the Spanish government pursuant to the LD clause.

107 Lord Robertson stated that the applicable test was whether the payment was merely stipulated *in terrorem* and could not possibly have formed a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation (at 19). At the same time, his Lordship noted that (at 19–20):

> Now, all such agreements, whether the thing be called penalty or be called liquidate damage, are in intention and effect what Professor Bell calls 'instruments of restraint,' and in that sense penal. But the clear presence of this element does not in the least degree invalidate the stipulation. The question remains, *Had the respondents no interest to protect by that clause or was that interest palpably incommensurate with the sums agreed on?*
> …

> … 'The subject-matter of the contracts, and the purposes for which the torpedo-boat destroyers were required, make it extremely improbable that the Spanish Government ever intended or would have agreed that there should be inquiry into, and detailed proof of, damage resulting from delay in delivery. *The loss sustained by a belligerent, or an intending belligerent, owing to a contractor's failure to furnish timeously warships or munitions of war, does* ***not*** *admit of precise proof or calculation*; …
>
> [emphasis added in italics and bold italics]

108 It has been suggested that the approaches by Lord Robertson in *Clydebank* and by Lord Dunedin in *Dunlop* "are illustrative of ***two*** *different* external norms under which an impugned clause can be assessed to determine whether the clause is punitive" [emphasis added in italics and bold italics] (see Tiverios at p 136). According to Tiverios, the first norm in *Clydebank* is the "legitimate interest" standard (which "enables the court to consider the broader functions of an agreed remedy, beyond compensation for pecuniary losses"); the second norm is the stricter standard *per* Lord Dunedin in *Dunlop* where the court compares the agreed remedy fixed by the impugned clause with the consequence which would flow from a hypothetical breach of contract.

109 We respectfully disagree with Tiverios as well as the above interpretation adopted in *Cavendish Square Holding* ([1] *supra*). We pause to observe that many of the perceived difficulties in the case law of precedents (some of which were canvassed in *Cavendish Square Holding*) might, with respect, be attributable to too literal and/or mechanistic a characterisation of loss and compensation. In our view, when examined in context, it is clear that both *Clydebank* and *Dunlop* ([1] *supra*) were cases where damages were not easily ascertainable or calculable on any juridical basis but that the court was *nevertheless* concerned with *compensation*. There is no reason why the loss of the usage of warships or the damage caused to a trade system should be analysed as relating to *non*-compensatory interests rather than being concerned with the

traditional paradigm of compensation, which is sufficiently elastic to embrace both pecuniary and non-pecuniary interests (and *perhaps* many of the "legitimate interests" alluded to in *Cavendish Square Holding*). Viewed in this light, if we interpret the concept of "legitimate interest" as referring *only* to *compensation* and *not* as an all-encompassing "umbrella concept" that embraces interests that may include but also go *beyond* compensation as well (as is the position taken in *Cavendish Square Holding* (and *cf* the reference in Morgan to "*supra*-compensatory clauses" [emphasis added] (at p 260)), there is, in fact, only *one* external norm, and hence the approaches adopted in both *Clydebank* and *Dunlop* would be entirely *consistent* with each other.

110 Turning to a separate (albeit related) point, we note that in discussing the single lump sum test, *ie*, principle 4(c) in Lord Dunedin's judgment (at [103] above), Lord Atkinson also explained that (see *Dunlop* at 95–96):

> … although it may be true, as laid down by Lord Watson, that a presumption is raised in favour of a penalty where a single lump sum is to be paid by way of compensation in respect of many different events, some occasioning serious, some trifling damage, it seems to me that *that presumption is rebutted by the very fact that the damage caused by each and every one of those events, however, varying in importance, may be of such an uncertain nature that it cannot be accurately ascertained.* The damage has been proved to be of that nature in the present case, and the very fact that it is so renders it all the more probable that the sum of 5*l.* was not stipulated for merely in terrorem, but was really and genuinely a pre-estimate of the appellants' probable or possible interest in the due performance of the contract. [emphasis added]

111 As Prof Halson perceptively points out, Lord Atkinson's focus on the fact that the damage for each separate breach could not be accurately ascertained suggested that "*rule 4(c)* is ***intended to operate in conjunction with*** *Lord Dunedin's final rule 4(d)*, which recognises that liquidated damages clauses may be enforceable when the loss they are created to compensate for

might be *impossible to calculate*" [emphasis added in italics and bold italics] (see Halson at para 1.34). As the learned author then proceeds to add, "[i]ndeed, rule 4(d) expressly acknowledges that these are *the very circumstances* when parties may wish to include such provisions in their contracts" [emphasis added].

112 Turning then to *Cavendish Square Holding*, the court was concerned with two appeals. In the first appeal, *Cavendish Square Holding BV v Makdessi* ("*Cavendish v Makdessi*"), by an agreement in 2008, Mr Makdessi and Mr Ghossoub agreed to sell a controlling stake in the holding company of a large advertising and marketing communications group to Cavendish. The agreement was extensively negotiated by counsel for both sides, and contained in particular two clauses that stipulated consequences if Mr Makdessi were to breach his non-compete obligations within two years of the sale. First, under cl 5.1, Mr Makdessi would lose his entitlement to receive two pending payments from the company's operating profits that were to form part of the purchase price. Second, under cl 5.6, Cavendish could call on Mr Makdessi to sell his remaining shares in the company at their net asset value (*ie*, without the substantial mark-up attributable to goodwill). Mr Makdessi subsequently breached his obligations under the agreement and Cavendish sued. The question was whether cll 5.1 and 5.6, as summarised, were penalties and therefore unenforceable.

113 In the second appeal, *ParkingEye Ltd v Beavis (Consumers' Association intervening)* ("*ParkingEye v Beavis*"), the impugned clause stipulated that after two hours of free parking, motorists who overstayed in a car park would be charged £85. The appellant, Mr Beavis, overstayed by an hour and was served a demand to pay the relevant charge, but he refused to do so. The appellant contended that the £85 charge was unenforceable because it was a penalty

and/or that it was unfair and therefore in violation of UK consumer protection legislation.

114 Relying on, *inter alia*, the authorities of *Clydebank* ([106] *supra*) and *Dunlop* ([1] *supra*) as noted above, the court in *Cavendish Square Holding* ([1] *supra*) observed (at [23] and [28]) that:

> 23 … Lord Atkinson was making substantially the same point as Lord Robertson had made in [*Clydebank*]. The question was: what was the nature and extent of the innocent party's interest in the performance of the relevant obligation. *That interest was not necessarily limited to the mere recovery of compensation for the breach*. Lord Atkinson considered that the underlying purpose of the resale price maintenance clause gave Dunlop a wider interest in enforcing the damages clause than pecuniary compensation. £5 per item was not incommensurate with that interest even if it was incommensurate with the loss occasioned by the wrongful sale of a single item.
>
> …
>
> 28 … A damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach. This must depend on whether the innocent party has a *legitimate interest in performance* extending ***beyond*** the *prospect of pecuniary compensation* flowing directly from the breach in question.
>
> [emphasis added in italics and bold italics]

115 As we have already noted above, the court went on to introduce the "legitimate interest" test formulated in the following way (at [32]):

> The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker *out of all proportion to* ***any legitimate interest*** of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. ***In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity***. But *compensation is not necessarily the only legitimate interest* that

> the innocent party may have in the performance of the defaulter's primary obligations … [emphasis added in italics and bold italics]

116 What is clear is that the legitimate interest test allows the court to consider the broader functions of the given clause, *beyond* that of compensation for loss. In other words, a damages clause may be justified by some other consideration than the desire to recover compensation for a breach (see *Cavendish Square Holding* at [28]). However, in doing so, the court in *Cavendish Square Holding* did *not* have to overrule *Dunlop*; on the contrary, the learned Law Lords *shifted* the focus in the previous decisions on Lord Dunedin's decision to that of *Lord Atkinson's* instead (see *Cavendish Square Holding* at [23]–[24]). This was an approach that did not pass unnoticed by academic commentators (see, for example, Worthington at p 151 and Halson at para 2.38). Indeed, the court recognised that Lord Dunedin's principles remain applicable to "straightforward cases" (see *Cavendish Square Holding* at [25]).

117 It should be noted that the requirement of proportionality remains, despite the pivot in *Cavendish Square Holding*. In other words, while the focus has widened beyond compensatory interests (*ie*, legitimate interests), the court is ultimately engaged in a "limited review of the parties' means-end rationality" that is central to the concept of proportionality (see Tan Zhong Xing, "The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?" (2020) 33 CJLJ 215 at 230). As will be recalled, principle 4(a) in Lord Dunedin's pronouncement in *Dunlop* states that a provision is a penalty "if the sum stipulated for is extravagant and unconscionable in amount *in comparison* with the greatest loss that could conceivably be proved to have followed from the breach" [emphasis added] (see [103] above). Similarly, Lord Parmoor stated in *Dunlop* that "[t]o justify interference there must be an

extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate" [emphasis added] (see *Dunlop* at 101).

118 On the facts of the *Cavendish* appeal, there was a difference of views among the *coram* on the threshold question of construction of the impugned clauses. Lord Neuberger and Lord Sumption, with whom Lord Carnwath agreed, held that the Penalty Rule was not engaged as the clauses, on their proper construction, were not secondary obligations at all. Although these clauses were triggered only upon Mr Makdessi's breach of the non-compete obligation, the purpose of these clauses was *not* to regulate compensation for the breach but had the effect of varying the *primary* obligations under the contract, relating to the purchase price and the extent of share acquisition (at [74] and [83]). The same view however was not shared by all the other judges. In particular, while Lord Hodge recognised that there was a "strong argument" to be made that cl 5.1 was in substance a primary obligation, he disagreed on the construction of cl 5.6, preferring to analyse the latter clause as a secondary obligation designed to deter the sellers from breaching their non-compete obligations and from other misconduct that could damage the interests of the corporate group (see [270] and [280]). Lord Clarke of Stone-cum-Ebony and Lord Toulson concurred in Lord Hodge's opinion on the interpretation question (see [291]–[292]).

119 Nonetheless, the court unanimously agreed in the *Cavendish* appeal that there was a legitimate interest that justified both clauses. The protection of the marketing group's goodwill, which was critical to the continued success of the company and which could be jeopardised by disloyal actions undertaken by its founder to compete with the company, was central to Cavendish's commercial objective in acquiring the business. This was explained by Lord Neuberger and Lord Sumption as follows (at [75] and [82]):

> 75 Although clause 5.1 has ***no relationship, even approximate, with the measure of loss attributable to the breach, Cavendish had a legitimate interest in the observance of the restrictive covenants which extended beyond the recovery of that loss.*** It had an interest in measuring the price of the business to its value. The goodwill of this business was critical to its value to Cavendish, and the loyalty of Mr Makdessi and Mr Ghossoub was critical to the goodwill. The fact that some breaches of the restrictive covenants would cause very little in the way of recoverable loss to Cavendish is therefore beside the point. As Burton J graphically observed in para 43 of his judgment, once Cavendish could no longer trust the sellers to observe the restrictive covenants, 'the wolf was in the fold'. *Loyalty is indivisible.* Its absence in a business like this introduces a very significant business risk whose impact cannot be measured simply by reference to the known and provable consequences of particular breaches. It is clear that this business was worth considerably less to Cavendish if that risk existed than if it did not. *How much less? There are no juridical standards by which to answer that question satisfactorily.* …
>
> …
>
> 82 In our view, the same legitimate interest which justifies clause 5.1 justifies clause 5.6 also. It was an interest in matching the price of the retained shares to the value that the sellers were contributing to the business. There is a perfectly respectable commercial case for saying that Cavendish should not be required to pay the value of goodwill in circumstances where the defaulting shareholder's efforts and connections are no longer available to the company, and indeed are being deployed to the benefit of the company's competitors, and where goodwill going forward would be attributable to the efforts and connections of others. It seems likely that clause 5.6 was expected to influence the conduct of the sellers after Cavendish's acquisition of control in a way that would benefit the company s business and its proprietors during the period when they were yoked together. To that extent it may be described as a deterrent. But that is only objectionable if it is penal, i e if the object was to punish. But the price formula in clause 5.6 had a *legitimate function which had nothing to do with punishment and everything to do with achieving Cavendish's commercial objective in acquiring the business.* …
>
> [emphasis added in italics and bold italics]

120 In so far as the *ParkingEye* appeal was concerned, notwithstanding the respondent's concession that the £85 charge was not a pre-estimate of damages

and that it suffered no real loss from errant motorists, the court held that the impugned clause was not a penalty because ParkingEye had a legitimate interest in charging overstaying motorists which extended *beyond the recovery of any loss* (at [97]–[99]). The court noted that the *landowner* had authorised ParkingEye (in return for a fee) to control access to the car park and to impose the agreed charges in order to manage the car park in the interests of the retail outlets, their customers and the public at large. In turn, *ParkingEye* had a legitimate interest in so far as it sold management services for such schemes and met the costs of doing so from the charges it levied for breach of the terms. In the circumstances and having regard to comparable charges imposed for similar car parks, the charge in question was not out of all proportion to ParkingEye's interest or that of the landowner for whom it was providing the service (at [100]). Separately, the court also found that the charge did not contravene the relevant consumer legislation provisions.

AUSTRALIA

121 Turning to the Australian context, the most important decision is *Paciocco* ([71] *supra*) (where the court considered in some detail the applicable legal criteria in relation to the Penalty Rule; its decision in *Andrews* ([1] *supra*) being concerned instead with the *scope* of the Penalty Rule).

122 The dispute in *Paciocco* turned on the central question as to whether certain late payment fees on credit card accounts and deposit accounts charged by ANZ Bank were penalties (or, alternatively, whether they contravened the relevant statutory provisions on unconscionable conduct). The High Court of Australia (Nettle J dissenting) held that the late payment fees were not penalties. Kiefel J (as she then was) (with whom French CJ agreed) explained that the late payment fees were *not out of all proportion to the bank's interests* in relation to

operation costs, loss provisioning and increases in regulatory capital costs (at [58] and [68]). She referred, for this purpose, directly to the legitimate interest test propounded in *Cavendish Square Holding* ([1] *supra*), that the "true test is whether the provision is a secondary obligation which imposes a detriment on the party in breach 'out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'" (at [54]).

123 Keane J too agreed that the bank had a "multi-faceted" legitimate interest in the timely performance of its customers' obligations as to payment (at [271]). There were, however, references to a secondary inquiry as to whether the *only* or *predominant* purpose of the clause was to punish. This featured particularly in the judgment of Gageler J (at [158]) and also in Keane J's reasons. Only Nettle J, declining to apply a "legitimate interest" standard, held that on the principles in *Dunlop* ([1] *supra*) the late payment fees were penalties as they were "grossly disproportionate" to the greatest amount recoverable as damages for breach of contract (at [370]).

124 It would appear that, unlike the issue relating to the scope of the Penalty Rule, there is a high degree of commonality between the English and Australian case law in so far as the applicable legal criteria in relation to the Penalty Rule are concerned, centring on the concept of "legitimate interest" and the purported shift away from the statement of principles set out by Lord Dunedin in *Dunlop* (see also J W Carter, Wayne Courtney & G J Tolhurst, "Assessment of Contractual Penalties: *Dunlop* Deflated" (2017) 34 JCL 4 at 39). Indeed, in this last-mentioned article, the learned authors are of the view (as the title itself suggests) that the orthodox penalties doctrine exemplified in the statement of principles set out by Lord Dunedin in *Dunlop* has been dismantled by *Paciocco* ([71] *supra*) and that "[t]he practical impact of the decision is that provisions will hardly ever be penalties" (at 40). We pause to

note, in passing, that although the court in *Paciocco* did not expressly state it, its adoption of the concept of "legitimate interest" does bear some broad correlation to the expansion of the *scope* of the Penalty Rule in *Andrews* ([1] *supra*) which has, as explained, resulted in extending the potential application of the Penalty Rule to situations *other than* a breach of contract.

NEW ZEALAND

125 We turn briefly then to the position in New Zealand. Shortly after the release of *Paciocco*, a purported penalty clause under a loan agreement governed by New South Wales law arose for consideration before the New Zealand Court of Appeal in *Wilaci Pty Ltd v Torchlight Fund No 1 LP (in receivership)* [2017] 3 NZLR 293 ("*Wilaci*"). The appellant in that case entered into an arrangement with the respondent who had sought short-term bridging finance of NZ$37m. The loan agreement provided for a late payment fee of NZ$500,000 per week after the deadline for the repayment of the loan, which the lower court found to be an unenforceable penalty.

126 The New Zealand Court of Appeal stated that putting aside the anterior question of whether breach of contract is a prerequisite for engaging the Penalty Rule, the substantive test for the Penalty Rule under both *Cavendish Square Holding* ([1] *supra*) and *Paciocco* is consistent (at [86]). The key question under New South Wales law was therefore whether the secondary obligation was grossly disproportionate to the primary obligation (at [87]–[88]). The question of whether the predominant or sole purpose of the clause was to punish default was also a relevant consideration, as highlighted in *Paciocco* (at [97]). On the facts, the court found that the late payment provision in question was not a penalty. It emphasised the following contextual factors: both parties were commercially astute entities which had been independently advised; both

parties stood to gain substantially from the loan arrangement; and the appellant-lender undertook "exceptionally high risk" in providing the loan in the circumstances (at [91]–[93]). Viewed in the foregoing context, the late payment fee claimed against the respondent was not out of all proportion to the legitimate interests of the appellant as the parties themselves had assessed in the loan agreement, nor was it predominantly intended to punish the respondent (at [100]).

127 Not long after *Wilaci*, the New Zealand Court of Appeal was again presented with the opportunity to consider the Penalty Rule. In *Honey Bees (NZCA)* ([94] *supra*), the appellant-landlord, 127 Hobson Street Ltd, entered into a lease for certain premises in a commercial building and a collateral deed (for the installation of a second lift in the premises) with the respondent-tenant, Honey Bees Preschool Ltd, a childcare services provider. The collateral deed provided that if the lift was not installed within a given period, the landlord would indemnify the tenant for all obligations under the lease until its expiration. When the relationship between the parties went awry, the tenant claimed an indemnity against the appellant. The landlord argued that the indemnity clause was an unenforceable penalty, and that the tenant had taken advantage of its weak financial status and the absence of independent legal advice.

128 The court in *Honey Bees (NZCA)* affirmed *Wilaci* as representing the law in New Zealand even though that case had been concerned with New South Wales law (at [29]). The court noted that New Zealand law has largely followed English law on the Penalty Rule, as set out in *Dunlop* ([1] *supra*). In this connection, the court stated that save on the issue of whether breach of a primary obligation is a prerequisite for engaging the Penalty Rule (as highlighted

earlier), there is "no material difference between Australian and English law" on this area.

129 The Court of Appeal endorsed, as the primary test for the Penalty Rule, that promulgated in *Cavendish Square Holding* by stating that the "essential question is whether the secondary obligation challenged as a penalty imposes a detriment on a promisor out of all proportion to any legitimate interest of the promisee in the enforcement of the primary obligation" (at [31]). In addition, the court also stated that the above "disproportionality test" may be cross-checked by the punitive purpose test. Taking a leaf out of the judgments of Gageler J and Keane J in *Paciocco* ([71] *supra*) (see [123] above), this inquiry is concerned with "whether the *predominant* purpose of the secondary obligation is to punish the promisor rather than protect the legitimate interest of the promisee in performance of the primary obligation" [emphasis added], which is intimately connected with the disproportionality test (at [36]).

130 The court held that the landlord had not discharged its burden of establishing that an indemnity *vis-à-vis* the tenant was *out of all proportion* to the tenant's legitimate interest in performance of the obligation to complete the second lift by the agreed time (at [56]). Amongst other things, it was noted that the installation of the second lift was a matter of considerable importance to the respondent, which had expended a substantial sum of money in renovating the premises in order to secure the requisite regulatory approval (at [57]–[58]).

131 Most recently, on further appeal in *Honey Bees (NZSC)* ([94] *supra*), the New Zealand Supreme Court definitively set out the law on penalties in New Zealand and largely affirmed the pronouncements by the court below.

132 The test to be applied is that a "clause stipulating a consequence for breach of a term of the contract will be an unenforceable penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation" (at [56]). A "legitimate interest in performance" includes an interest in enforcing performance or some appropriate alternative to performance. After reviewing the developments in *Cavendish Square Holding* ([1] *supra*) and *Paciocco*, the court observed that this test, which it called "the proportionality test", was "more flexible and permissive" compared to the dichotomy between a penalty and LD propounded by Lord Dunedin in *Dunlop* ([1] *supra*) (*Honey Bees (NZSC)* at [57]). The new test was also more consistent with the judicial reticence to interfere with parties' bargains given the principle of freedom of contract (at [57]).

133 In applying the legitimate interest standard, the court noted that the bargaining power of the parties will be relevant (at [90]). However, it added that it is not necessary in all cases for the court to assess the damages that would have been awarded at common law for breach, though there may be cases where such an assessment will be helpful (for example, "where the clause purports to provide a pre-estimate of loss", or "where the only legitimate interest in performance is properly analysed as the monetary value of that performance or as the direct losses which will flow from breach, and which are readily calculated") (at [77]). In relation to the concept of legitimate interest, the court observed that a party to a contract may impose consequences for breach which protects its performance interest. This can extend beyond the harm occasioned by the breach as measured by a conventional assessment of damages. While legitimate interests will not include objectives unrelated to the performance interest such as punishment, the court stated that deterring breach can be a

legitimate objective of a clause since it is simply the flipside of securing performance (at [59]–[61]).

134 However, the New Zealand Supreme Court rejected the need for a cross-check on the legitimate interest standard in the form of the predominant purpose test (at [58]). It opined that the predominant purpose test "is a fresh inquiry" which might lead to a different result. In any case, if that test was to be determined from the degree of disproportion between the liquidated sum stipulated in the clause and the innocent party's legitimate interests, then it added nothing to the proportionality test.

135 On the facts, the New Zealand Supreme Court agreed with the court below that the indemnity clause enforced against the appellant-landlord was not a penalty. In doing so, the court found that despite the expansive language of the indemnity clause as was emphasised by the landlord, when properly construed, it only applied for a limited duration and in relation to specific obligations (at [99]). As against this, the respondent-tenant had a clear legitimate interest in the installation of a second lift on the premises since it would affect access to its childcare facilities and hence the growth and success of its business (at [102]–[103]). While the appellant was not legally advised, he was a sophisticated commercial party with extensive experience managing properties and thus there was no exploitation of unequal bargaining power (at [109]–[111]). Therefore, in the circumstances, the indemnity clause was *not* out of all proportion to the tenant's legitimate interests in performance.

CANADA

136 We consider briefly the position in Canada, which stands apart from much of the Commonwealth jurisprudence summarised above. Not long after

Dunlop ([1] *supra*) was decided, the Supreme Court of Canada in *The Canadian General Electric Company v The Canadian Rubber Company of Montreal* (1915) 52 SCR 349 adopted the formulation in *Dunlop* that "[a] penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. The essence of liquidated damages is a genuine covenanted pre-estimate of damage" (at 351).

137 The Supreme Court of Canada decision of *H F Clarke Limited v Thermidaire Corporation Limited* [1976] 1 SCR 319 ("*Thermidaire*") illustrates the application of the *Dunlop* approach. Laskin CJ observed that (at 330–331):

> What the court does in this class of case, as it does in other contract situations, is to refuse to enforce a promise in strict conformity with its terms. The court exercises a dispensing power … because the parties' intentions, directed at the time to the performance of their contract, will not alone be allowed to determine how the prescribed sum or the loss formula will be characterized. The primary concern in breach of contract cases … is compensation, and judicial interference with the enforcement of what the courts regard as penalty clauses is *simply a manifestation of a concern for fairness and reasonableness*, rising above contractual stipulation, *whenever the parties seek to remove from the courts their ordinary authority to determine not only whether there has been a breach but what damages may be recovered as a result thereof.* [emphasis added]

In finding that the provision in question was a penalty, Laskin CJ noted that it was a "grossly excessive and punitive response to the problem to which it was addressed" (at 338), referring specifically to *Clydebank* ([106] *supra*) and Lord Dunedin in *Dunlop* for the proposition that a sum is a penalty if it is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach".

138 Concerned with what it saw as an incursion into the principle of party autonomy, however, the Supreme Court of Canada later held that the court's

power to relieve against penalties was applicable only in the context where there was *oppression*. In *Lorna P Elsley, Executrix of the Estate of Donald Champion Elsley v J G Collins Insurance Agencies Limited* [1978] 2 SCR 916 ("*Elsley*"), Dickson J, writing on behalf of the court which consisted of Laskin CJ as well, stated that (at 937):

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is *designed for the* ***sole*** *purpose of providing relief* ***against oppression*** *for the party having to pay the stipulated sum. It has no place where there is no* ***oppression***. If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. [emphasis added in italics and bold italics]

139 The result of *Thermidaire* and *Elsley* is that there appears to be some uncertainty as to what precisely the applicable test for whether a given clause is a penalty is in the Canadian context. As observed in Paul-Erik Veel, "Penalty Clauses in Canadian Contract Law" (2008) 66 UT Fac L Rev 229 ("Veel"), there are broadly two competing lines of authorities split between (a) the traditional standard originating from *Dunlop*; and (b) an oppression or unconscionability-based standard under which courts have been increasingly reluctant to strike down penalty clauses (at 239 and 246). In the latter line of authorities, the court essentially examines if there is oppression or unconscionability in the circumstances *notwithstanding* that the clause in question may have been found to constitute a penalty on the standard in *Dunlop*. In this line of assessment, regard is had to factors including the reasonableness of the sum in question, the inequality of bargaining power, and the relative sophistication of parties (see Veel at 245).

140 Indeed, the oppression or unconscionability standard in *Elsley* has gained significant traction among the lower appellate courts in modern times. The Canadian courts have increasingly preferred to apply doctrines such as

unconscionability to address the question of enforceability of stipulated remedies, rather than the traditional Penalty Rule (see Kevin Davis, "Penalty Clauses Through the Lens of Unconscionability Doctrine: *Birch v. Union of Taxation Employees, Local 70030*" (2010) 55 McGill L J 151; see also, S M Waddams, *The Law of Contracts* (The Carswell Company Ltd, 7th Ed, 2017) at pp 313–315, which is, in fact, one of the leading Canadian contract law treatises). Nonetheless, this approach, in so far as it finds its source in oppression or unconscionability, is clearly not a viable approach in the Singapore context (particularly having regard to the narrow role accorded to the doctrine of unconscionability in Singapore (see also [98] above)).

141 The Penalty Rule was recently considered in *Deloitte Restructuring Inc in its Capacity as Trustee in Bankruptcy of Capital Steel Inc, a Bankrupt v Chandos Construction Ltd* 2019 ABCA 32 ("*Capital Steel Inc*"). In this case, the agreement between a contractor and subcontractor stated that in the event the subcontractor entered insolvency, 10% of the total contract price would be forfeited to the contractor. The question was whether the provision was unenforceable under the common law anti-deprivation rule, which prevents parties from circumventing bankruptcy laws, or because it was in substance a penalty. The majority of the Alberta Court of Appeal held that the provision was unenforceable under the common law anti-deprivation rule and hence did not consider the Penalty Rule. This holding was recently upheld by a majority of the Supreme Court of Canada which likewise did not consider the Penalty Rule (see *Chandos Construction Ltd v Deloitte Restructuring Inc in its capacity as Trustee in Bankruptcy of Capital Steel Inc, a bankrupt* 2020 SCC 25 at [22] and [24]).

142 However, in a lengthy dissent, Thomas Wakeling J of the Alberta Court of Appeal held that the clause did not fall afoul of either the anti-deprivation

rule or the Penalty Rule. While noting some of the developments in *Cavendish Square Holding* ([1] *supra*) and *Paciocco* ([71] *supra*), Wakeling J criticised the Penalty Rule in the strongest terms (see *Capital Steel Inc* at [154]–[180]), emphasising that the principle of freedom of contract means that absent compelling reasons, contractual bargains should be enforced by the courts (at [188]–[198]). In his view, a compelling reason to interfere with the parties' bargains only exists if the court is asked to enforce an *oppressive* remedies clause, thereby expressing support for the oppression standard in *Elsley* ([138] *supra*) (at [210]). The oppression concept, he noted, was more frequently engaged in consumer contracts rather than commercial ones. On the facts, he noted that both parties had the resources to obtain competent legal counsel and advice to protect their own interests.

HONG KONG

143 In Hong Kong, it appears that the courts have not had the opportunity to fully consider the Penalty Rule in the wake of the developments in the UK and Australia. However, in *Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd & Ors* [2019] 5 HKC 496 ("*Eddy Technology*"), the Hong Kong Court of Appeal cited with approval the discussion of default interest rate provisions in *Cavendish Square Holding* at [149]–[152]. On the facts, it found that there was no evidence that the default rates which the plaintiff had charged were "extravagant, exorbitant or unconscionable" (at [38]). A subsequent decision in the District Court cites *Eddy Technology* as applying the "exorbitant or unconscionable" test in *Cavendish Square Holding*, which forms a part of the laws of Hong Kong (see *Cham Cham Pong Cedric v Too Ka Man and another* [2019] HKDC 917 at [79]). There was no discussion with regard to the concept of legitimate interest.

MALAYSIA

144 The common law distinction between LD and penalties is not strictly relevant in Malaysia, where s 75 of the Contracts Act 1950 (Act 136 of 1950) (M'sia) stipulates that an innocent party can never recover *simpliciter* the sum fixed in a damages clause for a breach of contract whether as penalty or LD, but is entitled instead to "reasonable compensation" (see *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15 at [60]–[61]). Nonetheless, in determining what amounts to "reasonable compensation", the Federal Court of Malaysia held that the concepts of legitimate interest and proportionality in *Cavendish Square Holding* are relevant (at [66] and [74(d)]).

SINGAPORE

145 Finally, a brief discussion of the Singapore cases is also apposite. Hitherto, *Dunlop* has held sway in Singapore. This court had affirmed those principles in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*") at [78], a decision that preceded the release of *Cavendish Square Holding* ([1] *supra*) in the UK by a few months.

146 As the Judge below noted at [178], while a number of High Court decisions have considered *Cavendish Square Holding* especially in relation to the anterior question as to *when* the Penalty Rule is engaged, they have applied the substantive criteria in *Dunlop* ([1] *supra*) in determining whether the relevant clauses were penalties (see, for example, *iTronic Holdings Pte Ltd v Tan Swee Leon and another suit* [2016] 3 SLR 663 ("*iTronic*") and *Nanyang Medical Investments Pte Ltd v Kuek Bak Kim Leslie and others* [2018] SGHC 263 where the respective courts found that the Penalty Rule was inapplicable to the clauses impugned because they were *not* secondary obligations). More recently, in *Ricardo Leiman* ([95] *supra*), this court was invited to consider both

Dunlop and *Cavendish Square Holding*. However, on those facts, it was not necessary to arrive at a definitive conclusion as to which approach was to be preferred (at [98] and [107]). In *NSL Oilchem Waste Management Pte Ltd v Prosper Marine Pte Ltd and other suits* [2020] SGHC 204, the most recent case to our knowledge to have touched on the Penalty Rule in the High Court, Lee Seiu Kin J noted the differing tests in *Dunlop* and *Cavendish Square Holding* but found that on either test, the impugned clause concerning late payment interest was not a penalty (at [148]–[156]).

147 In *Xia Zhengyan*, this court was concerned with the appellant's purchase of part of the respondent's interests in a chain of private children's education centres. One of the appellant's claims against the respondent was for breach of the sale and purchase agreement, which, notably, was not drafted by lawyers. Clause 7.2 of the agreement provided that in the event of a breach by the respondent in transferring the requisite shares to the appellant, the respondent had to return all the moneys paid by the appellant *and* pay a sum of $100,000 "in penalty" (at [41]). Applying the principles in *Dunlop*, the court found that the $100,000 sum could not be a genuine pre-estimate of loss and was a penalty (at [79]). This was because the breach in question – the respondent's failure to transfer the shares – could occur in a variety of ways such that the loss would undoubtedly differ. Nevertheless, the first limb of the clause with respect to the return of the payment was a separate and enforceable obligation against the respondent.

148 In *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22, the court was concerned with a claim against various defendants for recovery of moneys as a result of the first defendant's default on a series of loans structured as Convertible Bond Subscription Agreements ("CBSAs"). One of the arguments

raised by the defendants was that the default interest rate stipulated in a particular clause in the CBSAs was an unenforceable penalty (at [124]). Audrey Lim JC (as she then was) stated that the *Dunlop* test applied but that it was qualified by a "strong initial presumption" that the parties themselves are the best judges of what constitutes a legitimate provision where both sides are properly advised and are of comparable bargaining power (citing *iTronic* at [177], which refers to *Cavendish Square Holding* at [35]). The learned judge also noted that a clause will not become a penalty simply because it results in overpayment in *particular* circumstances, given the generous margin afforded to parties to agree to their damages payable upon breach (at [125] citing *iTronic* at [176]).

149 On the facts, the judge found that the clause in question did not contravene the Penalty Rule (at [126]). The judge found that the defendants did not adduce evidence to show that the default interest rate of 2% per month was so out of line with that imposed in comparable loans of a similar nature. On the contrary, the claimant's unchallenged evidence showed that the rate was not extravagant or unconscionable. Moreover, given that the parties in question were properly advised and of comparable bargaining power, the defendants had failed to rebut the "strong initial presumption" that applied to the negotiated CBSAs (at [127]).

(2) Our views

150 The question that we now have to consider (and decide) is whether we should endorse the statement of principles set out by Lord Dunedin in *Dunlop* ([1] *supra*) or incorporate the concept of "legitimate interest" as embodied in the most recent Australian, UK and New Zealand case law in order to *extend* the Penalty Rule beyond that of compensation (or some alternative approach).

151 Although the approach mooted by the UK Supreme Court in *Cavendish Square Holding* ([1] *supra*) is, at first blush, an attractive one (not least because it adopts what appears to be a modern approach that endorses a more flexible legitimate interest of the innocent party in seeking to enforce the contractual provision in question, which approach is also that adopted at present in Australia (see, especially, *Paciocco* ([71] *supra*))), we respectfully *decline* to follow it and ***endorse the statement of principles set out by Lord Dunedin in*** **Dunlop** ([1] *supra*) ***instead***.

152 We do so because the test as to whether or not the contractual provision concerned provided a genuine pre-estimate of the likely loss is wholly consistent with the fact that the focus is on the ***secondary*** obligation on the part of the defendant to pay ***damages*** by way of <u>***compensation***</u>. Indeed, the court in *Cavendish Square Holding* was of the *same* view inasmuch as it endorsed the distinction between the primary obligations of the parties on the one hand and their secondary obligations on the other (see above at [92]). If indeed this is the case, then, with respect, the approach of the court in *Cavendish Square Holding* in holding that there could be situations in which the clauses which operate upon a breach are *not* genuine pre-estimates of the likely loss but which are nevertheless *commercially justifiable* and therefore *not* penalties would be ***at variance*** with the aforementioned distinction. Put simply, a contractual provision which stipulates for an amount of damages to be paid in the event of breach that is ***more*** *than* the pre-estimate of the *likely* ***loss*** must <u>***necessarily***</u> be (on a ***normative*** *level*) <u>***penal***</u>, as opposed to ***compensatory***, in nature – ***notwithstanding*** that it might have been in the *commercial interests* of the plaintiff to have included such a provision or clause on a ***factual*** *level*. Looked at another way, the "legitimate interest" (or commercial interest) of the plaintiff, whilst grounded in practical *factual* circumstances, has ***no*** *role* to play at the

level of ***legal principle*** – except to the extent that the "legitimate interest" concerned is coterminous with that of *compensation*.

153 Our rejection of the legitimate interest test does *not* mean that the key elements which weighed heavily with the court in *Cavendish Square Holding* (including that of commercial interest as well as the relative bargaining power of the contracting parties) are entirely irrelevant at the level of legal principle. Nevertheless, these elements must be viewed in the light of the fact that the focus is on *whether or not the provision or clause concerned is a **genuine pre-estimate** of the **likely loss*** in general and the statement of principles set out by Lord Dunedin in *Dunlop* in particular. This is the way in which we would read the observations by Lord Atkinson in *Dunlop* as well. Before we elaborate on this, two further points ought to be made.

154 First, the approach which we have adopted is also *consistent with* our decision in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hongkong) Ltd and another appeal* [2017] 2 SLR 129 ("*PH Hydraulics*") which held that, as *a general rule*, punitive damages *cannot* be awarded for breach of contract (at [135]). This is also aligned with the position in the UK where punitive damages also cannot be awarded for a breach of contract (see *PH Hydraulics* at [96] referring to the House of Lords decision of *Addis v Gramophone Company, Limited* [1909] AC 488).

155 Secondly, we emphasise that the concept of "legitimate interest" is, in and of itself, a very general concept that could be utilised in a myriad of ways, particularly in the process of *application* to the relevant facts and circumstances of a given case. Its protean character lends itself – potentially at least – to be utilised *too flexibly* and this would lead to too much uncertainty both prior to the entry into the contract concerned as well as with regard to the specific result

arrived at by the court thereafter. This, we think, may also have the unwanted effect of encouraging litigation. As Prof Peden perceptively observes (see Elisabeth Peden, "Penalties after *Paciocco* – the Enigma of 'Legitimate Interests'?" (2019) 35 JCL 263 at 267−268):

> *The fact that there are so many different formulations of the 'legitimate performance interest' does not instil confidence that there is a test that can be easily applied.* … Adopting an approach that allows a party to protect interests in performance which are 'intangible and unquantifiable' means that freedom of contract has led to a situation where the public policy of ensuring that one party does not 'overreach' in claiming what the common law would not allow appears to have been abandoned.
>
> Further, it has been recognised that a party may have a more unusual interest sought to be protected by an agreed clause where it would be difficult to determine the appropriate compensation in common law damages. Lord Dunedin in *Dunlop* recognised interests that might be protected by a form of liquidated damages clause that would not fall foul of the penalty doctrine. In his test 4(d) it was explained:
>
>> It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to *make precise pre-estimation almost an impossibility*. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.
>
> [emphasis added]

156 And taking the second paragraph of the quotation just set out, this might be an appropriate juncture to underscore the fact that a difficulty in determining common law damages in a particular situation would, in Lord Dunedin's view, be precisely a situation where an LD clause might be particularly apt – provided, of course, there is a reasonable basis for arriving at the quantum of LD stipulated in the clause concerned. The main point to note is that we are *still* in the sphere of *damages and compensation* which, as we shall point out in a moment, is itself a *plausible* conception of the concept of "legitimate interest". We also pause to emphasise the fact that when considering an award of *damages*, whilst courts

do not shy away from making such an award merely because it is difficult in the circumstances to calculate the precise quantum of damages that ought to be awarded, there must nevertheless be a reasoned and principled evidential basis for making an award (see, for example, the decisions of this court in *Robertson Quay* ([60] *supra*) and *Biofuel Industries* ([60] *supra*)). By analogy, in the context of assessing whether a clause passes legal muster pursuant to the Penalty Rule, the court would have regard to all the facts and circumstances of the case in arriving at its decision and, as noted above, the concept of *proportionality* would be an extremely important factor which it would take into account.

157 On a *linguistic* level, the concept of "legitimate interest" is also susceptible to a number of possible interpretations or conceptions. For example, the court in *Cavendish Square Holding* ([1] *supra*) viewed the "legitimate interest" of a particular contracting party as being coincident with that party's "*commercial* interest" – a view that was, with respect, flawed for the reasons set out above. And yet, one other possible conception of "legitimate interest" could, coincident with the approach we have adopted towards the Penalty Rule, simply refer to an interest in *compensation* (see also, William Gummow, "What is in a Word? 'Legitimate Interests and Expectations as Common Law Criteria" (2018) 45 Aust Bar Rev 23 ("Gummow")).

158 In the final analysis, therefore, the approach that ought to be adopted must remain one of *substance* rather than *form* (whether linguistic or otherwise) and this entails, as we have sought to demonstrate, a return to first principles.

159 We pause, at this juncture, to note, however, that there have been attempts to *defend* the test of "legitimate interest", particularly (and perhaps not surprisingly) in the academic sphere (though *cf* Allsop at 21 (where the learned

author, while referring to the fact that there has been a "loosening of stability" of the tests, is nevertheless of the view that this has facilitated "a more evaluative approach that gives considerable weight to the bargain and autonomy of the parties")).

160 Perhaps the most powerful defence is to be found in Solène Rowan, "The 'Legitimate Interest in Performance' in the Law on Penalties" [2019] CLJ 148 ("Rowan"). In this recent essay, the learned author examines other areas of the law of remedies in the context of breach of contract where the concept of "legitimate interest" is used by the courts and then attempts to suggest considerations that are or might be relevant in determining whether a contracting party has a legitimate interest in performance, especially (in line with the decision in *Cavendish Square Holding*) where such an interest goes *beyond* compensation. It is interesting to note that quite a lot of attention is devoted to Lord Reid's formulation of the concept in the House of Lords decision in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 ("*White and Carter*") (see Rowan at 154−159). This is not, of course, surprising in view of the focus in *Cavendish Square Holding* itself on *White and Carter*. It is equally interesting, though, that even Prof Rowan admits that "*White and Carter* is itself controversial" and that "[i]t has been criticised" (see Rowan at 157). Reference may also be made to the observations made by this court in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [253], where reference is also made to the use of the concept of "legitimate interest" in *AG v Blake* damages (see the House of Lords decision of *Attorney General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268), which is also another category considered by Prof Rowan (see Rowan at 161−164). Indeed, in concluding her learned essay, Prof Rowan does admit that "the parallels [drawn from other areas] inevitably only go so far,

not least because there is also uncertainty in relation to the requirement [of "legitimate interest"] in some of these contexts" (see Rowan at 174).

161 In so far as the learned author attempts to set out (in the second main part of her essay) the various considerations that might aid the court in ascertaining whether a particular contracting party has a "legitimate interest" in performance of the contract (see generally Rowan at 164−174) and whilst the attempt is helpful, we would respectfully suggest that she is seeking to articulate what really cannot be articulated, particularly with regard to *normative* guidance for *practical* application (see Gummow at 26; *cf* also the observations of this court in *BOM v BOK* ([98] *supra*), especially at [176]). In any event, many of these considerations would nevertheless be relevant as *factors* to be considered pursuant to the application of the statement of principles enunciated by Lord Dunedin in *Dunlop* ([1] *supra*) – albeit at a purely *factual* level in the context of applying those principles.

162 Another powerful defence of the concept of "legitimate interest" may be found in Tiverios (at pp 171−175), where the learned author also responds to criticisms of that concept. He first proffers three arguments justifying what he terms "the legitimate interest standard".

163 His initial argument is that this "more deferential standard of judicial scrutiny is justifiable on the basis that the general law should be reluctant to limit the parties' powers to set the terms of consensually created rights and obligations" (see Tiverios at p 171). With respect, the *general tenor* of Lord Dunedin's statement of principles in *Dunlop* is to like effect in so far as it is clear that the court concerned must not unnecessarily interfere with the parties' autonomy in entering into the agreement they did. The learned author also takes as an important premise that a *non*-compensatory remedy can

constitute the basis of an agreement between the relevant parties to begin with. As we have sought to explain, this premise may well be questionable in jurisdictions that do not accept *Andrews* ([1] *supra*), in so far as LD clauses should be confined to the sphere of *compensation* for the reasons given above. As a brief aside, it is interesting that the terminology utilised by the author ("agreed remedy clauses") reflects the premise that a non-compensatory remedy can constitute the basis of a valid agreement between the parties.

164 The learned author's second argument in favour of the legitimate interest standard is that "greater deference to what the parties have agreed [pursuant to this standard] acknowledges that the enforcement of an agreed remedy clause has an inherent utility for both [parties] but also for the operation of the law of contract as a whole" (see Tiverios at p 172). With respect, this raises the same point that was already considered in relation to the first argument and, in particular, glosses over the point that the general tenor of Lord Dunedin's statement of principles in *Dunlop* also adopts a deferential attitude as well.

165 The third argument proffered by the learned author is that "there exists a limited set of cases in which the [*Dunlop*] genuine pre-estimate of damage standard is inappropriate" (see Tiverios at p 172). In particular, he points to what is essentially the need to achieve a just and fair result in a situation where the parties contemplated an agreed remedy clause that was premised on a *non*-compensatory loss. With respect, however, this may well be stretching the general rule in order to accommodate the exceptional situation. More importantly, the extension of the law based on the legitimate interest standard does not (as we have already pointed out above at [155]) address the weaknesses in that standard (for example, the protean nature of the concept of "legitimate interest" and the danger of uncertainty that could be engendered by the excessive flexibility afforded by that concept itself). Indeed, these last-

mentioned arguments were not really addressed in the cases that endorse the legitimate interest standard.

166 In so far as the learned author's responses to criticisms of the legitimate interest standard are concerned, he first meets the criticism that the Penalty Rule might be rendered obsolete, arguing that the legitimate interest standard affords parties "a more generous margin in which to agree remedies but some of the key benefits of the doctrine are retained" (see Tiverios at p 174). With respect, however, there are also many other difficulties which we have set out above and which point to problems with the "more generous margin" referred to by the author.

167 More importantly, he acknowledges an important point already made above – which is the danger that that standard might be utilised in a way that creates uncertainty. Indeed, the author goes further and observes as follows (see Tiverios at p 174):

> One final potential difficulty with the legitimate interest standard is that *it might be doubted whether such a standard is sufficiently certain to be applied with predictability in future cases*. … [A]pplied in practice to a substantive legal doctrine, the language of legal judgment will provide a thin covering for matters of individual judicial taste. *There is considerable force to such a criticism.* [emphasis added]

He then proceeds to make four brief points in response, the first being that "a degree of negative certainty is achieved by virtue of the legitimate interest standard" inasmuch as there is "a clear default position that an agreed remedy ought generally to be enforceable" and that "[f]rom this starting position, the standard creates a 'high hurdle' for a litigant to clear in order for an agreed remedy to be characterised as punitive" (see Tiverios at pp 174−175). However, again, as we have already noted above, the general tenor of Lord Dunedin's statement of principles in *Dunlop* ([1] *supra*) is not, in substance, radically different.

168 The learned author's second point is that "as penalties cases are decided by applying the legitimate interest standard, such decisions form a body of knowledge which will limit future exercises of judicial power" (see Tiverios at p 175). With respect, however, this point is somewhat speculative for it could equally well be the case that if the standard leads to vagueness and uncertainty, then the body of case law will not really be of much (if any) use.

169 Thirdly, the learned author argues that "the law on penalties prior to *Paciocco* and *Cavendish Square Holding* was no paragon of legal certainty" (see Tiverios at p 175). Whilst the process of the *application* of a set of legal principles to the *facts* of a case will necessarily vary from case to case (if only because the facts of each case can vary in a myriad of ways), this does *not necessarily* mean that the set of legal principles itself is uncertain. In any event, it may well be the case that the law (as embodied principally in the statement of principles by Lord Dunedin in *Dunlop*) was (consistently with the analysis set out above) *relatively* more certain than the legitimate interest standard embodied in *Paciocco* ([71] *supra*) and *Cavendish Square Holding* ([1] *supra*). It may be added that the Supreme Court in *Cavendish Square Holding* had thought that Lord Dunedin's principles had been rather too rigidly applied, such that they had attained the status of a "quasi-statutory code" (see *Cavendish Square Holding* at [22]).

170 Fourthly (and finally), the learned author argues that "the penalties doctrine is not a doctrine in respect of which the court is free to assess the reasonableness of contractual terms" (see Tiverios at p 175). However, the danger inherent in the legitimate interest standard is that such a standard actually

permits (potentially at least) such an assessment to *an even greater extent* compared to the statement of principles set out by Lord Dunedin in *Dunlop*. Indeed, nowhere in the last-mentioned statement of principles is there any indication, in any event, that the court was free to (let alone encouraged) to assess the reasonableness of contractual terms.

171 Having accepted that the statement of principles enunciated by Lord Dunedin in *Dunlop* ([1] *supra*) ought to remain the law relating to the Penalty Rule in the Singapore context, how then (and returning to the point raised earlier) does the court *apply* those principles – particularly in the light of *Lord Atkinson's* observations in that same decision (see [105] and [110] above)?

172 One consideration which figured prominently in *Cavendish Square Holding* was the fact that the parties were of roughly equal bargaining power and had the necessary legal representation. Lord Neuberger and Lord Sumption posited that in cases of contracts negotiated between parties of comparable bargaining power who have been properly advised by counsel, "the strong initial presumption" is that the parties are the best judges of what is legitimate in an LD clause (at [35]). Despite the court's assertion that the modern conception of the Penalty Rule is substantive rather than procedural (at [34]), the presumptive approach suggests that evidence of procedural fairness may "weigh heavily enough to turn a substantively dubious clause into one" that passes legal muster (see Andrew Summers, "Unresolved Issues in the Law on Penalties" [2017] LMCLQ 95 at 117; see also Rowan at 173).

173 Indeed, there is a school of thought which advocates the view that where the parties are in fact of equal bargaining power, the Penalty Rule should not apply (see, for example, Lord Hope's extra-judicial lecture, David Hope, "The Law on Penalties – A Wasted Opportunity?" (2016) 33 JCL93 at 98−99),

although the court in *Cavendish Square Holding* ([1] *supra*) was of the view that the Penalty Rule ought not to be abolished. We are of the same view although in order to ensure that the Penalty Rule does not undermine the general principle of freedom of contract, it ought to be exercised sparingly. As mentioned earlier, the tenor of Lord Dunedin's judgment in *Dunlop* is, in our view, to the same effect. Returning to equal bargaining power as a factor, there is no reason why this particular factor cannot (in appropriate factual circumstances) constitute an important factor and it is certainly open to a party to rely upon it in argument.

174 The following observations of the Judicial Committee of the Privy Council (on appeal from the Court of Appeal of Hong Kong) in *Philips Hong Kong Limited v Attorney General of Hong Kong* [1993] 1 LRC 775 ("*Philips Hong Kong*") at 785 are also instructive:

> Except possibly in the case of situations where one of the parties to the contract is *able to dominate the other as to the choice of the terms of a contract*, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision *could* result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is *not extravagant, having regard to the range of losses that it could reasonably be anticipated* it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages. As the Law Commission stated in *Penalty Clauses and Forfeiture of Monies Paid* (Working Paper No. 61, at 1975) at p 30):
>
>> 'The fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not … outweigh the very definite practical advantages of the present rule upholding a genuine estimate, formed at the time the contract was made, of the probable loss.'
>
> [emphasis added]

That being said, to be clear, the Penalty Rule does *not* depend on any disparity of power of the contracting parties (*per* Lord Hodge in *Cavendish Square Holding* at [257]).

175 It should also be noted that the Penalty Rule is not without its advantages (see, for example, *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) ("*The Law of Contract*") at para 8.106; Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) ("*Burrows*") at p 396; and Morgan at p 252) although, as is customary, there are arguments that these advantages may be overstated (see *The Law of Contract* at para 8.106)). We would also add that, in so far as the Penalty Rule is based on a limited conception of public policy (see, for example, the English Court of Appeal decision of *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1446, *per* Diplock LJ (as he then was)), this is not something that is unknown in the law of contract. The legal principles relating to the doctrine of remoteness of damage, for example, are also undergirded by an element of public policy (albeit with, understandably, somewhat different content (see, for example, *Robertson Quay* ([60] *supra*) at [70])). There is, of course, yet another conception of public policy in the form of a full-fledged vitiating factor which we traditionally term "illegality and public policy" but, even there, the courts must be careful with respect to legal line-drawing lest the general principle of freedom of contract be unduly undermined.

176 Another consideration in the application of the Penalty Rule may be the purpose of the underlying transaction and the particular primary obligation that has been breached. This is consistent with the emphasis on a composite view of the parties' contract and the nature of their relationship as highlighted by Lord Atkinson in *Dunlop* ([1] *supra*) (see [105] above). This brings us back to

the approach set out in *RDC Concrete* ([60] *supra*) for the situations that justify the innocent party's termination of the contract, particularly Situation 3(a) and Situation 3(b). As highlighted earlier, Situation 3(a), *ie*, the condition-warranty approach contemplates the scenario where the term breached is a *condition* of the contract. Whether a given provision is a condition is a fact-specific enquiry to be determined based on the intentions of the contracting parties by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole (see *Man Financial* at [161]). Situation 3(b) on the other hand, *ie*, the *Hongkong Fir* approach, is engaged where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract. In other words, Situation 3(a) is concerned with the nature of the term breached whereas Situation 3(b) is concerned with the consequences of the breach. These considerations – the importance of the primary obligation and the seriousness of the consequences of breach – are also highlighted by Rowan at 164–168, albeit in the context of factors relevant in identifying legitimate interests under the test in *Cavendish Square Holding*. In this connection, it may be added that the difficulty of quantifying loss (*viz,* principle 4(d)) or obtaining a substitute following the breach in question may also be a relevant consideration (see *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) ("*Chitty on Contracts*") at para 26-217).

177 In our view, the above factors cohere with the following observations of Mason J and Wilson J in the High Court of Australia decision of *AMEV-UDC Finance Limited v Austin and another* (1986) 162 CLR 170 ("*AMEV-UDC*"*)*, which represented the position on the Penalty Rule in Australia before *Andrews* ([1] *supra*) (at 193–194):

> The test to be applied in drawing [the distinction between compensation and unconscionable and oppressive and so penal contracts] is *one of degree and will depend on a number of circumstances*, including (1) the *degree of disproportion* between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the *nature of the relationship* between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term. The courts should not, however, be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers … an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties: see, generally, Atiyah, *The Rise and Fall of Freedom of Contract* (1979), esp. Ch. 22. [emphasis added]

178 At this juncture, it is helpful to consider how the *Dunlop* approach would have applied to the facts in *Cavendish v Makdessi* and *ParkingEye v Beavis* (see [118]–[124] above).

179 In respect of the first appeal in *Cavendish v Makdessi*, it will be recalled that the two impugned clauses in question were considered by Lord Neuberger and Lord Sumption to be primary obligations which did not trigger the Penalty Rule (see *Cavendish Square Holding* ([1] *supra*) at [74] and [83]). As stated earlier, under the two clauses, Mr Makdessi's breach of his non-compete obligations meant that he would lose his entitlement to receive two pending payments from the company's operating profits that were to form part of the purchase price; and Cavendish could call on Mr Makdessi to sell his remaining shares in the company at a diminished value (see *Cavendish Square Holding* at [55]–[63]). In any event, their Lordships were satisfied that Cavendish had a sufficient legitimate interest on the facts – specifically, because of the centrality of Mr Makdessi's loyalty to the company – and, hence, the clauses in question

were not penalties (at [75] and [82]). In our view, to the extent that the Penalty Rule was engaged, the application of Lord Dunedin's principles in *Dunlop* would have yielded the ***same*** conclusion.

180 Central to the sale of shares was the fact that a large proportion of the purchase price represented goodwill, and this was common ground between the parties (see *Cavendish Square Holding* at [66]). The non-compete obligations in the agreement were a recognition of this and, thus, Mr Makdessi's loyalty, as already noted, was critical to the transaction (see *Cavendish Square Holding* at [75]; see [119] above). The value of loyalty – which was indivisible – in the context of the parties' agreement was clearly something unamenable to juridical or forensic assessment, as Lord Neuberger and Lord Sumption explicitly noted. Rather, it was something to be decided by sophisticated contracting parties who have been advised by competent legal counsel, as had been done on the facts (at [75] and [82]). In our view, there was no reason why such a "loss" (on the assumption that the Penalty Rule was engaged) could not have been accommodated within the schema of *Dunlop* ([1] *supra*) given our foregoing observations. In particular, principle 4(d) of Lord Dunedin's statement seems most apposite. It is quite clear to us that here was a case, not unlike the facts of *Dunlop* and *Clydebank* ([106] *supra*) themselves (see [104]–[109] above), where the damage suffered by the innocent party was not only intangible but was also impossible or, at any rate, extremely difficult to measure as a matter of arithmetic calculation. Seen in this light, and as observed by Lord Hodge at [275], the damage caused to Cavendish was such that no presumption under Lord Dunedin's principle 4(c) could arise.

181 While it was clear that the Penalty Rule was engaged because of a breach of primary obligations, the second appeal in *ParkingEye v Beavis* poses more difficulty in so far as the substantive application of *Dunlop* is concerned. As

noted earlier at [120], the respondent, ParkingEye, acknowledged that as it was not the owner of the parking space but simply its manager, the charge of £85 was not a genuine pre-estimate of loss since it suffered no real loss when motorists overstayed. These concessions posed no obstacle to the court given its adoption of the concept of legitimate interest, which ParkingEye was found to possess.

182 In our view, the reasoning and outcome in this second appeal are inconsistent with the principles enunciated by Lord Dunedin in *Dunlop*. Quite unlike the *Cavendish v Makdessi* appeal, it is evident that whatever legitimate interests ParkingEye had, they had little to do with compensation for loss. Rather, it seems to us that broad appeal was made to *non*-compensatory interests, including how the respondent sold its management services to landowners and how the charge formed part of the respondent's income stream. For the reasons already stated above, we consider the reasoning therein to be, with respect, a step too far from the fundamental tenets of contract law as they presently stand. We also add that with the advent of consumer protection legislation such as the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No 2083) (UK) (which was also considered in this particular appeal), there is a question of what role remains (or ought to remain) for the Penalty Rule in the same space (see *Cavendish Square Holding* at [309] and also *Honey Bees (NZCA)* ([94] *supra*) at [29]).

183 We conclude our statement of the substantive test for the Penalty Rule with a few final observations. In the vast majority of cases, it is possible that the same result or outcome will ensue regardless of whether the test formulated by Lord Dunedin in *Dunlop* ([1] *supra*) or that in *Cavendish Square Holding* ([1] *supra*) is applied. Indeed, the court in *Cavendish Square Holding* did acknowledge that "[i]n the case of a straightforward damages clause, any

legitimate interest will rarely extend beyond compensation for the breach … and Lord Dunedin's four tests would usually be perfectly adequate" (at [32]). Hence, the need to look to "legitimate interests" beyond those relating to compensation would be the *exception* rather than the rule. This itself raises the question as to whether the prodigious efforts to craft relevant legal criteria for the exceptional situation are needful (especially if, as we have noted above, that effort results in legal criteria that are, in the final analysis, vague and general). However, putting that to one side, the question arises as to whether or not application of either test would nevertheless – and *generally* – result in the *same* outcome in any event. As a learned author points out, whilst this is a possible argument, more research would need to be undertaken (see John Eldridge, "The New Law of Penalties: Mapping the Terrain" [2018] JBL 637 at 649) and we would not wish to speculate further at this point without having the benefit of such further research.

184 Finally, there appears to be a difference between the English and Australian positions in so far as the *remedies* available in the event that a clause is considered to fall foul of the Penalty Rule are concerned (see generally Tiverios at ch 7). Put briefly, in *Australia*, the clause considered is not rendered void but is given a scaled down operation to the extent that it does not exact a punishment on the party against whom the clause is sought to be enforced (see Tiverios at p 177). In this regard, it is unclear what the effect of a clause found to be a penalty is, in particular, whether the claimant would then be compensated based on the default rules for breach of contract (*ie*, applying the rules of remoteness) or that the court would enforce the penal clause to the extent necessary to compensate for the factual losses incurred (*ie*, the remoteness rules are relaxed). In contrast, in *the UK*, a clause that is found to be penal is void and the parties are then left to the remedial regime available under general law (see

generally Halson at ch 3). Quite apart from the fact that we have not endorsed the (equitable) approach adopted in *Andrews* ([1] *supra*), there is, in our view, much to be said for adopting the *UK* approach. Indeed, this particular issue was not addressed specifically by the parties in the present case and we will (as just mentioned) adopt the *UK* approach although we would not exclude a reconsideration of such an approach in a future case when such an issue is properly before this court.

A summary

185 This would be an appropriate juncture to summarise the applicable legal principles:

> (a) First, the Penalty Rule applies only in the context of a breach of contract. This does not preclude the applicability of other doctrines (including the narrow doctrine of unconscionability in *BOM v BOK* ([98] *supra*)) from operating where relevant.
>
> (b) Secondly, the legal criteria to ascertain whether the Penalty Rule applies may be found in the statement of principles enunciated by Lord Dunedin in *Dunlop* ([1] *supra*). The focus is whether the clause concerned provided a genuine pre-estimate of the likely loss at the time of contracting. In this regard, the *only* "*legitimate interest*" *which the Penalty Rule is concerned with is that of **compensation***.
>
> (c) Third, it is nevertheless important to emphasise that in applying the aforementioned principles, much would depend on the precise facts and circumstances of the case itself. Hence, factors such as the relative bargaining power of the parties as well as the purpose for which the parties entered into the contract concerned would be relevant.

186 It would now be appropriate to *apply* the applicable legal principles to the facts of the present case. Indeed, the first substantive issue (*viz*, whether there had been a ***breach*** *of contract*) is simultaneously one of the *prerequisites* to the operation of ***the Penalty Rule*** in the *remedial* context – and that is the issue to which our attention now turns.

Our decision

Issue 1 – Did Denka breach the ERAs?

187 Although the issue of repudiation formed the main dispute on liability both at the trial below and on appeal, not all of the ERAs were terminated as a result of Seraya's exercise of its common law right to accept Denka's repudiation and terminate the contract. Only ERA 100 was terminated in this manner, *ie*, under Situation 2 per *RDC Concrete* ([60] *supra*) (see above at [32(a)]). Importantly, although Seraya relied on contractual grounds for termination in ERAs 99 and 101 (*ie*, Situation 1 per *RDC Concrete*), those grounds for termination, as shall be seen below, were ***at least indirectly*** based on or brought about by Denka's position that it wanted to cease the operation of all ERAs (see *Seraya Energy (No 1)* at [136] and [140]). Before we consider whether Denka repudiated the ERAs however, we first address the question of whether the ERAs are binding on Denka.

Were the ERAs part of a "package deal"?

188 One of the key arguments raised by Denka to dispute the validity and enforceability of the ERAs is the package deal argument. It will be recalled that under the terms of the Concession Offer extended by Seraya to Denka, DSPL and YTL were supposed to enter into the ASA to record their agreement in

respect of the Concession Offer which modified the SSA (see [23] above). The salient terms of the Concession Offer state:

> 1. We refer to the [SSA] dated 16th January 2012, that was signed between [DSPL] and [PowerSeraya], and subsequently novated by [PowerSeraya] to [YTL] with effect from 1 April 2012 (the "SSA").
>
> 2. We are pleased to confirm that the parties have agreed that the Commercial Operation Date under the SSA shall be 1 September 2012.
>
> …
>
> 4. [YTL] has carefully considered DSPL's request to reduce the Committed Capacity to 6.5 MT/hr and the TOP to 3.0 MT/hr. We have simulated various permutations of Committed Capacity and TOP in our review, in our attempt to meet DSPL's request. We are now prepared to offer DSPL *a concession of the original terms of the SSA ("Concession Offer") on the terms and conditions set out in this letter ("Concession Terms")*.
>
> 5. DSPL acknowledges and agrees that:
>
> …
>
> (H) DSPL shall execute or procure the execution of *any ancillary supplemental agreement(s)* prepared by [YTL] to record the parties' agreement in respect of the Concession Terms as set out in this letter; and
>
> (I) DSPL shall, prior to the Commercial Operation Date, *execute an electricity retail agreement* with [SE] on [SE]'s standard terms and conditions for the supply of electricity to all of DSPL's premises in Singapore, for the period commencing from 1 September 2012 to 31 January 2021, and provide [SE] with a security deposit as required in accordance with the terms of the electricity retail agreement.
>
> 6. Once you agree to and accept the Concession Offer herein, the Concession Terms shall apply from 1 September 2012 to 31 January 2021, or such earlier date as parties may mutually agree in writing (the "Concession Expiry Date"). Thereafter, either the original terms and conditions of the SSA shall apply or the Concession Terms shall continue to apply, at the sole discretion of [YTL]. [YTL] will inform DSPL of its

> decision in writing on or before the Concession Expiry Date.
>
> 7. The existing SSA terms shall, notwithstanding anything set out in this letter, continue to apply on and after the Commercial Operation Date of 1 September 2012 *in the event that both parties are unable to agree on the amendments to the SSA and / or the terms of any ancillary supplemental agreement* (referred to in paragraph 5(H) above) prior [to] 1 September 2012.
>
> [emphasis added]

189 The thrust of Denka's package deal argument, as previously noted, is that in return for the execution of the ASA contemplated in the Concession Offer, Denka entered into the ERAs with Seraya for the supply of electricity. Denka described this as a "quid pro quo" between the parties. Since the ASA was never signed, Denka was entitled to withdraw from the ERAs on the basis of Seraya's and/or YTL's misrepresentations that the ASA would be executed in exchange for Denka's entry into the ERAs. Alternatively, the court should imply a term into the ERAs that Denka was entitled to withdraw from the ERAs when the ASA was not executed.

190 The nub of the issue here, as the Judge had rightly identified, is whether the ERAs are subject to a condition subsequent, *ie*, that the parties enter into the ASA (see *Seraya Energy (No 1)* at [92]). In order to answer that question, it is necessary to first consider the backdrop to the Concession Offer and the ASA.

191 As a starting point, we think it is clear from the terms of the Concession Offer quoted above that it constitutes a contract between YTL and DSPL to amend the SSA. It is equally clear that the Concession Offer was subject to a condition subsequent that the parties enter into the ASA and is thus properly described by the Judge as an *interim* contract. Since the condition subsequent was not fulfilled, the parties were entitled pursuant to cl 7 of the Concession

Offer to revert to the SSA, which was what happened following DSPL's letter of 20 August 2014 (see [31] above).

192 However, that does not get Denka very far. The question that remains is whether Denka is entitled to rescind the ERAs because of the non-execution of the ASA. What we consider to be most telling in this regard is that there is nothing in the Concession Offer or the ERAs which refers to the non-execution of the ASA as a basis for Denka to extricate itself from its obligations to purchase electricity from Seraya (see *Seraya Energy (No 1)* at [119]). As seen above, the express terms in the Concession Offer simply contemplated that if the parties were unable to reach an agreement on the ASA, the parties could revert to the terms of the SSA to govern their relationship for the supply of steam.

193 Nonetheless, Denka argues that it was induced into entering the ERAs as a result of Seraya and/or YTL's misrepresentations regarding the execution of the ASA. Specifically, Denka argues that in three meetings before the signing of the ERAs, Seraya and YTL had represented that if Denka signed the ERAs, YTL would sign the ASA in exchange.

194 We are unable to accept Denka's submission based on misrepresentation for several reasons. First, having reviewed the evidence, we do not think any clear representation as framed by Denka was made by Seraya or YTL. We accept that on the face of the Concession Offer, the parties had envisioned that the ASA (formalising the terms of the Concession Offer) and the ERAs would begin operating from the same date, *ie*, 1 September 2012. We also accept that there is some evidence from contemporaneous documents and correspondence in the period leading up to September 2012 that Seraya and/or YTL had spoken of the "bundled" nature of the ASA and the ERAs. However, it is not clear what

that means and, more crucially, what the consequence of such a "bundling" is. In this context, the references to "bundling" may simply be a factual descriptor of how Denka would be purchasing both steam and electricity from Seraya under the SSA (as modified by the Concession Offer) and the ERAs. There was certainly no clear representation that Denka could withdraw from the three ERAs if the ASA was not signed.

195 Secondly, assuming any unequivocal representation was made specifically as to a *quid pro quo* between the parties *vis-à-vis* the ASA and ERAs, that is merely a statement of intention and Denka has not pointed to any evidence to show that such a statement was false at the material time it was made. In fact, the evidence suggests quite the opposite. As the Judge noted (see *Seraya Energy (No 1)* at [95]), after Denka signed the Concession Offer on 14 August 2012, the parties continued to discuss the technical aspects of the reductions for steam supply for the contemplated ASA. However, as time wore on, the frequency and intensity of discussions tapered off. YTL and DSPL were content to proceed on the basis that the terms of the Concession Offer governed their relationship. It was only when electricity prices in the market had dropped significantly in 2014 that DSPL expressed its intention to cease purchasing electricity and to revert to the terms of the original SSA, although it proffered a different explanation for its request (see *Seraya Energy (No 1)* at [113]).

196 Thirdly, each of the three ERAs contained entire agreement clauses and/or non-reliance clauses. For example, cl 9.2 in both ERAs 99 and 101 provides that:

> The Consumer acknowledges and confirms that, it *has not relied* on any representation, warranty or undertaking (other than as expressly set out in this Agreement) in entering into this Agreement. This Agreement and any document referred to *herein represents the entire understanding, and constitutes the*

> *whole agreement*, in relation to the subject matter and supersedes any previous agreement between the Parties with respect thereto and without prejudice to the generality of the foregoing, excludes any warranty, condition or other undertaking implied at law or by custom. [emphasis added]

197 Similarly, ERA 100 contained an entire agreement clause excluding any warranty, condition or implied undertaking. In our view, these clauses in the ERAs prevent any potential liability for the misrepresentations alleged by Denka from arising. For the above reasons, we reject Denka's arguments on misrepresentation as a ground for avoiding its liabilities under the three ERAs.

198 We also find that there is no basis for Denka's argument to imply a term into the ERAs that would allow it to withdraw from them if the ASA was not executed. The test for the implication of terms in contracts in the Singapore context is the three-step process set out by this court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [101]:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is *necessary* in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such

a clear response, then, the gap persists and the consequences of that gap ensue.

199 According to Denka, the term to be implied into the ERAs is that if the ASA was not concluded, then Denka would not be bound by the three ERAs. The purported gap in the ERAs arises because at the time when parties were negotiating the ASA, they "did not consider a scenario where the ASA was not signed because parties had negotiated with the intention of signing the ASA and the ERAs as a bundled package".

200 The primary difficulty we had with the argument on implied terms is that it is irreconcilable with Denka's broader case. On the one hand, Denka's argument was that Seraya and/or YTL had falsely represented that the ASA would be executed in exchange for Denka entering into the three ERAs, and that if the ASA was ultimately not signed Denka would not be bound by the ERAs. On the other hand, Denka now argues that a term to like effect should be implied since the parties did *not* consider a scenario where the ASA might not be signed. While counsel for Denka, Mr Lee Eng Beng SC ("Mr Lee"), sought to tread the tightrope between the two arguments, that seemed to us to be an impossible task – Denka simply cannot have it both ways. We also add that to the extent that Denka appeared to be arguing, at times, that the term should be implied as it would reflect *what the parties actually intended*, it seemed to us that Denka was in effect seeking the *rectification* of the terms of the ERAs, which is quite distinct from the process of implication of a term in fact (see our observations in *Sembcorp Marine* at [96]).

201 We do not think this is a case where parties failed to contemplate the question of grounds for terminating the ERAs and hence left a gap. It is clear from the provisions of the ERAs that the grounds for termination were

contemplated and expressly provided for. It is not necessary at this juncture to go into these grounds in each of the ERAs, save to note that they make no mention of the execution (or non-execution) of the ASA.

202 Even if Denka passes the first stage of the analysis for implied terms, *ie*, there is a gap in the ERAs, it cannot show how the implied term is *necessary* under the business efficacy and officious bystander tests. Denka has not demonstrated how business efficacy demands that the specific term it has framed must be implied. There is simply no basis to presume that the parties intended for Denka to be able to avoid its obligations under the ERAs should the ASA not be executed. The SSA, as modified by the Concession Offer, and the ERAs are capable of operating independently and there is no suggestion that the two types of contracts were unworkable unless the term submitted by Denka is implied.

203 During the course of oral submissions before us, it was also suggested by Mr Lee that no reasonable commercial party would enter into the three ERAs for no benefit in return, especially given that Seraya could throw a spanner into the works by refusing to participate in the discussions for the ASA. In such a scenario, the refusal to imply the said term would result in Denka being saddled with obligations under the ERAs with no commensurate benefit. With respect, this submission mischaracterises the circumstances in which the parties entered into the Concession Offer and the ERAs, and is rather fanciful. It will be recalled that Denka had come forward requesting a modification of the SSA, which Seraya acceded to. In that context, we find it quite inconceivable that the parties could be presumed to have intended that Denka could renege on its obligations under the ERAs altogether if the ASA was not entered into.

204 Much was also said about the package deal argument in the context of Denka's implied terms argument but it also does not assist Denka's case. As mentioned earlier, we accept that the contemporaneous evidence does disclose a number of references to a "bundled deal" prior to the execution of the ERAs. However, the meaning and effect of these references is patently unclear. The mere references to a "bundled deal" do not change what are, in actuality, separate but related contracts *viz*, the ASA and the ERAs, into something else.

205 Therefore, we agree with the Judge that if the parties had been asked, at the time when the three ERAs were entered into, whether Denka could withdraw from them, Seraya and YTL would in all likelihood have replied in the negative. There is no justifiable ground for Denka's implication of terms into the ERAs.

Was there an obligation to purchase electricity under the ERAs?

206 Another argument raised by Denka was that even if the ERAs were binding, Denka was under no obligation to purchase electricity from Seraya, and had to pay only for what it had consumed. The only term in the ERAs that imposed any obligation on Denka in relation to the purchase of electricity was phrased in the following manner:

(a) In ERA 99, "[DSPL] shall not purchase electricity from any person other than [Seraya] during the Contract Duration".

(b) In ERA 101, "[DAPL] shall not purchase electricity from any person other than [Seraya] during the Contract Duration".

(c) In ERA 100, "[DSPL] shall not purchase electricity from any person other than [Seraya] for use at the Premises unless [Seraya] agrees otherwise".

These terms above shall be referred to as the “exclusivity provisions”. Denka submitted that these terms were only breached if Denka bought electricity from a third party. *Ceasing* to buy electricity under the ERA would not fall afoul of the exclusivity provisions, and nowhere else in the ERAs was it stated that Denka had a positive obligation to buy electricity from Seraya.

207 At the outset, we agree with the Judge that Seraya is not precluded by its pleadings from relying on the exclusivity provisions to establish Denka’s liability for breach of the ERAs (see *Seraya Energy (No 1)* at [62]). The key question, however, is whether there exists any obligation on the part of Denka to purchase electricity. It is plain that the foregoing provisions impose an obligation on Denka to only purchase whatever electricity it needs or uses from Seraya. The fact that the ERAs are silent as to the minimum quantity of electricity to be purchased is irrelevant. Simply put, the effect of the exclusivity provisions is that so long as Denka required electricity for its plants or facilities, it was contractually obliged under the ERAs to purchase it from Seraya.

208 Denka sought to draw a distinction between “Take *and* Pay” utility contracts and “Take *or* Pay” contracts. According to Denka’s appointed expert, Mr Michael Thomas (“Mr Thomas”), in the former category, the buyer simply pays for what it consumes; in the latter category, the buyer is obliged to pay for at least a minimum agreed quantity regardless of what the buyer actually consumes. Denka submits that the ERAs were “Take *and* Pay” contracts, which are “well established in the industry to mean no obligation to buy”.

209 This submission is neither here nor there. Whatever the industry practice might be, the exercise of contractual interpretation is the proper province of the courts. To assert that the ERAs are “Take and Pay” contracts (or “Take or Pay” contracts for that matter) is conclusory and fails to account for the express terms

of the contract, which is the lodestar in any exercise of contractual interpretation. As mentioned above, the exclusivity provisions in the ERAs require Denka to purchase any electricity it needs from Seraya for as long as the contract subsists. Notably, Denka's own witness, Ms Chia Miaw Ling, admitted at trial that Denka's plants continued in operation and needed electricity at the time Denka purported to unilaterally cease the purchase of electricity. The mere absence of the minimum quantity for purchase does not undermine the certainty or validity of the contract, and indeed no such suggestion has been advanced.

210 It was also suggested by Denka that it was "senseless" for the parties to impose such an obligation through "a tortuous route of an implied meaning of a negative covenant in the 'warranties and undertakings' section of the contracts".

211 For context, cl 2.1 of ERA 99 and ERA 101 reads as follows:

> **2 Warranties and Undertakings**
>
> 2.1 [Denka] warrants and represents that:
>
> 2.1.1. it is entitled to lawfully purchase electricity from [Seraya] during the Contract Duration;
>
> 2.1.2. *it shall not purchase electricity from any person other than [Seraya] during the Contract Duration*;
>
> 2.1.3 (if any Retailer other than [Seraya] was retailing electricity to the Consumer prior to the Commencement Date) the agreement between the Consumer and such Retailer will be terminated immediately prior to the Commencement Date …
>
> [emphasis added]

212 Similarly, cl 1.2 of the Seraya Energy Low Tension Electricity Retail Conditions ("SELTERC") in ERA 100 states:

> 1. Sale of Electricity and Undertakings
>
> …

> 1.2 During the Contract Period:
>
> 1.2.1 [Seraya] agrees to sell, and [DAPL] agrees to purchase and pay [Seraya] for all electricity consumed at the Premises;
>
> 1.2.2 *[DAPL] shall not purchase electricity from any person other than [Seraya] for use at the Premises unless [Seraya] agrees otherwise*;
>
> …
>
> [emphasis added]

213 While there might be *more* straightforward ways of expressing the parties' rights and obligations in the ERAs, viewed in the totality of the contracts, we are satisfied that Denka did have an obligation to continue to purchase electricity from Seraya so long as it needed electricity. The fact that the provisions were placed under the heading of "Warranties and Undertakings" is inconclusive and has no bearing on our finding.

Whether the ERAs were validly terminated

214 We turn then to the issue of breach and termination, which requires us to examine the parties' correspondence in some detail. It will be recalled that on 20 August 2014, DSPL had written to YTL stating that "the supply of steam and electricity shall cease under … the Concession Offer" (see [31] above). Denka argues that it did not repudiate the ERAs through its 20 August 2014 letter because it merely intended to "cease" purchasing electricity and had not used the word "termination". In fact, even after it sent that letter, Denka did not stop buying electricity from Seraya until 2 September 2014 for ERA 100, 15 October 2014 for ERA 99 and 14 November 2014 for ERA 101.

215 We deal first with ERA 100, which, as mentioned, is the only contract for which Seraya expressly invoked its common law right of termination based on Denka's repudiation. Where a party, by words or conduct, simply renounces

its contractual obligations by conveying to the other party to the contract that it will not perform its contractual obligations at all, that is repudiatory conduct and the innocent party is entitled to terminate the contract (see *RDC Concrete* ([60] *supra*) at [93] and also above at [61]). Denka did not have to know that its conduct amounted to a repudiation in law, nor did it have to use the legal language of "termination" or "repudiation" to evince its intention to renounce its performance of the ERAs from 20 August 2014 onward. In our view, the 20 August 2014 letter from DSPL to YTL is an unequivocal expression of repudiation.

216 YTL evidently regarded DSPL's letter as repudiatory conduct and accepted the renunciation *vis-à-vis* ERA 100 in its letter of 25 August 2014:

> With reference to the [ERAs] with [DAPL] numbered … [ERA 101], we assume that DAPL likewise wishes to cease the DAPL ERAs. *For good order, please let us have DAPL's written confirmation of its intentions.*
>
> With reference to the [ERAs] numbered [ERA 99] and [ERA 100] (the "DSPL ERAs"), in light of the fact that the reasons cited for termination in the Termination Letter do not appear to fall under any of the provisions set out in the respective ERAs for termination by DSPL, *the unilateral termination by DSPL* as set out in the Termination Letter is held by [YTL] to be, amongst others, a repudiatory breach of the ERAs.
>
> In respect of [ERA 99], we *hereby give notice of your repudiatory breach and require you to perform your obligations under the ERA within 10 calendar days.*
>
> In line with DSPL's Termination Letter terminating the ERAs' contract durations and the ERAs, please note *that [ERA 100] will be transferred to the market support services licensee with effect from 2 September 2014 unless we are in receipt of DSPL's written instructions to stop the transfer …*
>
> [emphasis added]

Since no contrary instructions were issued by DSPL, ERA 100 was terminated on 2 September 2014.

217 On 28 August 2014, DSPL wrote back to YTL on behalf of the Denka companies, denying any allegations of repudiation or breaches of the ERAs. Denka stated that the Concession Offer was "subject to contract", namely the execution of the ASA. Since the ASA was never signed, Denka's position was that it was only required to purchase steam and not electricity under the ERAs. It also stated that DAPL's position regarding all three ERAs was the same as that advanced by the Denka group of companies.

218 The parties continued to exchange correspondence, bitterly disputing their respective obligations *vis-à-vis* the ERAs and the Concession Terms. On 3 September 2014, DSPL wrote to YTL essentially offering to continue purchasing electricity while the dispute was being determined by the court (*ie*, the Mitigation Offer) (see below at [311]).

219 On 4 September 2014, Seraya wrote to DAPL in respect of ERA 101 and another contract between the parties:

> 3. As you may be aware, in DSPL's 20 August Letter, DSPL had purported to terminate various ERAs without identifying the specific ERAs.
>
> 4. Upon [YTL's] request for clarification in respect of the ERAs entered into between [YTL] and DAPL (as set out in [YTL's] 25 August letter), DSPL had specifically replied in its 28 August Letter to state:
>
> > (a) As DAPL are part of the Denka Group, DAPL's position in respect of its [ERA 101] is the same as DSPL's position in respect of the ERAs entered into between DSPL and [YTL], i.e. that ERA (Contract No.: *OCLl2012/101)* is terminated …
>
> 5. As we have not received any communication from DAPL with regard to its ERAs … *please let us have your written clarification if DSPL's 28 August Letter is correct, i.e. DAPL are unilaterally terminating [ERA 101] …*
>
> 6. As you are aware. ***DAPL are not entitled to unilaterally terminate its [ERA 101] and such conduct will***

> ***amount to a repudiatory breach of the ERA***. In such event, DAPL may be liable to pay liquidated damages under [ERA 101].
>
> [emphasis added in italics and bold italics]

220 On 10 September 2014, YTL wrote to DSPL regarding ERA 99 and ERA 101 as follows:

> 10. … Given that DAPL are a party to the DAPL ERAs, it would be prudent for [Seraya] to write to DAPL to ascertain DAPL's position in respect of [ERA 101]. *As you are aware, to-date, **we have not received any confirmation from DAPL that DSPL are authorised on [sic] act on their behalf***.
>
> …
>
> 12. … As you are aware, as a result of your unilateral termination of [ERA 100], [Seraya] has since accepted the repudiation, and proceeded to transfer the same to the market support services licensee on 2 September 2014. Going forward, please let [Seraya] *have DSPL's confirmation whether*:
>
> > (a) *DSPL wish to revoke their unilateral termination of [ERA 99],* and are now willing to perform their obligations under the said ERA; or
> >
> > (b) DSPL maintain their decision on 20 August 2014 to unilaterally terminate [ERA 99].
>
> [emphasis added in italics and bold italics]

221 Notably, on 7 October 2014, DSPL wrote to Mr Lim Sam San of YTL complaining about the delay in transferring Denka's account as follows:

> 3. … we were surprise to note that apart from [ERA 100], you have delayed transferring out the other [ERAs] to the market support service licensee ("MSSL"). We note also that you have requested us to "reconsider" our decision. As you know, we did not ask you to delay the transfer out. We regret to advise you that *our position remains the same as per our letter of 20 August 2014 and there was no reason for you to delay transferring out the remaining [ERAs] to MSSL as we had not advised nor intimated to you that we might reverse our decision.* The position is as follows:
>
> > a. We had ceased the non-contractual steam and electricity bundled package arrangement since 1 September 2014.

> …
>
> [emphasis added]

222 Finally, on 3 November 2014, YTL wrote to DSPL explaining the circumstances of the termination, the salient parts of which state:

> 5. … As you are aware, the circumstances leading to the termination of [ERAs 99 and 100] are as follows:
>
> …
>
> > f. However, on 7 October 2014, you wrote to us expressing surprise that we (or more accurately, [Seraya]) had "*delayed transferring out the other 2012 [ERAs] to market support service licensee ("MSSL")*, and stating that you would only pay for electricity based on the MSSL's rates until the ERAs have been transferred to the MSSL. In the same letter, you also maintained your position that you wished to unilaterally terminate the ERA.
> >
> > g. ***[Seraya] therefore gave notice of termination of the contract duration of [ERA 99] on 13 October 2014***, and subsequently took steps to transfer the ERA to the MSSL with effect from 16 October 2014.
>
> …
>
> 7. ***In respect of [ERA 101], [Seraya] has not terminated the same.*** It remains open to DAPL to write to [Seraya] directly to confirm their willingness to continue to be bound by and to perform [ERA 101].
>
> [emphasis in italics in original; emphasis added in bold italics]

223 It is clear that for both ERA 99 and ERA 101, Seraya exercised its right of termination under the terms of the respective contracts, *ie*, under Situation 1 of *RDC Concrete* ([60] *supra*) (see [228]–[229] below). This was in all likelihood because under ERA 99 and ERA 101, LD was claimable only when the contract was terminated pursuant to those express grounds of termination. However, despite invoking its contractual right of termination under ERA 99 and ERA 101, Seraya's termination of those contracts was still inextricably linked to Denka's repudiation of the ERAs by way of the letter of 20 August

2014. As this is a point that assumes some significance subsequently in our assessment of the LD clauses, we elaborate on this briefly.

224 In respect of ERA 99, it is evident from Seraya's letter dated 25 August 2014 excerpted above that Seraya considered Denka's conduct to constitute repudiatory breach. While no specific clause was mentioned in the letter, Seraya takes the position that it was acting in accordance with cl 8.2.2 of the contract by providing the ten calendar days' notice. Clause 8.2.2 of ERA 99 reads:

> 8.2 [Seraya] shall be entitled to terminate the Contract Duration and cease Retailing electricity to [Denka] immediately by written notice to [Denka] if:
>
> …
>
>> 8.2.2. without prejudice to Clause 8.2.1, [Denka] *is in breach of any of its obligations under this Agreement and fails to remedy the same within 10 calendar days* after being served with a written notice giving particulars of the breach and requiring it to be remedied;
>
> [emphasis added]

225 We agree with the Judge that Denka's repudiatory conduct beginning with its letter of 20 August 2014 engages cl 8.2.2 of ERA 99 in so far as it is effectively a breach of the *entire* contract and all the obligations therein (see *Seraya Energy (No 1)* at [136]). The requisite ten-day notice to remedy the repudiation had been given to Denka in the letter dated 25 August 2014.

226 The fact that Denka continued to purchase electricity under the ERAs does not detract from their repudiatory conduct. First, it should be pointed out that the reason that the supply of electricity only ceased in October and November 2014 respectively for ERA 99 and ERA 101 was because *Seraya* exercised its right to terminate the ERAs then, in accordance with the ERAs. Second, Denka's continued purchase of electricity in no way intimated any

withdrawal by Denka of its intention to repudiate the ERAs. For instance, in its letter to YTL on 3 September 2014, Denka stated:

> 4. It appears that your company has taken the position that we have to continue to purchase electricity even though the concession arrangement clearly provided that it was subject to contract and no contract was signed in the end by the parties, *We have been advised by our solicitors that in a similar case, the Singapore Court held that the effect of such an arrangement was that there was no contract and either party could cease the arrangement at any time*. [emphasis added]

227 The contemporaneous correspondence puts paid to Denka's characterisation of the events *ex post facto*. The language of the letters reveals that Denka, with the benefit of legal advice, was taking the position that it was justified in ceasing the arrangement between the parties since the purported package deal did not work out (see [189] above). Denka's conduct, objectively interpreted, was clearly a repudiation of the ERAs and at no point afterward did it retract from that repudiatory conduct. It cannot now allege that it was unaware that intimating an intention to "cease" buying under the ERAs amounted to a repudiation in law. Further, Denka's offer to continue to purchase electricity *pending the determination of the dispute* between the parties was plainly a mitigation offer (which we will consider later) and has no bearing on the question of its repudiation of the ERAs here.

228 For ERA 101, Seraya purported to terminate under cl 8.2.1, which reads:

> 8.2 [Seraya] shall be entitled to terminate the Contract Duration and cease Retailing electricity to [DAPL] immediately by written notice to [DAPL] if:
>
> …
>
> 8.2.1. [DAPL] fails to pay any amount due and payable to [Seraya] under this Agreement;

229 As mentioned, Seraya continued to supply Denka with electricity for some time after 20 August 2014. However, we do not think that constitutes affirmation of ERA 101. Despite repeated requests on the part of Seraya as seen from the correspondence above, it appears that confirmation of the unilateral termination on the part of DAPL was not forthcoming. Subsequently, Seraya issued an invoice to DAPL dated 10 October 2014 for the month of September 2014 based on the contractual rates (rather than MSSL's rate which Denka had insisted upon in a letter dated 7 October 2014 to YTL (see [34(b)] above)). This invoice was not paid up despite a reminder for payment on 7 November 2014. Finally, on 13 November 2014, Seraya wrote to DAPL to terminate ERA 101 as follows:

> 3. In the circumstances, pursuant to Clause 8.2.1 of the ERA … we are entitled to, and hereby give you notice of termination of the contract duration, with effect from 14 November 2014…
>
> 4. As a result, pursuant to Clause 8.4 of ERA … you shall pay us all sums payable to us under the ERA … including the total current charges …
>
> 5. Separately, you are also liable for liquidated damages to be computed in accordance with Clause 8.4.2 of the ERA …

230 In our view, DAPL's refusal to make payment on the invoice evinces Denka's manifest and continued intent to repudiate the ERAs as had been indicated in the 20 August letter. This resulted in Seraya's termination letter for ERA 101 on 13 November 2014 under cl 8.2.1 (see *Seraya Energy (No 1)* at [143]). It is settled law that an injured party, when faced with what appears to be repudiatory conduct by a counterparty, need not dive headlong into exercising its termination rights. An injured party might find itself in breach if it terminates the contract when, in fact, it had no basis to do so. The injured party is entitled to assess the situation, as Seraya no doubt was doing, before committing to a legally binding position. It is plain that whatever doubt Seraya

harboured as to DAPL's fidelity to ERA 101, which was first called into question on 20 August 2014, evaporated by November 2014 with the persistent refusal of DAPL to fulfil its payment obligations. Objectively speaking, by that time, DAPL's conduct was such that it clearly no longer intended to be bound by the ERA (see *Biofuel Industries* ([60] *supra*) at [10], citing *San International Pte Ltd v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20]).

231 Therefore, we agree with the Judge that Denka was bound by the three ERAs and had wrongfully repudiated all of them. It bears reiterating that with regard to ERA 99 and ERA 101, whilst Seraya had relied on an express termination clause in the contracts (*ie*, Situation 1 of *RDC Concrete* ([60] *supra*)), such termination could ***not*** be divorced from Denka's repudiation of the contracts (*ie*, Situation 2 of *RDC Concrete*). We will return to this point later when assessing the LD clauses (see [282] below).

232 For completeness, Denka also argues that cl 8.5 of ERA 99 and ERA 101 excludes the common law right to terminate for repudiation. Clause 8.5 essentially stipulates that the contract may only be terminated on the grounds stipulated in cl 8 (see [236] below). We are unable to accept this submission. Much clearer language is required in order to find that Seraya and Denka intended to oust the operation of the common law right of termination (see the English High Court decision of *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 at [21], citing the House of Lords decision of *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd* [1974] AC 689 at 717).

233 In the circumstances, Seraya had validly terminated the ERAs and we now turn our attention to the question of remedies for breach of contract.

Issue 2(a) – Were the LD clauses in the ERAs penalties and therefore unenforceable?

234 Having decided that the test for what constitutes a penalty remains Lord Dunedin's statement of principles in *Dunlop* ([1] *supra*), our present task is to assess the LD clauses in the three ERAs by those principles.

235 As we emphasised earlier, the Penalty Rule applies to ***secondary*** *obligations* ***only*** – specifically, the obligation on the part of the wrongdoing party to *pay* ***damages*** to the innocent party. ***Primary*** *obligations* between the contracting parties on the other hand are not interfered with at all. The threshold that must be crossed is whether the LD clauses in this case impose on Denka *secondary* obligations to pay damages upon a breach of contract. If they do, their enforceability is subject to the Penalty Rule; otherwise, they must be upheld as part of the primary obligations agreed upon by the parties.

Whether the LD clauses are secondary obligations

236 The LD clauses found at cl 8.4.2 of ERA 99 and ERA 101 are identical, and they state:

> 8.4 In the event that the Contract Duration is terminated, Seraya Energy may by giving written notice to the Consumer, transfer the Consumer to the MSSL. *In addition, the Consumer shall immediately pay Seraya Energy*:
>
> 8.4.1 any and all sums payable to Seraya Energy under this Agreement (whether then accrued due for payment or not); and
>
> 8.4.2 *(if the Contract Duration is terminated pursuant to Clause 8.2, save for Clause 8.2.8) liquidated damages in an amount computed as follows:*
>
> *Amt = A x B x 40%*
>
> Where:

> Amt is the amount of the liquidated damages payable to Seraya Energy pursuant to this Clause 8.4.2;
>
> A is the ***number of months*** (rounded down to the nearest month) between the date the Contract Duration is terminated and the Expiry Date; and
>
> B is the ***arithmetic average*** of the amount payable by the Consumer to Seraya Energy in each of the ***3 Billing Periods preceding the termination*** of the Contract Duration.
>
> 8.5 Neither this Agreement nor the Contract Duration may be terminated except in accordance with this Clause 8.
>
> [emphasis added in italics and bold italics]

237 For context, cl 8.2 of ERA 99 and ERA 101 sets out a list of no fewer than eight events that would give rise to Seraya's right to terminate the ERAs:

> 8.2 Seraya Energy shall be entitled to terminate the Contract Duration and cease Retailing electricity to the Consumer immediately by written notice to the Consumer if:
>
> 8.2.1 the Consumer fails to pay any amount due and payable to Seraya Energy under this Agreement;
>
> 8.2.2 without prejudice to Clause 8.2.1, the Consumer is in breach of any of its obligations under this Agreement and fails to remedy the same within 10 calendar days after being served with a written notice giving particulars of the breach and requiring it to be remedied;
>
> 8.2.3 the Consumer, in the reasonable belief of Seraya Energy, has committed theft of electricity;
>
> 8.2.4 an order of court is made to wind up the Consumer or to place it under judicial management or a resolution is passed by the members of the Consumer for its winding up or liquidation;
>
> 8.2.5 any mortgagee, chargee or encumbrancer takes possession or a receiver is appointed over any of the property or assets of the Consumer;

> 8.2.6 any distress or execution is levied or enforced in relation to any of the assets of the Consumer;
>
> 8.2.7 the Consumer makes any voluntary arrangement with its creditors or becomes subject to an administration order; or
>
> 8.2.8 for any reason whatsoever, it becomes unlawful for Seraya Energy to perform any of its obligations as contemplated by this Agreement.

As mentioned in cl 8.4.2, save for the ground of termination under cl 8.2.8, invoking any other ground under cl 8.2 would allow Seraya to claim for LD. The parties do not dispute that cl 8.4.2 of ERA 99 and ERA 101 is subject to the Penalty Rule, *ie*, that it imposes a secondary obligation (see *Seraya Energy (No 1)* at [183]).

238 Of greater concern is the LD clause in ERA 100. This clause is found in cl 5.3 of the SELTERC, which terms form part of the contract between DSPL and Seraya. This LD clause is substantially similar to that found in ERA 99 and ERA 101, save for some differences emphasised below:

> 5.3 If the Contract Period is *for* ***any reason whatsoever*** *terminated before the Expiry Date, the Customer shall immediately pay the Retailer* on the termination of the Contract Period:
>
> 5.3.1 any and all sums payable to the Retailer under these Conditions (whether then accrued due for payment or not); and
>
> 5.3.2 liquidated damages in an amount computed by the formula: "A x B x 40%", where "A" is the number of months (rounded down to the nearest month) between the date the Contract Period is terminated and the date the Contract Period would otherwise have expired, and "B" is the arithmetic average of the total amount payable by the Customer to the Retailer in each of the ***2 months preceding the termination*** of the Contract Period (exclusive of goods and services tax) Provided That the Retailer may at its sole discretion waive all or part of the liquidated damages payable pursuant to this Condition 5.3.2.
>
> [emphasis added in italics and bold italics]

239 Seraya argues, as it did before the Judge below, that cl 5.3 of SELTERC is *not* a secondary obligation, but rather a conditional primary obligation and thus the Penalty Rule is not even engaged.

240 The Judge found below that depending on how cl 5.3 was exercised, it could either be a conditional primary obligation or a secondary obligation, *ie*, it was a "hybrid". But in the present case, as Seraya had exercised it by terminating ERA 100 for cause, the provision was a secondary obligation (see *Seraya Energy (No 1)* at [186]).

241 We pause to note at the outset that the use of the term "*conditional* primary obligations", though inspired by the judgment in *Cavendish Square Holding* ([1] *supra*), is not, with respect, one we would endorse. The term appears liable to engender difficulties in characterisation that may lead to confusion and uncertainty in practical application for lawyers and parties, which is not desirable in commercial transactions (see Worthington at pp 142–144; Tiverios at p 126). The idea of "conditional primary obligations" erroneously suggests that in addition to the distinction between primary and secondary obligations, there are other obligations that lie somewhere in between. That is not correct. In reality, any obligation that on proper construction of the contract does not amount to a secondary obligation must necessarily be a primary obligation, whether or not it is "conditional" on the occurrence of a stipulated event.

242 The approach to distinguishing between primary and secondary obligations was one that this court recently tackled in *Ricardo Leiman* ([95] *supra*). As we stated in that case at [101], the question of whether a given clause imposes a primary or secondary obligation is a matter of substance rather than form. The court must have regard to the following factors: the overall context

in which the bargain in the clause was struck, any particular reasons for the inclusion of the clause, and whether the clause was contemplated to form part of the parties' primary obligations to secure some independent commercial purpose, or was only to secure the affected party's compliance with his primary obligations (at [101]). In *Ricardo Leiman*, although a clause was worded as a primary obligation to provide Mr Leiman with payments and benefits if he complied with his ongoing contractual obligations of non-competition and confidentiality, in reality, there was no independent commercial purpose behind the clause except to enforce those non-compete and confidentiality obligations. The clause, in substance, could not have been a primary obligation (at [104]–[106]).

243 We turn to apply these principles to the facts. The complication in this case is that, unlike the clause described in *Ricardo Leiman*, cl 5.3 of SELTERC stipulates payment to be made if ERA 100 is "for whatsoever reason terminated". The termination of ERA 100 could occur in a number of ways. For ease of reference, the material clauses for grounds of termination read as follows:

> **5. Termination**
>
> 5.1 Notwithstanding Condition 1.1, [Seraya] shall be entitled to terminate the Contract Period (as deemed appropriate by the Retailer) immediately by written notice to [Denka] if:
>
>> 5.1.1 [Denka] fails to pay any amount due and payable to [Seraya] under the Agreement or fails to provide security in accordance with Condition 3.3;
>>
>> 5.1.2 without prejudice to 5.1.1, [Denka] breaches any of its obligations under these Conditions and fails to remedy such breach within 5 days after being served with a written notice describing the breach and requiring it to be remedied;
>>
>> 5.1.3 [Denka], in reasonable belief of [Seraya], has committed theft of electricity;

> 5.1.4 an order of court is made to wind up [Denka] or to place it under judicial management or a resolution is passed by the members of [Denka] for its winding up or liquidation; or
>
> 5.1.5 [Seraya] is of the view that [Denka] is or may be or may become insolvent.
>
> 5.2 Notwithstanding Condition 1.1, [Denka] shall be entitled to terminate the Contract Period by giving [Seraya] not less than 30 days' written notice.

244 First, ERA 100 could be terminated by way of *Seraya's* exercise of its right of termination under cl 5.1. Second, termination could occur via *Denka's* contractual right of termination under cl 5.2. And third, although this is a point not taken by the parties, the plain wording of cl 5.3, which provides for the payment of LD, as quoted earlier, appears to extend even to methods of termination not stipulated under the contract, for example, the exercise of any available common law rights of termination by *either* party. Furthermore, while some of these methods of terminating ERA 100 involve a breach of contract on Denka's part, not all of them do. For example, under cl 5.2, Denka was also entitled to terminate ERA 100 at any time by giving 30 days' written notice. In these circumstances, the question is how to classify an LD clause such as cl 5.3 as a primary or secondary obligation for the purpose of determining whether the Penalty Rule applies.

245 Clauses such as this have until now not received consistent treatment in the case law, despite their widespread usage in hire-purchase contracts. In *Bridge*, a decision we referenced above (at [90] *supra*), the hirer of a car made an initial payment and one instalment payment before informing the company by letter that he could not keep up with payments, and returned the car. The hirer had the right under cl 6 of the contract to terminate the hiring at any time by giving notice in writing. Clause 9 further provided that, if the agreement was terminated "for any reason" before the vehicle became the hirer's property, the

hirer was liable to pay the owners such further sum as was necessary to make up payment of two-thirds of the total hire-purchase price. In the English Court of Appeal, it was held that the hirer had terminated the contract by giving notice under cl 6, and as there was no breach of contract, the question of whether cl 9 was a penalty or LD clause did not arise.

246 On appeal to the House of Lords, the court by a majority held that the contract had instead been terminated by the hirer's repudiation and the owner's acceptance of the same, and not under cl 6. The Penalty Rule accordingly applied and cl 9 was unenforceable as a penalty. It is the *dicta* of their Lordships that is interesting to the present discussion. Viscount Simonds and Lord Morton of Henryton thought that if the contract had been terminated by the hirer under cl 6, such that there was no breach, the Penalty Rule would not apply and the hirer would have been bound to pay the stipulated sum (at 613 and 614). Lord Radcliffe preferred to leave the question open. On the other hand, Lord Devlin was dissatisfied with the potential implication that cl 9 could "be genuine for one purpose and a sham for another", and was inclined to hold that cl 9 would have been a penalty regardless of the ground of termination invoked (at 634). The strongest criticism of these fine distinctions came from Lord Denning, who called it an "absurd paradox" that the Penalty Rule would have relieved the hirer of his obligation under cl 9 if the termination had occurred through his breach of contract, but would not have come to his aid if he had lawfully and conscientiously terminated the contract by giving notice under cl 6 (at 629). This criticism was also what led Lord Denning to the view, considered fairly radical at the time, that the penalties jurisdiction ought not to turn on any requirement of breach if it produced such an unjust and arbitrary result.

247 We have decided above that in Singapore, the Penalty Rule does depend on breach, in so far as its application to secondary obligations only is important for establishing a principled outer limit to the doctrine. For that reason, we would hold that cl 5.3 is indeed a "hybrid" obligation, in the sense that it may be *either* a primary or a secondary obligation depending on the event that triggers the termination of ERA 100. It is a secondary obligation for the purposes of those grounds of termination that involve a breach of contract, for which the amount stipulated in cl 5.3 presumably functions to stipulate compensation. But it is *not* a secondary obligation for those grounds of termination that do not involve a breach of contract. If, for instance, Denka were to exercise its right under cl 5.2 to lawfully terminate the contract by giving notice, on the express terms of cl 5.3, Denka would still be liable to pay the amount stipulated in that clause. But the rationale in such a case is that this is simply the *price* for Denka's exercise of its termination right. Expensive though the right may seem, parties are free to agree to such "consideration" (see *Bridge* at 615, *per* Lord Morton). The court's supervisory remedial jurisdiction is not invoked in the absence of breach and there is no justifiable basis for the court to intervene in this hypothetical situation.

248 Applying the same reasoning, we think it is arguable that cl 8.4.2 in ERA 99 and ERA 101 may similarly be a "hybrid" provision, that is, it may not function as a secondary obligation for all stipulated grounds of termination under cl 8.2. As the parties were content to treat cl 8.4.2 as a secondary obligation in its entirety, however, the point does not arise for determination and we say no more on this issue. In any event, the respective events of termination relied on by Seraya for ERA 99 and ERA 101 involved Denka's refusal to continue purchasing electricity and its failure to pay invoiced amounts, both of which clearly constituted breaches of the ERAs.

249 As the LD clauses in all the ERAs are secondary obligations when the event giving rise to termination is a breach of contract, we turn to the substantive question of whether these clauses are penalties which are therefore unenforceable.

Whether the LD clauses are genuine pre-estimates of Seraya's potential loss

250 We turn then to the question of whether the LD clauses can pass legal muster in respect of the Penalty Rule.

251 Seraya claims in its pleadings approximately $30.8m (excluding interest) against Denka based on the formula set out in the LD clauses. Though there appears to be some slight variation on the exact quantum, the computation of this sum is not seriously disputed. Applying the principles in *Dunlop* ([1] *supra*), the Judge came to the conclusion that the LD clauses in all three ERAs were penalties. In sum, the Judge held that:

(a) The 40% figure in the LD formula could not be a genuine pre-estimate of the likely loss as it was "plucked out from the air". Mr Lim Sam San ("Mr Lim"), the Senior Vice-President of both Seraya and YTL, could not specifically show how the 40% figure was arrived at, which led the Judge to conclude that Seraya had not conducted the exercise of genuinely trying to assess the quantum of Seraya's potential damages (see *Seraya Energy (No 1)* at [197]).

(b) In assessing whether the 40% figure was much higher when compared to the greatest loss that Seraya might suffer, the presence of the CFD between Seraya and YTL should be disregarded. This was because the CFD was *not* an arms' length transaction (see *Seraya Energy (No 1)* at [199]–[200]).

(c) Importantly, the LD provisions in all the ERAs were engaged in a wide range of scenarios that varied greatly in severity. Where ERA 100 was concerned, the LD clause was triggered if the contract period was "*for any reason whatsoever terminated before the Expiry Date*". For ERA 99 and ERA 101, the grounds for termination in cl 8.2 that would trigger the operation of the LD clause could include Denka's failure to pay "*any* amount due and payable" to Seraya (see *Seraya Energy (No 1)* at [202] and [205]).

(d) The same LD formula was found not only in the three ERAs but were also "included indiscriminately" in other contracts which Seraya entered into, even though those contracts varied significantly in duration (see *Seraya Energy (No 1)* at [203]).

(e) Finally, it was also relevant that the LD formula did not give Denka any credit for accelerated payment (see *Seraya Energy (No 1)* at [207]).

252 Seraya argues that the Judge's finding that the LD clauses were penalties was incorrect for several reasons. While Mr Lim conceded that the formula, and in particular the 40% multiplier was *not* the result of an exact arithmetic calculation, his evidence was that it was largely based on gauging five main factors that affected the value of the ERAs, as shall be discussed below.

253 We turn therefore to the assessment of whether the LD clauses are penalties under the *Dunlop* principles.

(1) The greatest loss principle

254 We find it helpful to begin our analysis of the LD clauses in the present case with regard to the principle stated in *Dunlop* that a clause will be a penalty if the sum stipulated for is "extravagant and unconscionable in amount *in comparison with the greatest loss that could conceivably be proved to have followed from the breach*" [emphasis added] (see *Dunlop* ([1] *supra*) at 87). In this regard, the precise question in this case is whether the LD formula, calculated by reference to the payments that Seraya would have received over the remaining duration of the ERAs, is an extravagant sum to impose on Denka considering the greatest loss that Seraya might suffer from breaches that engage the LD clause. Three subsidiary questions arise from this:

> (a) First, in considering Seraya's loss arising from breaches of the ERAs, should the presence of the CFD between Seraya and YTL be taken into account such that Seraya's loss is reduced?
>
> (b) Second, how does the LD clause compare with the damages at common law that Seraya might receive?
>
> (c) Third, is the 40% multiplier in the LD formula justified?

We deal with each sub-question in turn.

(I) WHETHER THE CFD SHOULD BE TAKEN INTO CONSIDERATION

255 In respect of the CFD between Seraya and YTL, the parties took diametrically opposite positions as to its relevance. On the one hand, Seraya argues that the Judge was correct in disregarding the CFD for the purposes of assessing whether the LD clause violated the Penalty Rule because it was not an arm's length contract that was strictly enforced between Seraya and YTL.

On the other hand, Denka argues that it was essentially a cost incurred by Seraya for supplying electricity to Denka and thus had to be deducted in order to accurately assess Seraya's nett profit. The fact that Seraya and YTL were related entities in a gentailer structure did not change the nature of the CFD. In Denka's submission, the argument that the CFD was not an arm's length contract but merely an internal arrangement was both unsupported on the evidence and ambiguous as a matter of its legal effect.

256 We agree with the Judge that the CFD should *not* be taken into account when evaluating the LD clauses. The CFD was signed between Seraya and YTL on or around 1 April 2012. The preamble to the CFD reads as follows:

> **WHEREAS:**
>
> A. The parties are each a participant in the Singapore Electricity Market.
>
> B. Each party has an exposure to fluctuations in wholesale electricity prices by virtue of its participation in the Singapore Electricity Market.
>
> C. *In order to mitigate the risk in relation to such fluctuations, the parties wish to enter into this Contract under which a party who profits from an advantage due to a fluctuation in wholesale electricity prices will compensate the other party for the loss incurred by the other party disadvantaged by that same fluctuation.*
>
> …
>
> [emphasis added]

257 It is evident that the CFD is essentially concerned with managing price fluctuations in the electricity market. Under the CFD, Seraya will receive a difference payment from YTL where the price of electricity sold to the customer is lower than the Pool Price; whereas, it is Seraya that will make a difference payment to YTL should the price of electricity sold to the customer be higher than the Pool Price. It is also material to mention that the CFD was a *general*

arrangement entered into between Seraya and YTL; it was *not* specifically meant to hedge risks resulting from the three ERAs that are the subject of these proceedings.

258 In relation to the three ERAs between Seraya and Denka, what is known as a CFD ticket dated 29 August 2012 was entered into between Seraya and YTL. The effective date of the CFD ticket was 1 September 2012 and the termination date was 31 January 2021, which corresponds with the entire duration of the ERAs (see [26]–[27] above). The ticket stipulates that the index price for determining obligations (*ie*, the strike price) for the difference payment was "S$39.0 + 0.196 x HSFO x FX". This index price stated in the CFD ticket can be contrasted with the contractual rate in the ERAs, which is "S$42.50 + 0.196 x HSFO x FX". Thus, *assuming the CFD ticket had been strictly enforced*, on each unit of electricity sold, Seraya would have obtained a ***fixed margin*** of $3.50/megawatt hour, being the difference between the contractual rate and the rate in the CFD ticket. The remaining revenue (if any) is then passed onto YTL. Effectively then, the result of the CFD is that it is YTL which bears the risk of fluctuations in the prices of oil and electricity.

259 A report prepared for the Energy Market Authority by Frontier Economics, entitled "Review of Vesting Contracts Regime" (the "Frontier Economics Report") helps further explain the purpose of a CFD in the present context. The report makes the following pertinent observations:

> ***A generator that also serves retail customers*** – either itself or through a related retailing business – can be described as having a physical or '*natural*' hedge against its long position. Such a generator (or 'gentailer') will have smaller incentives to withhold output than if the generator did not have that retail position. ***A Genco with a given generation capacity and an equal retail load position would be indifferent, at least in the short term, to the spot prices.***

> …
>
> In the [Singapore Wholesale Electricity Market], there are a number of mechanisms that act to hedge generation capacity:
>
> …
>
> - **Retail customers** provide a hedge for a vertically integrated businesses in a manner similar to a wholesale contractual position, and are sometimes referred to ***as a natural hedge***. Retail load is not always known exactly in advance (due to uncertainty around demand) making a retail hedge non-firm. Retail customers also 'settle' on an average basis aligned with customer billing and recontracting cycles.
>
> Each of the hedging mechanisms above can be considered close (but not perfect) substitutes with regard to incentives to exert market power…
>
> [emphasis in italics and bold in original; emphasis added in bold italics]

260 Notably, the Frontier Economics Report records in a footnote to the above excerpt that "[w]hilst there may be various internal contracting arrangements between the generation and retail arms of a vertically integrated business, from the perspective of the overall business *there is an ability to 'look through' these internal arrangements in terms of overall strategy*. This is fundamentally different to wholesale contracts with external parties" [emphasis added]. In other words, industry practice suggests that as between related entities in a gentailer structure, internal arrangements such as CFDs can be ignored. This point was not seriously challenged by Denka.

261 It seems to us that the foregoing observations aptly describe the nature of the CFD between Seraya and YTL at hand. First, where a retailing arm is vertically integrated with the generation arm, this provides a "natural hedge" against fluctuations in the Pool Price. Second, contractual arrangements such as CFDs may be entered into between the related parties as an *additional* lever for hedging or risk-management within the group, apart from the natural hedge associated with vertical integration. This is also consistent with the evidence of

Mr Sharad Somani ("Mr Somani"), Seraya's expert, as well as a report on the electricity market authored by Denka's expert, Mr Thomas himself in January 2011, where he observes:

> For that reason, we may see the [wholesale electricity stock market] develop a relatively *concentrated 'gentailer' structure as seen in* New Zealand and *Singapore* (and to a degree in Australia) where vertical integration between a wholesale and retail operation (rather than financial contracts) *provides the main source of 'hedges'*. [emphasis added]

262 In cross-examination, Mr Thomas agreed that the presence of retail contracts within a vertically integrated structure operated as a "contract cover" and were natural, albeit imperfect hedges against price fluctuations. When asked specifically about the above extracts from the Frontier Economics Report, Mr Thomas also agreed that the report was correct as a general proposition.

263 Mr Lim's evidence is that the CFD was not enforced strictly between Seraya and YTL, and it was open to either party to re-adjust the volume of electricity managed under the CFD on a monthly basis. This is consistent with the position set out in the Frontier Economics Report. It is undisputed that a CFD is a risk-allocation device that is common in the electricity generation and retail industry. It is also clear from the evidence that as at 2012, a substantial portion of electricity retailers had a corresponding generation company as its parent. Accordingly, a CFD was typically executed between retailers and generators in the same group, as was the case between Seraya and YTL. This is in contradistinction to a CFD between Seraya/YTL and an unrelated third party. While Mr Thomas argued that it was possible for an independent retailer to enter into a CFD with an unrelated generation company, he conceded that he had never seen such an arrangement in Singapore. In this vein, Mr Somani testified that the duration of the CFD of ten years between Seraya and YTL is unusually

long and could not have been obtained between an independent retailer and a third party generation company.

264 The fact that the CFD was not an arm's length transaction between Seraya and YTL is further supported by circumstantial evidence. Sometime around November 2013, Denka approached Seraya to ask if they could get any concession on the rates under the three ERAs if they agreed to also purchase electricity from Seraya for another new plant. The parties hence agreed that the energy charges under the three ERAs would be reduced for a three-year period to "S$36.80 + 0.1955 x HSFO x FX". As noted earlier, the original contract rate under the ERAs was "S$42.50 + 0.196 x HSFO x FX" whereas that under the CFD ticket was "S$39.0 + 0.196 x HSFO x FX". The reduced rate under the ERAs however, was not updated in the CFD ticket. The result of this was that, had the CFD been enforced strictly, Seraya would have made losses for at least three years because the CFD rate was higher than what Denka was paying Seraya. This comports with Mr Lim's account that the CFD was merely an internal arrangement between Seraya and YTL which was not strictly enforced.

265 On the facts, we are satisfied that the CFD, being a purely internal arrangement that was not strictly enforced, ought not to factor in our analysis of Seraya's loss. Accordingly, we reject the argument that Seraya's greatest loss arising from the termination of the ERAs is circumscribed by the CFD and that the LD clauses are necessarily to be regarded as penalties from this factor alone.

(II) COMPARISON WITH THE MEASURE OF COMMON LAW DAMAGES

266 Next, in analysing what may be the greatest loss flowing from the particular breach, it is also useful to consider the measure of *common law damages* that might be available to the party seeking to enforce the LD clauses.

One notable feature of the LD clauses in the present case is that they are contingent on *termination*. The LD formula purports to stipulate a payment of 40% of the remaining contract value as determined by the average monthly payments around the time of termination (see [236] and [238] above). In order for this LD formula to be broadly comparable with the common law damages recoverable by Seraya, however, the overarching question is whether Seraya might have been entitled to damages for the *loss of the entire contract* where it had elected to terminate the ERAs following a breach of Denka's obligations. As shall be seen, this depends significantly on the *nature of the breach* committed by the wrongdoer that led to the termination of the contract (see Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) ("*Treitel*") at para 20-163)). We elaborate on this below.

267 Where ERA 100 is concerned, it is not controversial that Seraya would be entitled to claim damages for the loss of the whole contract. ERA 100 was terminated because Seraya accepted Denka's repudiation of its obligations, and Seraya's right in such a case would be to claim for damages for the loss of what it was promised for the remainder of the contract, *ie*, the loss of all future payments that Denka would otherwise have made for the supply of electricity until 31 January 2021. In that sense, given the formula for computing the LD, the LD clause in ERA 100 is not extravagant compared to the greatest loss that might flow from Denka's breach.

268 The analysis is quite different where ERA 99 and ERA 101 are concerned. It will be recalled that Seraya chose to terminate ERA 99 and ERA 101 by invoking one of the stipulated grounds of termination in the ERAs (see [222] and [229] above). However, the invocation of an express ground of termination under Situation 1 of *RDC Concrete* ([60] *supra*) does not necessarily mean that the innocent party is also entitled to the full measure of

expectation loss under the contract if there has, in fact, not been any breach which could have entitled it to terminate at common law. This issue was highlighted in *Sports Connection* ([63] *supra*) at [53]–[55] and bears quoting:

> 53 Turning to Situation *1* proper, its *basis* is founded on giving effect to the parties' intention by way of a termination clause that may *not necessarily* involve a breach of contract *but nevertheless has the legal effect (in substance) of a condition* (pursuant to the condition-warranty approach) …
>
> 54 Situation *3(a)*, on the other hand, relates to the breach of a *condition* proper (pursuant to the condition-warranty approach). Viewed in this light, ***Situation 1 in RDC Concrete might (and this is a very important point) be regarded (having regard to the preceding paragraph) as a more explicit way of characterising (from the perspective of legal effect) a situation that falls (in substance) within the purview of Situation 3(a). Put simply, there is no difference (in substance) between Situation 1 and Situation 3(a).***
>
> 55 It should, however, be noted, at this juncture, that ***whilst Situation 1 entails (in substance) the same legal effect as a condition (pursuant to the condition-warranty approach), this is only with regard to the termination of the contract. However, this does not necessarily mean that, from a remedial perspective, the innocent party is also entitled to the full measure of damages if there has, in fact, been no breach which would have entitled it to terminate the contract at common law*** (see the English Court of Appeal decision of *Financings Ltd v Baldock* [1963] 2 QB 104 ("*Financings*") as well as the High Court of Australia decision of *Shevill v The Builders Licensing Board* (1982) 149 CLR 620; but *cf Afovos Shipping* and (more importantly) the English Court of Appeal decision of *Lombard North Central Plc v Butterworth* [1987] QB 527 ("*Lombard*") (which demonstrates that the effect of *Financings* could be avoided by appropriate drafting and which is noted in G H Treitel, "Damages on Rescission for Breach of Contract" [1987] LMCLQ 143 as well Hugh Beale, "Penalties in Termination Provisions" (1988) 104 LQR 355); reference may also be made to *Stocznia Gdynia SA* as well as Carter on Termination Clauses ([53] *supra*) and Brian R Opeskin, "Damages for Breach of Contract Terminated Under Express Terms (1990) 106 LQR 293); indeed, even if the contract itself stipulates the damages recoverable, the term concerned might still be unenforceable as constituting a penalty clause (see, for example, *Financings* and *Lombard*).
>
> [emphasis in italics in original; emphasis added in bold italics]

269 There are two possible scenarios at play, as explained in the subsequent High Court decision of *Tan Wee Fong and others v Denieru Tatsu F&B Holdings (S) Pte Ltd* [2010] 2 SLR 298 ("*Tan Wee Fong*") at [30]−[35] with reference to *Sports Connection* at [55]. In the first scenario, the innocent party terminates pursuant to express contractual provisions but has *no concurrent right* to terminate at common law. Here, the innocent party's recovery is limited to damages for unperformed obligations that have accrued at the date of termination and nothing further. In the second scenario, the innocent party who terminated pursuant to express contractual provisions also has a concurrent right to do so under common law, *ie*, under Situations 2, 3(a) or 3(b) of *RDC Concrete*. In such a case, the innocent party is *not* limited to damages in respect of loss suffered at the date of termination but is entitled to claim the loss of the bargain or the full expectation measure of loss.

270 The first scenario arises from the English Court of Appeal decision of *Financings Ltd v Baldock* [1963] 2 QB 104 ("*Financings*") (see also *AMEV-UDC* ([177] *supra*), as discussed in Tiverios at pp 180–182 for an Australian example, and also the High Court of Australia decision of *Esanda Finance Corporation Limited v Plessnig and another* (1989) 166 CLR 131). The plaintiffs in *Financings* claimed against the defendant, Mr Baldock, for a sum due to them as damages under a hire-purchase agreement for a truck. Clause 8 of the agreement provided that if the hirer failed to pay any instalment within ten days after it had fallen due, the owner had the right to terminate the hiring immediately by written notice. Clause 11 of the agreement further provided that:

> Should the hiring be terminated by the hirer under clause 10 or by the [plaintiffs] under clause 8 hereof, the hirer shall … forthwith pay to the owner either (a) such further sum as with the total amount of any instalments previously paid hereunder will equal two-thirds of the total hiring cost shown in the

> schedule as agreed compensation for the depreciation of the goods or (b) the amount of all instalments and other moneys then already due hereunder, whichever is the greater.

The agreement contemplated 24 monthly instalments, but the hirer failed to pay even the first two instalments. The owners exercised their right under cl 8 to terminate the agreement, retook possession of the truck and sued for damages.

271 Citing the previous decision of the House of Lords in *Bridge* ([90] *supra*), Lord Denning found that cl 11(a) of the agreement was a minimum payment clause, which in the context of hire-purchase agreements was well known to be a penalty (at 111). Turning to the question of the damages that the owners could recover under common law, Lord Denning noted that despite the hirer's failure to pay two instalments, there was still no repudiation of the contract. The hirer's default, on the facts, did not evince a repudiation also of his obligation to pay *future* rentals (at 112–113). Hence, although the plaintiffs, as owners, were entitled to terminate the hiring and repossess the truck, they were only entitled to damages for loss up to the date of termination, *ie*, the arrears of instalments and interest thereon.

272 Notably however, Lord Denning observed that even where a contract was validly terminated pursuant to an express termination clause, for the purpose of assessing damages, there was a significant difference in the damages recoverable depending on whether or not the defaulting party's breach could be classified as repudiatory. He expressed his misgivings about the state of the law in this manner (at 113–114):

> But while those cases can be distinguished on the ground that they were cases of repudiation, I must say I am disturbed about the assessment of damages in them. Take the present case. A hirer does not pay two instalments, whereupon the owners retake the vehicle. There is no repudiation. The damages are limited to the unpaid instalments with interest. But take

> another case. If he had been more courteous and had written: "I cannot pay "any more instalments," that would have been a repudiation and the damages would be multiplied tenfold. *It seems that in the "repudiation" cases the damages were calculated on the basis that the hirer had bound himself by a firm contract to pay all instalments up to the very end-indeed, as if he had made a firm contract to purchase-and had repudiated it.* No regard seems to have been paid to the fact that the hirer had the right to terminate the hiring at any time and thus bring to an end his obligation to pay any more instalments. I should have thought that, on this account, he would not be liable for any more damages than if he had himself given a notice to terminate (see *Withers* v. *General Theatre Corporation Ltd.),* and that if he had given notice himself, the damages would be limited to the breaches up to the date of termination and no more: unless, of course, the owners could rely on the "minimum payment" clause. As a matter of principle, I should have thought that the damages should be the same in either case, whoever terminated the hiring. I say no more on this point, however, because it does not arise for decision today. [emphasis added]

273 Lord Denning's disquiet at this state of affairs is borne out in a later case, *Lombard North Central Plc v Butterworth* [1987] QB 527 ("*Lombard*"), which is an illustration of the second scenario alluded to in *Tan Wee Fong* ([269] *supra*). The facts in *Lombard* are essentially the same as in *Financings*, but with one important difference. The lease agreement for a computer, for which payment was to be in quarterly instalments, expressly stated in cl 2(a) that punctual payment was of the essence. Clause 5 further stipulated that in the event the lessee failed to make due and punctual payment of "*any* of the rentals or of *any* sum of money payable" [emphasis added] under the agreement, the owner could terminate the agreement and repossess the computer. Clause 6(a) stipulated that on repossession, the lessee was to pay the owner all arrears of rentals and *all further rentals.* As it turned out, the lessee was late on three instalments and after giving due notice, the owner terminated the contract and retook possession of the computer.

274 Although the appeal was against the lower court's finding on common law damages, and the issue of whether cl 6(a) was a penalty did not directly arise for determination, the English Court of Appeal observed that in the absence of a repudiatory breach, cl 6(a) would be a penalty because it purported to oblige the lessee to make *future* rental payments when the agreement was terminated by the lessor for breaches that could vary greatly in gravity (at 542). But what distinguished this case from *Financings* ([270] *supra*) was that the contract in *Lombard* also provided in cl 2(a) that time was of the essence, thereby making punctual payments a *condition* of the contract. Since the lessee was late in payment of instalments and the owner terminated the agreement on that basis, the owner was entitled to claim damages "for the loss of the whole transaction" (at 546). Mustill LJ (as he then was) stated that (at 535–537):

> A term of the contract prescribing what damages are to be recoverable when a contract is terminated for a breach of condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage, in the same way as a clause which prescribes the measure for any other type of breach. No doubt the position is the same where the clause is ranked as a condition by virtue of an express provision in the contract.
>
> …
>
> … I would add only the rider that when deciding upon the penal nature of a clause which prescribes a measure of recovery for damages resulting from a termination founded *upon a breach of condition, the comparison should be with the common law measure:* namely, with the loss to the promisee resulting from the loss of his bargain. ***If the contract permits him to treat the contract as repudiated,*** *the fact that the breach is comparatively minor should in my view play no part in the equation.*
>
> [emphasis added in italics and bold italics]

275 Notably, Nicholls LJ (as he then was) expressed considerable discomfort with how the situation in *Lombard*, save for one difference in drafting, seemed otherwise indistinguishable from *Financings* (at 546):

> I have to say that I view the impact of that principle in this case with considerable dissatisfaction, for this reason. As already mentioned, the principle applied in *Financings Ltd. v. Baldock* [1963] 2 Q.B. 104 was that when an owner determines a hire purchase agreement in exercise of a power so to do given him by the agreement on non-payment of instalments, he can recover damages for any breaches up to the date of termination but (in the absence of repudiation) not thereafter. *There is no practical difference between (1) an agreement containing such a power and (2) an agreement containing a provision to the effect that time for payment of each instalment is of the essence, so that any breach will go to the root of the contract. The difference between these two agreements is one of drafting form, and wholly without substance. Yet under an agreement drafted in the first form, the owner's damages claim arising upon his exercise of the power of termination is confined to damages for breaches up to the date of termination, whereas under an agreement drafted in the second form the owner's damages claim, arising upon his acceptance of an identical breach as a repudiation of the agreement, will extend to damages for loss of the whole transaction.*
>
> Nevertheless, as at present advised, I can see no escape from the conclusion that such is the present state of the law. This conclusion emasculates the decision in *Financings Ltd. v. Baldock*, for it means that a skilled draftsman can easily side-step the effect of that decision. Indeed, that is what has occurred here.
>
> [emphasis added]

276 The foregoing issues were not addressed by the parties in any of their submissions before the appeal. Hence, after the oral hearing of the appeal, we invited parties to tender further submissions on two questions which flowed from the above, as follows:

> (a) the implications of Seraya's exercise of the express grounds of termination in the ERAs on the common law damages that would be awarded in the absence of an LD clause, having regard to the observations in *Sports Connection* ([63] *supra*) at [55] and *Tan Wee Fong* at [31]–[33]; and

(b) how the answers to the above questions might affect the Court's assessment of an LD clause that operated on the termination of a contract.

277 The distinction reflected in *Financings* and *Lombard* ([273] *supra*), between the situations where loss of bargain damages may or may not be recovered, has engendered both confusion and criticism (see generally, Halson at paras 5.32−5.36 and 5.50−5.51; *Chitty on Contracts* at paras 26-208 and 26-233). One of these criticisms is that if Situation 1 of *RDC Concrete* ([60] *supra*) is substantially the same as Situation 3(a), as was the position suggested in *Sports Connection*, the outcomes in *Financings* and *Lombard* seem illogical (see, for example, the High Court decision of *Max Media FZ LLC v Nimbus Media Pte Ltd* [2010] 2 SLR 677 ("*Max Media*") at [35]). The problem, as noted by Andrew Ang J (as he then was) in *Max Media*, is that "it is artificial to ask what is the nature of a term under common law where there is within the contract an express provision stating that the breach of that term would give the innocent party the right to terminate" (at [35]). On Ang J's logic in *Max Media*, the decision in *Financings* is wrong; termination under Situation 1 of *RDC Concrete* should also sound in damages for loss of the full contractual bargain, given that Situation 1 is effectively indistinguishable from termination for breach of an express condition of the contract under Situation 3(a) of *RDC Concrete*.

278 However, Ang J also noted that Prof Treitel, in a rationalisation of the principles in *Financings* and *Lombard*, had sought to draw a distinction between terms which are classified by law as conditions because of the likelihood that the breach will result in serious prejudice to the injured party, and terms expressly classified by the parties to be conditions which may not have such a tendency (G H Treitel, "Damages on Rescission for Breach of Contract" [1987]

LMCLQ 143, cited in *Max Media* at [37]). In Prof Treitel's explanation, the function of an express termination clause is only to confer an *additional* right to *terminate*, but it does not alter the measure of *damages* to which the innocent party would otherwise have been entitled to for the breach (at 144–145):

> It is submitted that there is a possible argument that could have been used to avoid the result which evidently caused the Court of Appeal considerable unease. There is some ambiguity in describing a breach as "repudiatory". ***This word may be used to describe either the <u>nature</u> of a breach or its <u>legal consequences</u>. In its former sense, the word is used to explain <u>why</u> a breach justifies rescission: because it amounts to a repudiation, or goes to the root of the contract. In its latter sense, it is used merely to make the point that the breach justifies rescission; and it may do so even though it does not amount to repudiation or go to the root of the contract: for example, where the contract expressly so provides.*** This was the position in *Financings Ltd v Baldock*, where the breach can be described as "repudiatory" in the second sense even though it was *not* "repudiatory" in the first sense. The breach there gave rise to a right to rescind *only* because the contract expressly so provided; and the case shows that, although such a breach gives rise to the same right to rescind as one which goes to the root of the contract, ***it does not necessarily have the same consequences as to damages.*** The position in *Lombard North Central plc v. Butterworth* was in substance the same: the right to rescind for late payment arose only because the contract so provided and even though the breach did not go to the root of the contract. It was repudiatory only in the second of the above two senses, and this is not altered by the fact that the contract said so twice … rather than once, as in *Financings Ltd. v Baldock*. ***It is, therefore, hard to see why the right to damages should not be restricted, in accordance with that decision, to the situation in which the breach was repudiatory in the first of our two senses.*** [emphasis in italics in original; emphasis added in bold italics and underlined bold italics]

Reference may also be made to J W Carter and Wayne Courtney, "Breach of Condition and Express Termination Right: A Distinction With A Difference" (2017) 133 LQR 395 and J W Carter, Wayne Courtney and Gregory Tolhurst "The detrimental impact of 'repudiatory breach' on discharge for breach of contract" [2020] JBL 287.

279 Similarly, we note that Prof Carter takes the view that an express termination clause simply stipulates condition precedents to *the right to terminate*, but does not *ipso facto* create conditions of a contract (see J W Carter, "Termination Clauses" (1990) 3 JCL 90 at 105):

> Given that the function of the clause is to confer powers of termination rather than to define the terms of the contract, the *better approach is to say that although the occurrence of an event within the clause is a condition precedent to the right to terminate, neither the clause itself nor the terms to which the clause applies are conditions in the sense of essential contractual obligations*. [emphasis added]

280 Accordingly, notwithstanding the earlier criticisms levelled against the decisions in *Financings* and *Lombard*, these cases remain good law in the UK. Importantly, the parties appear to accept this as well, and there is no argument before us that the *Financings* principle should be reconsidered or revisited. We therefore proceed on the basis that the principle in *Financings* and *Lombard*, as interpreted in *Tan Wee Fong* (see [269] above), is applicable when the court is determining the measure of common law damages that would flow from a breach giving rise to a party's contractual right to terminate.

281 The final question, however, is whether the principle in *Financings* and *Lombard* ([273] *supra*) applies to its fullest extent in our present case, when the analysis of the measure of common law damages recoverable takes place *within* the context of the court assessing whether the LD clause is a genuine pre-estimate of loss. An important consideration is that the assessment of the genuineness of an LD clause is a question of construction that must be decided at the time the contract was entered into, and not as at the time of breach (see *Dunlop* ([1] *supra*) at 87; *Cavendish Square Holding* ([1] *supra*) at [9]). We would caution, therefore, against allowing the party seeking to uphold the LD clause to rely on hindsight reasoning – for instance, by justifying the LD clause

on the basis of their knowledge, *after the fact*, that in the circumstances there had been a common law right of termination arising concurrently with their contractual right of termination. That would not be correct, as the question in each case is whether the LD clause is extravagant in comparison to the greatest loss that could have reasonably been anticipated *at the time of contracting* (see *Philips Hong Kong* ([174] *supra*) at 785). If it were otherwise, it would be all too easy for parties to justify what would otherwise be an extravagant LD clause with the benefit of hindsight, and with their knowledge of the loss that may in fact have sounded. Nonetheless, we do not propose to set down strict principles for when this problem of hindsight reasoning may arise in the assessment of LD clauses, given the myriad ways in which these clauses – and indeed all contracts – may be drafted. We will only state that it will all depend on the particular facts as well as the circumstances of the case, and, in particular, the wording of the relevant termination clause.

282 In this case, as has been analysed in earlier sections (see [231] above), we are of the view that Seraya did have two concurrent rights of termination in relation to both ERA 99 and ERA 101. This was because the breach on Denka's part that allowed Seraya to terminate the contracts under cl 8.2 also constituted a repudiation of the ERAs. We refer, in particular, to cll 8.2.1 and 8.2.2 of ERAs 99 and 101, which allow Seraya to lawfully terminate the contract upon Denka's failure to pay "*any* amount due and payable" [emphasis added], or a breach of "*any* of [Denka's] obligations under this Agreement" [emphasis added] which is not remedied within ten calendar days, respectively. These clauses allow for a termination under Situation 1 of *RDC Concrete* ([60] *supra*).

283 At the same time, one can see how the wide wording of cll 8.2.1 and 8.2.2 implicitly contemplate that some instances of breach falling within those clauses could, simultaneously, amount to serious breaches of the contract. For

instance, as Denka has done, if it refused to carry out its obligations of purchasing electricity at all under the ERAs, this would amount to both a repudiation within Situation 2 of *RDC Concrete* ***and also*** give rise to Seraya's right to terminate the contract by relying on cl 8.2.2, *ie*, Situation 1 of *RDC Concrete*. That being the case, we would accept that, in this situation, the greatest loss to Seraya that could conceivably flow from these types of breaches would be the loss of the entire remainder of the ERAs. There is no problem of hindsight reasoning in this case because, on an interpretation of ERA 99 and ERA 101, the possibility of a repudiatory breach within Situation 2 of *RDC Concrete* giving rise to damages for the loss of the entire contract was within the contemplation of a reasonable person in the parties' position at the time of contracting (*quaere* whether, in contrast to Situation 2 and Situation 3(a) of *RDC Concrete*, there could be a fact situation involving Situation 3(b) of *RDC Concrete* that would not involve hindsight reasoning since, by its very nature, such a situation necessarily involves the parties "waiting and seeing" what the *actual* nature and consequences of the breach are (this last-mentioned situation, however, is *not* the situation in the present case)). The LD formula, calculated as a reasonable percentage of Seraya's expected revenue over the remaining duration of the ERAs from the time of the relevant breach by Denka (see below at [307]), is accordingly not out of all proportion to the greatest loss that could be anticipated in the present case.

284 The effect of our finding is that the broad shape of the LD formula in the ERAs is acceptable. We go on to consider, finally, the specific components of the LD formula and in particular the defensibility of the 40% multiplier in the LD clauses.

(III) THE 40% MULTIPLIER

285 The final question in relation to the greatest loss test is whether the 40% multiplier is an extravagant estimation of Seraya's loss. At trial, much time was expended adducing expert evidence from Mr Somani (on behalf of Seraya) and Mr Thomas (on behalf of Denka) as to what would have been the pre-estimated loss incurred by Seraya in the event of the termination of the ERAs. In this connection, Mr Lim, Seraya's primary witness at trial, also gave evidence as to various considerations that went into the 40% multiplier.

286 Mr Somani's evidence can be broadly summarised as follows. Based on his calculations, the estimated annual loss for Seraya *and* YTL was between \$3.4m and \$8.3m or between 31% and 76% of the annual contract value of the unexpired term of the ERAs. This range of projected annual loss excludes the CFD (as we have found above) and was computed based on five different scenarios adjusting, in simple terms, for variables such as historic prices and possible decrease or increase in electricity demand (*ie*, low and high spark spread scenarios respectively). Mr Somani testified that anything around 40% to 50%, being the lower to middle part of the aforementioned range, would avoid both under and over-recovery. Under cross-examination, Mr Somani conceded that the figures might have to be adjusted downwards slightly by a factor of 1.12 to account for the fact that the denominator to the LD formula was based on the average of past invoices, which included third party charges that would no longer be incurred by Seraya or YTL post-termination. On this basis, the more accurate range of pre-estimated loss would be *between 27.7% and 67.9%* of the annual contract value, which works out to be between \$3.0m and \$7.4m annually. Thus, taking September 2014 as the reference point of termination of the ERAs (for ease of calculation), Seraya's total pre-estimated

loss over the remaining duration of the ERAs would be *between $19.0m and $46.8m* approximately.

287 The burden of proof rests on Denka to prove on balance that the 40% multiplier, when assessed objectively at the time of the formation of the ERAs, was *not* a genuine pre-estimate of Seraya's losses flowing from the termination of the contracts.

288 The first criticism raised by Denka of Mr Somani's evidence is that in calculating Seraya's pre-estimated loss, Mr Somani took into account the option for Denka to convert from an index price plan to a fixed price formula, amounting to a loss in hedged fuel cost (see [27] above). Under the ERAs, this option could be exercised for up to three years (*Seraya Energy (No 1)* at [40]). According to Mr Thomas, however, the option ought not to be factored into the analysis because it was "completely speculative".

289 With respect, we disagree. Evidently, this option might be exercised if it was thought by Denka that the index prices would be going up and it wanted to fix its price of electricity. The evidence was that if such an option had been exercised by Denka, Seraya or YTL would in turn obtain a hedge from an external party to protect its interests. In the event that Denka terminated the ERAs during the three-year period however, this meant that either Seraya or YTL would be saddled with an external hedge which would have to be unwound at a certain cost. While it is undisputed that Denka did not exercise the said option in any of the ERAs and no third-party hedges were obtained, the inquiry at hand is what the *greatest conceivable* loss would have been at the *ex ante* moment. The fact is that the parties had agreed to this option in the ERAs and it was impossible at the time of contracting to say one way or another whether the option would be exercised. It is clear to us that this option under the ERAs

was a relevant consideration for assessing Seraya's pre-estimated loss and thus, Mr Thomas's criticism on this point is unfounded.

290 Secondly, a more fundamental critique levelled against Mr Somani's expert evidence on the pre-estimated loss is that it analysed the losses of Seraya and YTL together. Whilst this point appears to have some force at first glance, we do not think much weight can be given to it. On a careful review of Mr Somani's evidence, it seems to us that the aforementioned figures do in fact constitute the pre-estimated losses of *Seraya*. In simple terms, Mr Somani's assessment of annualised pre-estimated losses consisted of the following steps:

(a) First, the contract margins earned by Seraya under the entire remaining term of the ERAs are calculated;

(b) Second, the spot market sales, *ie*, the amount which Seraya could have earned by selling electricity to an alternative party on the open market after termination of the ERAs, are determined;

(c) Third, the difference between (a) and (b) constitutes the net loss.

(d) Fourth, the loss in hedged fuel cost is added to the loss computed in (c) to derive the *total net loss*. As mentioned earlier, the hedged fuel cost refers to the cost that arises from unwinding any hedges obtained by either Seraya or YTL pursuant to the option to convert from a fuel index formula to a fixed price formula under the three ERAs.

(e) Finally, the total net loss in (d) is compared against the annual value of the unexpired ERA contract period (*ie*, the annualised contract value) to derive the percentage loss.

The result of this assessment (after taking into account the downwards adjustment by a factor of 1.12 (see [286] above)) is, as mentioned, that the annualised pre-estimate of loss ranges from 27.7% to 67.9% depending on the applicable scenario.

291 In our view, Mr Somani's methodology as summarised above reveals that his evidence as to the range of pre-estimate losses is concerned with *Seraya's* losses. In this connection, at trial, there was some dispute as to whether the costs incurred by *YTL* for its own hedging for gas supply contracts it had entered into for generation of electricity ought to be factored into the assessment of Seraya's pre-estimated losses from termination of the ERAs. This point seems to have arisen because Mr Lim, Seraya's primary factual witness, had attested that one of the factors which justified the 40% multiplier in the LD formula was the fact that YTL might not be able to meet its take or pay obligations under its gas supply contracts when the retail side of the business under the ERAs collapses. Whilst Mr Somani appeared to agree with Mr Lim that this was relevant to the overall analysis as a matter of commercial sense, Mr Somani's report explicitly states that YTL's take or pay costs for its gas contracts were *not* taken into account for the computation of pre-estimated losses above.

292 In our view, Mr Somani's evidence rests on cogent and reasoned computations and assumptions. The confusion surrounding the apparent grouping of losses seems to have arisen primarily because of Mr Somani's emphasis on how Seraya and YTL ought to be viewed as one when considering questions of profit and loss as a matter of commercial reality. Whilst that may be the case having regard to the structure of the industry and in particular, the presence of vertically integrated gentailers such as Seraya and YTL, it is well-established that as a matter of law these are separate corporate personalities and

the single economic entity doctrine is not applicable in Singapore. In this vein, we note that Seraya had taken the position both at trial and in its closing submissions below that, applying the legitimate interest test espoused in *Cavendish Square Holding* ([1] *supra*), the court would be entitled to take into account the interests of YTL even though it was, strictly speaking, a third party to the ERAs. Given our affirmation of the *Dunlop* ([1] *supra*) principles, it is not necessary to say more about this submission. For present purposes, we are satisfied that the substance of Mr Somani's evidence accurately reflects Seraya's pre-estimated loss.

293 In our judgment, the 40% multiplier relied on by Seraya is well within the range of loss that may reasonably be incurred by Seraya, as borne out by Mr Somani's evidence. We found Mr Somani's evidence to be both independent and reliable, contrary to the suggestions of Mr Thomas. It is clear that the 40% multiplier falls squarely within the range of annualised losses estimated by Mr Somani, and is in fact on the slightly lower end of the range. More specifically, the LD sum claimed by Seraya in its statement of claim is approximately $30.8m (after deducting for $1.85m received by Seraya from the three bank guarantees) (see [48(c)] above). This sum is excluding interest, and is slightly below the mean of *$19.0m and $46.8m*.

294 As mentioned, Mr Lim also gave evidence that whilst the 40% multiplier in the LD clauses was not derived from an arithmetic calculation, it took into account five main factors that affected the value of the ERAs. We briefly consider them.

295 To understand the five factors, it is first necessary to briefly explain the contractual rate for electricity sold by Seraya to Denka under the ERAs. As set out in all three ERAs, this is: "S$42.50 + 0.196 x HSFO x FX". HSFO and FX

refer respectively to High Sulphur Fuel Oil ("HSFO") prices and the US$ to S$ foreign exchange rate ("FX") as published on the stipulated indices. The formula consists of two main components: (a) the non-fuel component which is represented by S$42.50; and (b) the fuel component represented by "0.196 x HSFO x FX". The fuel component essentially reflects the cost of electricity *generation* based on prevailing cost of the HSFO and FX. The factor of 0.196 for the fuel component is derived based on an estimation of YTL's average efficiency in electricity generation.

296 According to Mr Lim, the 40% multiplier takes into account five factors:

(a) The difference between the contractual rates under the ERAs and the historical Pool Price from 2003 to 2012, taking into account the fluctuations in the price of the HSFO and FX. This is essentially the projected profit margin for Seraya under the ERAs based on historical figures, excluding the operation of the CFD. The range of fluctuation between the rates under the ERAs and the historical Pool Price was up to 38%.

(b) The non-fuel margin earned by Seraya under the ERAs. This was calculated by deducting the estimated fuel-related cost from the contract rate under the ERAs for the period from 2003 to 2012, taking into account the HSFO and FX fluctuations. The range of fluctuation of the non-fuel margin based on the same historic rates is approximately 45% compared to the rates under the ERAs.

(c) The softening of the electricity price and anticipated drop in the Pool Price for the duration of the contract period of the ERAs due to various market factors including the foreseeability (in 2012 when the ERAs were signed) that large generation capacity would come into the Singapore market.

(d) As mentioned earlier, there was an option to convert from fuel index formula to a fixed price formula under the ERAs that could be exercised by Denka for up to three years (see [289] above). In the event those options were exercised, Seraya/YTL would obtain hedges for the HSFO and/or FX with third parties. If the ERAs were subsequently terminated for whatever reason, Seraya/YTL would likely incur losses in unwinding those external hedges.

(e) As also mentioned, the potential liability of YTL in not being able to meet its take or pay volume under its gas contracts needed for generation, should the ERAs be terminated (see [291] above).

297 Based on the foregoing factors, Seraya argues that the 40% multiplier in the LD clauses is a genuine pre-estimate of loss rather than a penalty. It argues that the figure is also supported by the expert evidence of Mr Somani, as explained above. In the light of the difficulty with pre-estimating its loss as highlighted by the variables above, Seraya also suggests that the LD clauses are *not* penalties, consistent with principle 4(d) of Lord Dunedin's statement in *Dunlop* ([1] *supra*).

298 Given our findings on Mr Somani's expert evidence, it is not strictly necessary for us to deal with each of these factors raised by Mr Lim. Nonetheless, we make a few observations in this regard.

299 First, whether or not Seraya *in fact* took into account these considerations when formulating the LD formula, is relevant but not dispositive, as the Judge himself acknowledged (see *Seraya Energy (No 1)* at

[198]). In our view, Mr Lim's evidence is simply a factor going towards the genuineness of the 40% pre-estimate and whether it is justified.

300 Second, we are unable to accept Denka's submissions that the LD formula is "arbitrary and inexplicable". Quite apart from Mr Somani's evidence as analysed above, the factors identified by Mr Lim seem to us to be relevant considerations for estimating loss, which are both backward- and forward-looking. In particular, the first two factors are based on the historical data in Seraya's internal database compared with the rates under the ERAs, and there are significant fluctuations of 38% (in respect of the Pool Price) and 45% (in respect of the non-fuel margin). To be clear, whilst we do not think that the losses of Seraya in the event of termination of the ERAs were *impossible* to pre-estimate (as was more clearly the case in *Clydebank* ([106] *supra*), *Dunlop* and *Cavendish Square Holding* ([1] *supra*)), we accept that the evidence demonstrates that *precise* pre-estimation of loss is not always possible.

301 Third, it is not disputed that the electricity market did in fact soften after the conclusion of the ERAs (see [296(c)]). This was due to large generation capacity projected to come on-stream from various generation companies; the continuing shift towards the use of natural gas instead of fuel oil; and the government's efforts in diversifying energy sources for power generation, including the import of liquefied natural gas (LNG). The evidence shows that this is publicly available information known to industry players at the material time. Notably, Mr Thomas conceded in cross-examination that it was foreseeable at the time of contracting of the ERAs that electricity prices might face downward pressure largely for the same reasons identified by Mr Lim. In fact, the evidence shows that Mr Thomas himself took this position in an article published by him in September 2013.

302 In the premises, it cannot be said that the LD formula in the ERAs is extravagant when compared to the greatest conceivable loss of Seraya when the contracts are terminated. As explained, the 40% multiplier in the LD formula falls squarely within the range posited by Mr Somani. At the same time, the aforementioned factors identified by Mr Lim also seem to us to be relevant to the pre-estimation of Seraya's losses.

(2) The "single lump sum" test

303 Apart from the greatest loss test in *Dunlop* ([1] *supra*), there is a ***presumption*** – but no more – that when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, *some of which may occasion serious and others but trifling damage*" [emphasis added], it is a penalty (see *Dunlop* at 87 citing *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886) 11 App Cas 332 ("*Elphinstone's Case*")).

304 A key plank of the Judge's reasoning that the LD clauses at hand were penalties was that they applied to a variety of situations of differing importance and consequence (see *Seraya Energy (No 1)* at [205]–[206]). For example, it was noted that under ERAs 99 and 101, cl 8.2.2 could be relied upon to terminate the contract and claim LD in the event of a breach of "*any* obligations" by Denka [emphasis added]; similarly, cl 8.2.1 could be resorted to in the event of Denka's failure to pay "*any* amount" [emphasis added] due and payable under the contract. Similar provisions are also found in ERA 100.

305 While we agree with the Judge that the provisions in question do appear to violate the single lump sum test, this only gives rise to a rebuttable presumption that the clauses are penalties. We must emphasise that the presence of a single lump sum payment in a contract is merely one indicia and is far from

determinative in the application of the Penalty Rule. In fact, we think that between principles 4(a) and 4(c) of *Dunlop*¸ it is the former, *ie*, the greatest loss test, that is of overarching importance. Where the court has found that the LD clause is not extravagant or out of all proportion to the greatest loss that could arise under the contract, this *should* lead the court to the conclusion that the LD clause is a genuine pre-estimate of loss and not a penalty. Once that test is passed, the court should be slow to criticise or to draw fine distinctions about how the LD clause could have been made *fairer* to the party in default. This is especially true where the court is dealing with sophisticated commercial parties who can be expected to look after their interests at the time of contracting, as both Seraya and Denka surely are. To be clear, we do not suggest that the single lump sum test by itself can never point the court towards the conclusion that an LD clause is a penalty. It must, however, be taken in the round together with the other relevant factors in the *Dunlop* framework.

306 In this case, we would note that in the ERAs, the LD formula is gradated according to the remaining duration of the contracts from the date of termination. This, in our view, is one factor that saves the LD formula from being regarded as a truly indiscriminate lump sum to be paid by Denka to Seraya upon a breach of any sort. For instance, in *Elphinstone's Case*, the respondent company had owed certain obligations to the appellant relating to the levelling and soiling of the surface of two slag hills. The contract stipulated that if the respondent failed to complete the levelling and soiling within the time specified, the respondent would owe the appellant a sum of money at a rate of *£100 per imperial acre* of land not restored by that time (at 340–341). As it turned out, despite an extension of time, the slag hills were, to a large extent, neither levelled nor covered with soil. The House of Lords found that the clause

stipulating payment for late performance was not a penalty. Lord Watson famously held as follows (at 342–343):

> But the payments stipulated … are, in my opinion, liquidated damages, and not penalties. When a single [lump] sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated … are not of that character; they are *made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure.* I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties… [emphasis added]

307 The LD formula in the ERAs is evidently expressed as a proportion of the contract sum which Seraya would have received had the ERAs been fulfilled. It will be recalled that the formula for the LD payable is A x B x 40%, where A refers to the *number of months* (rounded down to the nearest month) between the date the Contract Duration is terminated and the Expiry Date; and B is the *arithmetic average* of the amount payable by Denka to Seraya in either two or three billing periods *preceding the termination* of the Contract Duration. To our minds, such a formula is eminently sensible as a matter of logic in so far as it attempts to recoup a proportion of what Seraya would have received under the ERAs. As we explained earlier also, the 40% multiplier is a reasonable one on the expert evidence.

308 Therefore, in the light of our assessment as to Seraya's greatest loss, we are satisfied that any presumption from the single lump sum test is rebutted.

Conclusion on Issue 2(a)

309 In sum, we are satisfied that the LD clauses are not penalties. Having regard to the loss of bargain damages, which in our judgment would have been available as well as the expert evidence in relation to the 40% multiplier, the sums payable under the clauses cannot be said to be extravagant or unconscionable when compared with the greatest conceivable loss under the ERAs. We therefore allow Seraya's appeal on its claim under the LD clauses.

Issue 2(b) – Common law damages

310 In the light of our finding above that the LD clauses in the ERAs are enforceable, it is not necessary to determine the common law damages payable by Denka to Seraya.

Issue 2(c) – Did Seraya fail to mitigate its loss by rejecting the Mitigation Offer?

311 Turning to the issue of mitigation, Denka argues that even if it had repudiated the ERAs, its offer to continue purchasing electricity under the ERAs pending resolution of the dispute ought to have been accepted by Seraya as part of its duty to mitigate its loss. This offer was first made by Denka in its letter of 3 September 2014, where Denka denied any allegation of repudiation and stated:

> Our lawyers have further advised us that, without prejudice to our rights, we hereby offer to continue the purchase [of] electricity from your company on the basis of [ERAs 99, 100 and 101] while the dispute is determined by the Singapore High Court but without admission of your claims. This is to protect our rights. …

312 In its reply to Denka on 4 September 2014, YTL did not respond to the Mitigation Offer. Denka alluded to the offer again in a further letter dated 8 September 2014:

> Without prejudice to the above matters, we have already stated in our letter … that we are willing to continue the purchase of electricity on the basis of the [ERAs] while the dispute is determined by the Singapore High Court but without prejudice to our rights. There was accordingly no basis for you to claim alleged repudiation in any case or to alleged [*sic*] losses or penalties, and if you now choose to discontinue the electricity, that is a matter of your own choice.

313 Denka contends that Seraya ought to have accepted the offer, which was in effect to perform the ERAs until such time as the court determined whether Denka was in breach of the ERAs. This state of affairs, Denka contends, would have put Seraya in exactly the same position as if the contracts had been performed, should the court subsequently agree with Seraya on the issue of repudiation. Denka acknowledged that accepting the Mitigation Offer would entail Seraya giving up its right to terminate the ERAs and claim for LD, but submits that Seraya was not entitled to claim LD in any case since any loss could have been avoided by Seraya accepting Denka's offer to continue purchasing electricity.

314 Even assuming, in Denka's favour, that a claim for LD is subject to the principles of mitigation, the real issue remains the reasonableness or lack thereof of the Mitigation Offer in the circumstances. It is for Denka to show that it was clearly unreasonable for Seraya not to have taken up the Mitigation Offer.

315 The general principles on mitigation are well-established and need no detailed exposition. In *The "Asia Star"* [2010] 2 SLR 1154, this court noted (at [31]–[32]):

> 31 The existence of the duty to mitigate may also appear to be an unfair obligation to impose on the aggrieved party as it is the innocent party in relation to a breach of contract (in that the defaulting party is to blame for the breach of contract). ***To minimise any potential unfairness to the aggrieved party in this regard, the courts have sought to ensure that the standard of reasonableness required of the aggrieved party will not be too difficult to meet*** (see, *eg*, *OCBC Securities Pte Ltd v Phang Yul Cher Yeow* [1997] 3 SLR(R) 906 at [86]). For instance, the aggrieved party is not required to act in a way which exposes it to financial or moral hazard, such as taking steps which might jeopardise its commercial reputation or partaking in hazardous litigation against a third party to reduce its loss (see *Goode on Commercial Law* (Ewan McKendrick ed) (LexisNexis, 4th Ed, 2009) at p 136 as well as *McGregor on Damages* ([24] supra) at paras 7-081 and 7-087). ***The requisite standard of reasonableness is said to be an objective one; yet, it clearly also takes into account subjective circumstances such as the aggrieved party's financial position*** (see below at [58]). The reasonableness inquiry, therefore, falls short of being purely objective.
>
> 32 The many sub-rules, qualifications and nuances that have built up around the reasonableness inquiry may not infrequently appear to be confusing and unwieldy. Nevertheless, when one takes a step back to look at the object of this inquiry as a whole, it becomes clear that the inquiry amounts to nothing more than the common law's attempt to reflect *commercial and fact-sensitive fairness* at the remedial stage of a legal inquiry into the extent of liability on the defaulting party's part. The concept of reasonableness in the context of mitigation is a flexible one. ***In essence, it bars an aggrieved party from profiting or behaving unreasonably at the expense of the defaulting party***, and encapsulates complex interplaying notions of responsibility and fairness. As with any principle of law that encapsulates notions of fairness, the principle of mitigation confers on the courts considerable discretion in evaluating the facts of the case at hand in order to arrive at a commercially just determination.
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> [emphasis in italics in original; emphasis added in bold italics]

316 In our view, there is one fundamental flaw with the Mitigation Offer. It appeared, in principle, to be an offer that would minimise or completely eliminate the loss to Seraya from Denka's repudiation of the ERAs. But on closer examination of Denka's letters, it becomes apparent that it was not so

much an "offer" as it was simply an invitation for the parties to continue with their performance of the ERAs as before, *notwithstanding* Denka's earlier repudiation. This, in our view, flows from the way in which Denka couched the offer, for example when it said in the 8 September 2014 letter that it was "willing to continue the purchase of electricity on the basis of the [ERAs] while the dispute is determined by the Singapore High Court but without prejudice to [its] rights", and that because of that, "there was accordingly *no basis for [Seraya] to claim alleged repudiation in any case or to alleged losses or penalties*" [emphasis added]. To be clear, what Denka was offering was *not* to enter into separate contractual arrangements in which it would purchase electricity on the *same or similar terms* as the ERAs, for a duration to be decided by the parties. As the Judge noted, if such an offer had been made, it would have given Seraya more certainty (see *Seraya Energy (No 1)* at [154]). Rather, it seems that Denka's offer would require Seraya to agree to continue *their mutual performance of the ERAs*, notwithstanding Seraya's position that Denka had repudiated the contracts by its letter of 20 August 2014.

317 The implications of this offer must be viewed reasonably from Seraya's position. In Seraya's view, Denka had clearly indicated that it would "cease" its purchase of electricity under the ERAs, which amounted to repudiatory conduct and which would allow Seraya to terminate each of the ERAs and to claim for LD. We refer, at this point, to the trite principle that faced with the counterparty's repudiation, an innocent party is entitled to elect between accepting the repudiation and terminating the contract, or rejecting the repudiation and requiring the defaulting party to perform its end of the bargain (see the House of Lords decision of *Heyman and another v Darwins Ltd* [1942] AC 356 at 361). Denka's offer amounted to nothing more than a suggestion that Seraya should continue with the ERAs as before – in effect, a suggestion that

Seraya should choose to *affirm* the contracts despite Denka's repudiation and to allow the parties to continue on as before, while the matter went to litigation. But there was no obligation on Seraya to accede to Denka's request to continue with the ERAs. Seraya was perfectly entitled, in law, to choose to terminate the ERAs instead and to claim the benefit of the LD clauses from that point onward. Despite Denka suggesting that the performance of the ERAs might continue as before, Denka was not offering any *additional* benefit to Seraya for choosing to continue with the ERAs.

318 We endorse, in this vein, the Judge's observations below that, in reality, Denka's offer of mitigation was a purely one-sided bargain that benefited only Denka. The Judge had analysed the different situations that would result if the Mitigation Offer had been accepted, and said as follows (see *Seraya Energy (No 1)* at [152]–[153]):

> 152 At first blush, the Mitigation Offer appeared reasonable. However, on closer examination, it was in reality a one-sided offer. Denka's worst case scenario was to continue purchasing and paying for electricity at the contractual rates. On the other hand, it would not have to do so if it won, *ie*, Denka would only have had to pay for electricity at the market rates up till the date of the court's decision and could thereafter withdraw from the ERAs. For [Seraya], its best case scenario was to continue supplying electricity and be paid based on the contractual rates with the ERAs continuing. However, if it lost, it would have to refund Denka the difference between the contractual rates and the market rates, and be subject to the fact that Denka would withdraw from the ERAs.
>
> 153 *In either scenario, Denka would not be liable for LD at all if the Mitigation Offer was accepted. Yet there was no additional advantage or benefit to [Seraya] for giving up its claim for LD.* If the Mitigation Offer was not accepted and Denka was wrong in withdrawing from the three ERAs, [Seraya] would have been entitled to stop supplying electricity to Denka and claim LD (subject to the argument about non-enforceability of the LD provisions). …
>
> [emphasis added]

319 In the Judge's words, the Mitigation Offer was "Denka's attempt to blow hot and cold and hedge its bets without paying any premium for the hedge" (see *Seraya Energy (No 1)* at [156]). We entirely agree with that characterisation of Denka's offer. No reasonable person in Seraya's position, appreciating the true contours of the Mitigation Offer, would have accepted it.

320 We therefore dismiss the argument that Seraya failed to mitigate its loss when it rejected Denka's offer to continue purchasing electricity until the determination of the dispute by the High Court. In the circumstances, it is also unnecessary for us to decide the theoretical issue of whether the concept of mitigation is applicable to a claim for LD.

Issue 2(d) – Was Denka obliged to pay for the additional electricity supplied after 20 August 2014 at the open market price?

321 We turn to address the remaining arguments on remedies. Denka has argued, both here and below, that if its letter of 20 August 2014 amounted to a repudiation of the ERAs, it was entitled to pay for electricity supplied by Seraya after that date at the open market price (*ie*, the price charged by MSSL), and not the higher contractual rate under the respective ERAs. In particular, Denka's objection is that Seraya could not, on the one hand, claim that there was repudiation by Denka and on the other hand, continue to perform ERA 99 and ERA 101 until it chose to terminate those contracts two to three months later.

322 This argument has no merit and we have no hesitation in rejecting it. What amounts to a reasonable time for indicating acceptance of a repudiation must depend on all the circumstances of the case. As we analysed earlier under Issue 1 (at [220]–[230]), in the months following the letter of 20 August 2014, Seraya repeatedly tried to obtain confirmation that DSPL was not willing to withdraw its repudiation of ERA 99, and that DAPL was taking the same

position as DSPL in terms of its desire to cease purchasing electricity under ERA 101. Such confirmation was not forthcoming, and it was in these circumstances that ERA 99 and ERA 101 were terminated as of 15 October 2014 and 14 November 2014 respectively. Seraya's conduct was reasonable in the circumstances, and Denka is required to pay for the electricity supplied at the agreed contractual rates until the actual dates of termination of the ERAs.

Issue 2(e) – Was Seraya entitled to interest on the sums awarded?

323 Denka also argues, as it did below, that no interest should be awarded on any sums due to Seraya. In Denka's submission, Seraya was guilty of protracted delay in the conduct of the Suits, in particular through the filing of many interlocutory applications, evasion of requests for particulars and interrogatories, and default in court timelines for the filing of affidavits of evidence-in-chief and expert reports.

324 The Judge rejected these arguments and awarded interest to Seraya at the rate of 5.33% per annum from the date of the writ to the date of full payment, as he was not persuaded that Seraya's conduct disentitled it from interest on the sums due to it (see *Seraya Energy (No 2)* at [9]). We agree. The instances cited by Denka as examples of Seraya's dilatory conduct do not take Denka's case very far. We note that the majority of Seraya's interlocutory applications were ultimately successful in whole or in part, and were not the "hopeless" endeavours that Denka had made them out to be. The fault for impeding the expeditious resolution of the Suits cannot be laid at Seraya's door alone; Denka's own pleadings were criticised by the Judge for being "verbose and repetitive" (see *Seraya Energy (No 1)* at [67]). In these circumstances, there was no reason to depart from the general rule and disentitle Seraya to interest on the

sums awarded to it. We deal with the precise order on interest below (see [329]–[330]).

Issue 3 – Costs of the action

325 After the release of *Seraya Energy (No 1)* and *Seraya Energy (No 2)*, the Judge ordered that the parties bear their own costs in the action. However, on receiving further arguments in particular relating to the OTS, the Judge set aside his earlier decision on costs. In *Seraya Energy (No 3)*, having regard to the fact that Denka had issued an OTS that was open for five months and which was more favourable than the final award on damages that Seraya obtained, the Judge awarded Denka costs on a standard basis from the date of service of the OTS, and no costs to Seraya from the date the writ was filed. For simplicity, the Judge awarded Denka 90% of the costs of the action, noting that most of the work for the trial would have taken place after the service of the OTS (see *Seraya Energy (No 3)* at [18]–[19]).

326 In the light of our decision to allow the appeal on Seraya's claim for LD, however, the costs ordered at the trial below must be reconsidered. As mentioned, the LD sum claimed by Seraya amounts to approximately $30.8m. This is far greater than the sum offered in the OTS of $2,642,450. In principle, therefore, the costs consequences under O 22A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) no longer apply and the costs orders below must be modified.

327 We would award Seraya the costs of the trial below to be taxed or agreed. The original decision not to award costs must be seen in view of the fact that the damages recovered in the High Court were far less than was claimed in Seraya's pleadings. That order should not be maintained given Seraya's success

in its claim for LD on appeal and the substantial increase in the amounts to which it is entitled.

Conclusion

328 In conclusion, we allow Seraya's appeal in CA 38 with regard to its claim for LD, and allow its appeal in CA 101 in the manner specified at [326]–[327] above. We dismiss Denka's appeals in CA 37 and CA 100 in their entirety.

329 With reference to Seraya's statement of claim, we award Seraya the net sum of $30,829,369.79 being the sum owed to it under the LD clauses in the three ERAs. As for the rate and period of interest to be awarded, we are inclined to think that a more modest interest rate and more limited period of time than is typically awarded would be appropriate in the circumstances since Seraya's successful claim for LD essentially allows it to collect payment under the ERAs in advance and it may not be fair to Denka to uniformly award Seraya interest at the standard rate.

330 The parties are to file, within ten days from the date of this judgment, written submissions limited to ten pages on: (a) the rate and period for which interest on the sum of $30,829,369.79 should be awarded, and (b) the costs of these appeals, unless the parties are able to come to an agreement on the latter.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Judge of Appeal

Judith Prakash
Judge of Appeal

Tay Yong Kwang
Judge of Appeal

Steven Chong
Judge of Appeal

Lee Eng Beng SC, Tay Twan Lip Philip and Yip Li Ming (Rajah & Tann Singapore LLP) for the appellants in Civil Appeals Nos 37 and 100 of 2019 and the respondents in Civil Appeals Nos 38 and 101 of 2019;
Thio Shen Yi SC, Melvin Chan, Koh Li Qun Kelvin and Nguyen Vu Lan (TSMP Law Corporation) for the appellant in Civil Appeals Nos 38 and 101 of 2019 and the respondents in Civil Appeals Nos 37 and 100 of 2019.

Table of abbreviations

Abbreviation	Reference
ASA	Ancillary supplemental agreement to record the Concession Terms
CFD	Contract for Differences dated 1 April 2012
Committed Capacity	Maximum amount of steam that YTL was obliged to supply to DSPL on an hourly basis under the SSA
Concession Terms	Concession of the original terms of the SSA offered by YTL to DSPL
Additional Concession Terms	Additional terms to the earlier concession offer
DAPL	Denka Advantech Pte Ltd
DSPL	Denka Singapore Pte Ltd
ERAs	Electricity retail agreements
EMC	Energy Market Company Pte Ltd
HEUC	Hourly Energy Uplift Charge
Minimum Flow	Minimum Acceptable Flow Level for DSPL's steam consumption under the SSA
Mitigation Offer	Denka's offer to continue purchasing electricity under the three ERAs while the dispute was being determined by the court
MSSL	Market Support Services Licensee (SP Services Ltd)
NEMS	National Electricity Market of Singapore

SELTERC	Seraya Energy Low Tension Electricity Retail Conditions
SSA	Steam supply agreement dated 16 January 2012
TOP Volume	Minimum volume of steam which Denka had to take or pay from YTL each month under the SSA
USEP	Uniform Singapore Energy Price
YTL	YTL PowerSeraya Pte Ltd

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