

Punitive Damages & Contract Law: Implications of Airtrust¹

I. Introduction

In *PH Hydraulics & Engineering v Airtrust*,² the Singapore Court of Appeal (“CA”) addressed a significant point of law in respect of the availability of punitive damages for the breach of contract by a party. In their judgment, the CA held that concept of punishment has no place in the common law of contract. This case note aims to highlight the various arguments put forth by the CA in refusing to award punitive damages.

II. Background

The dispute revolved around a Sale and Purchase Agreement for a 300-ton Reel Drive Unit, entered into by PH Hydraulics & Engineering Pte Ltd (“**PH Hydraulics**”) and Airtrust (Hong Kong) Ltd (“**Airtrust**”). Under the SPA, PH Hydraulics undertook to design and manufacture the Reel Drive Unit for sale to Airtrust. Pursuant to this agreement, a third party, ABSG Consulting was engaged to ensure that the manufacturing was up to standard. ABSG Consulting ultimately issued three certificates stating that the Unit was considered satisfactory.³

Unfortunately, slightly over a year after delivery for the Unit was taken, it was damaged while in use. In the course of the repairs, and upon further investigations, Airtrust discovered multiple problems with its design and manufacture. This led Airtrust to commence a suit against PH Hydraulics for breach of the agreement.⁴

III. The lower court decision

The High Court (“HC”) found that PH Hydraulics’ conduct in carrying out its part of the contract was “outrageous and reprehensible”.⁵ It found that PH Hydraulics was fraudulent in the way it procured the certification, and had an intent to mislead Airtrust into believing that

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² *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26, (“**PH Hydraulics**”).

³ *Id.*, at [6]–[10].

⁴ *Id.*, at [10].

⁵ *Id.*, at [21].

RDU was fully functional. Amongst others, the court found that PH Hydraulics had misled ABSG Consulting (the firm in-charge of providing the certification) into believing that wind load need not be considered for the design review, and had misled Airtrust into believing that it had obtained full certification from ABSG thought it had only received partial certification.⁶ Based on these, the HC felt it imperative that punitive damages be imposed on PH Hydraulics. PH Hydraulics appealed the decision, on the basis that there is no room for punitive damages in contractual law.

IV. Rejecting the concept of punitive damages

The CA disagreed with the HC, advancing two main arguments against the awarding of punitive damages. First, the CA relied on the nature of contractual law as a voluntary agreement between two parties, which was antithetical to the imposition of punitive damages. Secondly, the CA found that there was no “remedial gap” in the law that justified the need for punitive damages to be awarded in contract.

A. The nature of contract law

It is accepted that the traditional basis of damages in contractual law is to put the innocent party - the party not in breach - in a position as if the contract had been performed.⁷ In short, damages for breach of contract are meant to be mainly be compensatory in nature, and not punitive. This stands in comparison to criminal or tort law where punishment of the wrongdoer is accepted (albeit in restricted categories in the latter).⁸ The question that thus arises is: why is contractual law so unique, that the presence of abhorrent behaviour still does not warrant punishment?

The main argument lay in the general nature of contract law.⁹ The CA noted that any duties or obligations that occur in a contract are undertaken voluntarily and willingly by the parties.¹⁰ The scope of the obligation is, thus, governed purely by what the parties agreed, and it can be

⁶ *PH Hydraulics*, *supra* n 2, at [21].

⁷ *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* [1998] 1 AC 1 at [15]; *Robinson v Harman* [1849] 1 Exch 850 at 855

⁸ Lee Pey Woan, “Contract Damages, Corrective Justice and Punishment” (2007) 70 Mod L Rev 887 at 888.

⁹ *PH Hydraulics*, *supra* n 2, at [67].

¹⁰ *PH Hydraulics*, *supra* n 2, at [68].

changed or altered to suit the parties shared preferences.¹¹ The focus of the enquiry is then whether the innocent party had been denied of his expectation, or if he had made any loss by relying on the promised actions of the other party. Therefore, there is little room for the society or the court to govern or dictate the parties' conduct. Unlike tort, these obligations do not arise by a matter of policy that affects the innocent party.¹²

Further, it was noted that the voluntary nature of contracts is of utmost importance. In essence, the only imposition of any responsibility in contractual law is that the parties must keep to their own bargain.¹³ Beyond that, there is no room for the court to impose any legal or moral obligations on the parties.¹⁴ This is even more so when the law has accepted a level of "self-serving behaviour" in contract law.¹⁵ Contracts are formed with an end goal in mind to serve the vested interest of the parties.¹⁶ It is only through negotiation that the self-seeking parties arrive at a position that is mutually beneficial, without compromising too much on their own interests.¹⁷ Given that this form of selfishness is the foundation of contracts, the Courts should not determine how the parties ought to conduct themselves as it would substitute the primacy of the parties' own interests with ideals of commercially acceptable behaviour.¹⁸

The CA's refusal to impose punitive damages should thus not be taken as the approval of the contract breaker's actions or his motives.¹⁹ The very foundation of punitive damages being "to punish" runs on a parallel track to that of contracts. The award of punitive damages, would amount to the court imposing a higher standard of moral or legal duties on the parties. In this regard, it has been suggested by academics that the award of punitive damages may be appropriate in order to protect contracting parties with weaker bargaining power from morally reprehensible conduct.²⁰ In response, however, the CA noted that a rejection of punitive damages in contract law was not to concede that morality played no role in the decision.²¹

¹¹ *PH Hydraulics*, *supra* n 2, at [71].

¹² *PH Hydraulics*, *supra* n 2, at [68].

¹³ *PH Hydraulics*, *supra* n 2, at [68].

¹⁴ *PH Hydraulics*, *supra* n 2, at [71].

¹⁵ *PH Hydraulics*, *supra* n 2, at [71].

¹⁶ *PH Hydraulics*, *supra* n 2, at [88].

¹⁷ *PH Hydraulics*, *supra* n 2, at [74] – [75].

¹⁸ *PH Hydraulics*, *supra* n 2, at [74] – [75].

¹⁹ *PH Hydraulics*, *supra* n 2, at [71].

²⁰ Lee Pey Woan, *supra* n 8, at 897.

²¹ *PH Hydraulics*, *supra* n 2, at [75].

Rather, this was done to emphasise that the goal of contract does not revolve around morality, and that the plaintiff still did have recourse under tort law.²²

B. Remedial Gap

The second point raised by the CA to deny the award of punitive damages involved rebutting the idea of the remedial gap.²³ The remedial gap argument was one that advocated awarding punitive damages, as a form of discretionary measure available to the courts to punish for reprehensible behaviour. The corollary of needing such a discretionary measure was that the existing remedies are inadequate to punish.²⁴ The CA went on to reject this argument, primarily as it felt that there was no gap to fill in the first place, given that the nature of contract law did not allow for such damages in the first place.²⁵ However, even if there was such a gap, the CA noted that there exist alternative measures currently available at its disposal, which it felt would be able to fill that gap.²⁶

Relying on the analysis submitted by *amicus curie* from Singapore Management University's Associate Professor Lee Pey Woan on remedial damages, the CA identified three such alternative measures that it felt could adequately fill the gap in a more principled manner.²⁷ First, the award of "Wrotham Park damages": these refer to damages quantified by reference to the sum of money that a Plaintiff could have reasonably demanded in exchange for allowing a defendant to breach a restrictive covenant.²⁸ Secondly, the award for account of profits, where a court is permitted to quantify damages based on the profits made by the Defendant, even though the Plaintiff would not be entitled to them on traditional contractual principles.²⁹ Lastly, the CA also noted the alternative of damages for the compensation of mental distress.³⁰ This last alternative is usually awarded where the purpose of the contract that was breached was to provide peace of mind or freedom from distress.³¹

²² *PH Hydraulics*, *supra* n 2, at [75].

²³ *PH Hydraulics*, *supra* n 2, at [76].

²⁴ *PH Hydraulics*, *supra* n 2, at [77].

²⁵ *PH Hydraulics*, *supra* n 2, at [78]-[79].

²⁶ *PH Hydraulics*, *supra* n 2, at [89].

²⁷ *PH Hydraulics*, *supra* n 2, at [75].

²⁸ *PH Hydraulics*, *supra* n 2, at [80].

²⁹ *PH Hydraulics*, *supra* n 2, at [81].

³⁰ *PH Hydraulics*, *supra* n 2, at [83].

³¹ *PH Hydraulics*, *supra* n 2, at [75].

V. Conclusion

For the purposes of doctrinal clarity, the CA's decision clearly affirms the distinction between contract law and other forms of tortious or criminal liability.³² In doing so, the court sought to highlight distinctions that were inherent in the very nature of the various areas of law. For example, the tort of negligence places an importance on the presence of a "duty of care".³³ The word "duty" in of itself indicates the presence of a moral or legal responsibility to other people.³⁴ There is no element of voluntariness in tort.³⁵

However, the argument for a need to plug the "remedial gap" does raise certain interesting observations. The underlying commonality for all three alternatives is that while they are primarily compensatory in nature, the award of the head of damage is also incidentally punitive.³⁶ This raises a further question – what happens in situations where the Defendant has breached the contract in an outrageous manner that would be deserving of punitive damages but the suggested alternative remedies are inappropriate? As the CA acknowledged, the alternative remedies that it referred to are usually employed in *exceptional* circumstances.³⁷ The appropriate measure of damages would be according to the traditional approach. It thus appears that there could arise a remedial gap in such exceptional situations, given the absence of a residual power to award punitive damages.

Nevertheless, the primary reasoning of the Court of Appeal should apply here, that such punitive damages are contrary to the idea of contracts and should not even arise in the first instance.³⁸ In addition, introducing punitive damages into contractual law would possibly lead to an elongation of proceedings and bring in claims that would hardly succeed, as the court recognised.³⁹ It is unlikely that the courts will "punish" contract claimants for any morally reprehensible conduct in the performance of their obligations under pure contractual principles. Contract law has little/no room for punishment, and future litigants should bear this in mind.

³² G.H Trietal, Edwin Peel, *"The Law of Contract"* (Sweet & Maxwell 13th Ed, 2011), at pp 1000–1001.

³³ See generally, Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, Gen Ed, 2016), at pp 77 – 224.

³⁴ Angus Stevenson & Maurice Wait, *The Concise Oxford Dictionary of Current English*, (Oxford University Press, 12th Ed, 2011).

³⁵ Lee Pey Woan, *supra* n 8, at 888.

³⁶ *PH Hydraulics*, *supra* n 2, at [84].

³⁷ *PH Hydraulics*, *supra* n 2, at [105].

³⁸ *PH Hydraulics*, *supra* n 2, at [62]. See also *The Law of Contract*, *supra* n 32.

³⁹ *PH Hydraulics*, *supra* n 2, at [105].

There is a better chance for a party to be awarded damages for a morally reprehensible conduct under tort law than contract law.