Compensatory damages are the traditional remedy for breach of contract. Such damages are payable as of right to the innocent party, irrespective of motive or fault on the part of the contract-breaker. Punitive damages that aim at punishing the wrongdoer clearly militates against the well-established compensatory principle in contract law. However, in cases of egregious breaches, should punitive or exemplary damages be awarded in addition to compensatory damages? How can such an award be justified? Do punishment and deterrence have a place in contract law? This paper seeks to explore whether there is any legal basis on grounds of principle or policy for liberalising punitive damages against outrageous commercial misconduct on the part of the contract-breaker.

The current position at common law
The generally well-accepted proposition is that “the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations" of the innocent party. Compensatory damages are awarded to compensate the innocent party for the loss it has suffered and to put it, as far as money allows, into the same position it would have been in had the contract been performed. Thus, if a wholesaler fails to deliver goods to a retailer, it will be liable to compensate the retailer for the increased price, if any, that it paid in order to secure the same goods on the open market and for any loss of profits. This will put the retailer into the position as if the goods had been delivered. Punitive damages that aim at punishing the contract-breaker are traditionally unavailable in a purely contractual context. Such an award goes against the compensatory purpose of damages.

Authorities and arguments against punitive damages in purely contractual breaches
The weight of authority in the major common law jurisdictions is against the recognition of punitive damages. Arguments against punitive damages also far outweigh those in favour of awarding punitive damages. However, punitive damages have been awarded in a few exceptional cases or are arguably available in selected situations. These will be discussed below.

Singapore
Singapore law on punitive damages was unsettled and in a state of flux until the Court of Appeal’s recent decision in PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd & Another.2 In that case, the court reviewed the common law authorities as well as the arguments for and against the award of such damages and reiterated the general rule that punitive damages will not be awarded in a purely contractual context. It did not, however, rule out entirely the future possibility of awarding punitive damages in a purely contractual context involving a particularly outrageous type of breach which necessitates a departure from the general rule. The court used the expressions “Never say never” or “hardly ever”3 to express its present sentiments on the availability of punitive damages for breach of contract. It held, on the facts, that PH Hydraulics had not been fraudulent, at best only grossly negligent which would fall short of the kind of egregious conduct found in the Canadian case of Whiten v Pilot Insurance Company4 (Whiten) which was deserving of punishment. Even then, the Singapore court was reluctant to award punitive damages for conduct as extreme as that in Whiten for the following reasons. First, PH Hydraulics was clearly not a case meriting an award of punitive

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3 Co-operative Insurance Society v Argyll Stores (Holdings) Ltd [1998] 1 AC 1 at 15. House of Lords
2 [2017] SGCA 26
3 Lord Nicholls in the Privy Council decision of A v Bottrill [2003] 1 AC 449 at [26]
4 Lord Hailsham in the House of Lords’ decision in National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675 at 692
damages. Even if fraud had been established, and even if it had been planned and deliberate, the Singapore court did not consider this to be an exceptional case that would justify departing from the general rule to award punitive damages. It referred to the statement made in the Canadian case of Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd 6 (Sylvan) that fraud in and of itself was not sufficient to justify an award of punitive damages, particularly in the commercial context. The same Supreme Court of Canada, while awarding punitive damages in Whiten, declined to make such an award in Sylvan, a case more similar to PH Hydraulics. It is submitted that these differences in approach merely demonstrate the subjectivity of the court’s perception of the degree of outrageous commercial conduct that will merit the imposition of punitive damages. The second reason for the Singapore court’s reluctance to award punitive damages is that even if PH Hydraulics made a fraudulent misrepresentation, the innocent party would obtain a generous measure of damages at common law in which case it would be difficult to justify imposing a further award to punish PH Hydraulics. This generous measure is said to be justified because it serves as a deterrent in discouraging fraud and moral considerations therefore require the fraudster to bear the consequences directly caused by his fraud.7 It is submitted that such damages are based on the tort measure and contain a punitive element, even though fraudulent misrepresentation is a contractual action. This supports the proposition that punitive damages can be awarded in exceptional cases where there is concurrent liability in tort. This will be discussed below.

Arguments raised before the Singapore Court of Appeal

The arguments against awarding punitive damages in a purely contractual context in the absence of concurrent liability in tort were canvassed before the Singapore Court of Appeal.8 The first argument is that parties to a contract create contractual obligations voluntarily. These give rise to certain expectations which the law should protect through an award of compensatory damages for loss of bargain, irrespective of fault or motive on the part of the contract-breaker. The court should therefore not impose its own external standard to regulate the conduct of the contract-breaker by awarding non-compensatory punitive damages to express its outrage and to indicate what proper commercial behaviour should be. This should rightly be the function of criminal law and to a certain extent, of tort law. It would seem anomalous for the court to impose unforeseen punitive damages in the event of a breach when the law strikes down penalty clauses which stipulate in advance non-compensatory damages for breach that are out of all proportion to the likely loss.9

Turning to the argument that there would be a remedial gap if punitive damages are not available to punish and deter deliberate or outrageous breaches of contract, the court did not think this could be justified, since there is no gap to begin with, the aim of damages being to compensate and not to punish. If there is any gap, it can be plugged by certain remedial options such as an award of damages for mental distress and an account of profits. The latter remedy may be ordered in exceptional circumstances where the plaintiff cannot otherwise recover damages on contractual principles, such as where there is no difference in value of the contractual subject matter and hence no expectation loss suffered. Although an account of profits (sometimes known as restitutionary damages) is based on the profit or gain made by the defendant and hence a departure from the traditional loss-based measure of damages, its primary purpose is still compensatory in that it protects the plaintiff’s interest in contract performance and may be used to ensure that deliberate breaches of contract are met with just remedial responses. Such a remedy may seem to have a punitive or deterrent effect but this is arguably incidental. An account of profits can be measured by a clear and definable standard which is the profit made by the defendant, whereas punitive damages are measured by the court’s sense of what conduct merits punishment and the quantum of award to reflect that punishment. However, even the court did envisage the possibility of departing from the general rule in exceptional circumstances, as seen above.

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6 [2002] 1 SCR 678
7 Per Lord Steyn in the leading case of Smith New Court Securities Ltd v Citibank NA [1997] AC 254
8 In PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd & Another [2017] SGCA 26
Finally, the court observed that in the absence of criteria for determining when commercial conduct has become so outrageous as to merit an award of punitive damages, such an award would be subjective and lead to uncertainty. Moreover, certain commercial misconduct is already regulated by established principles without the need for such a draconian measure as punitive damages. This includes misrepresentation, duress and undue influence which render a contract voidable if it was entered into as a result of these vitiating factors. However, it is submitted that duress and undue influence merely allow the innocent party to avoid the contract without any compensatory damages. This begs the question of whether other remedial responses such as punitive damages should be available in exceptional cases where the duress and undue influence amount to such reprehensible and outrageous conduct as to justify monetary sanctions.

The court also referred to policy arguments against the award of punitive damages in a purely contractual context. First, allowing punitive damages would adversely affect the conduct of litigation by adding to its length, complexity and costs and giving plaintiffs an undue advantage in forcing large settlements and tagging on a claim for punitive damages as a matter of course. Second, certain reprehensible conduct especially where the parties are of unequal bargaining power, such as in insurance, employment and consumer contracts would be more appropriately managed by regulation rather than by judicial remedies such as punitive damages. In these cases, the regulator would generally be in a better position to assess the wider social and economic impact of the type of remedial response including penal sanctions. However, the courts in certain common law countries have, in exceptional cases, awarded punitive damages, particularly in insurance contracts. These will be discussed below.

**England and Wales**

It is established that punitive damages have never and cannot be awarded for a breach of contract.¹⁰ Recent English authorities affirm that it is not the purpose of contract damages to punish.¹¹

**UK Law Commission’s Report**

The UK Law Commission in its Report¹² recommended that the law which does not recognise exemplary [punitive damages] should not be changed, stating five reasons: first, punitive damages have never been awarded for breach of contract. Second, contract primarily involves pecuniary, rather than non-pecuniary losses. Punitive damages most commonly awarded for torts are usually for non-pecuniary losses. Third, the need for certainty is perceived to be greater in contract than in tort and, arguably, there is less scope for judicial discretion in determining the availability and quantum of exemplary damages. Fourth, contractual rights and duties are negotiated between the parties as opposed to tort law where duties are imposed by the law. Arguably, the notion of state punishment is more readily applicable to the latter than to the former. Lastly, to award punitive damages would tend to discourage efficient breach. According to the doctrine of efficient breach, parties should have the option of breaking the contract and paying compensatory damages if they are able to find a more remunerative use for the subject matter of the promise.

**Australia and New Zealand**

The position in Australia is similar to that in England. Punitive damages are not generally available for breach of contract.¹³ The legal position is also similar in New Zealand,¹⁴ where the Court of Appeal, after surveying English, Australian, Irish, American and Canadian authorities, concluded that it should follow the clear trend of authority against the possibility of awarding punitive damages for breach of contract. It also observed that there is no need for punitive damages to fill any gap in the range of compensatory

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¹⁰ *Addis v Gramophone Co Ltd* [1909] 1 AC 488
¹¹ *Johnson v Unisys Ltd* [2003] 1 AC 518
¹² Report on Aggravated, Exemplary and Restitutionary Damages (Law Com No 247, 1997) at para 1.72
¹³ High Court of Australia decisions of *Butler v Fairclough* (1917) 23 CLR 78 at 89 and *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6-7
¹⁴ *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 at [180], [182]
damages in the contractual context, given the wide range of contractual remedies such as damages for mental distress and an account of profits. Furthermore, the New Zealand Court of Appeal\(^\text{15}\) ruled out entirely the availability of punitive damages, rather than allow it to be awarded in exceptional circumstances. To leave the position open would mean any plaintiff could assert its case is exceptional and extract large settlements. Furthermore, the difficulty of devising clear criteria for determining the quantum of such awards adds to the risk of unjustifiably high awards.

United States

American courts do not, as a general rule, award punitive damages for breach of contract. However, there are exceptions to the general rule which will be dealt with below.

Cases where punitive damages are awarded or arguably available

**Canadian authority**

The strongest argument is to be found in the Supreme Court of Canada’s decision in *Whiten v Pilot Insurance Company*\(^\text{16}\) where the court endorsed for the first time that punitive damages are an available remedy for breach of contract. However, in an earlier decision, the same court\(^\text{17}\) held that punitive damages would only be awarded for breach of contract where the conduct complained of simultaneously constituted an “independent actionable” wrong which caused the injury to the plaintiff. In *Whiten*, the jury found that the defendant insurance company had behaved in a manner that was “malicious, high-handed, arbitrary as well as capricious” and imposed on the defendant punitive damages of Canadian $1 million in addition to compensatory damages of Canadian $318,252.32. *Whiten* supports such an award, but has been criticised for not being a true authority for the award of punitive damages in a purely contractual context as there were features not commonly found in commercial contracts, notably “a public, quasi-regulatory interest in inducing insurers to investigate claims fairly and meet their obligations”.\(^\text{18}\) However, it will be argued below that this may provide an alternative ground for awarding punitive damages.

**Concurrent liability in contract and tort**

Punitive damages are well-recognised in tort law. Where there is a concurrent claim in both contract and tort, punitive damages may, in exceptional cases, be recoverable in tort.\(^\text{19}\) The rationale for such an award is that tortious duties, unlike contractual obligations, are standards of conduct imposed by law which the court may regulate through making available an award of punitive damages. Thus, punitive damages have been awarded, not for a purely contractual breach, but in tort.

**Argument based on uniformity**

If punitive damages can be awarded in tort for outrageous conduct, high-handed public conduct or profit-motivated private conduct, should it not also be available for similar conduct whatever the cause of action, whether in tort or in contract? The decision of the Supreme Court in *Boise Dodge, Inc v Clark*\(^\text{20}\) supports this argument, even though considered by the Singapore Court of Appeal\(^\text{21}\) to be unpersuasive since tort law is qualitatively different from contract law. In that case, the plaintiff bought a “new” automobile from the defendant which was, in fact, a well-used demonstrator on which the odometer had been turned back. The plaintiff recovered damages which included an award of punitive damages. On appeal, the court rejected the defendant’s argument that punitive damages were improperly awarded since the plaintiff’s action was in contract. It stated that from the legal point of view, it did not matter whether the claim technically sounded in contract or in tort. Punitive damages may be assessed in contract where there is fraud, malice, oppression or other sufficient reason for doing so.

**Argument that punitive damages are needed to plug a remedial gap**

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\(^{15}\) Ibid. at [181]

\(^{16}\) (2002) 209 DLR (4th) 257

\(^{17}\) *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085


\(^{19}\) Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th Ed, 2015 at 20-019)

\(^{20}\) 92 Idaho 902, 453 P.2d 551 (1969)

\(^{21}\) *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd & Another* [2017] SGCA 26
The argument that there would be a remedial gap if punitive damages are not available to punish and deter deliberate or outrageous breaches of contract has been dealt with above.

**Conclusion**

Having surveyed the various common law authorities and arguments, this paper concludes that the weight of authority and opinion is against the recognition of punitive damages in purely contractual breaches. However, this paper submits that punitive damages should be liberalised in selected contract actions. This is supported by common law decisions arising out of contract breaches where punitive damages have been awarded on the alternative basis such as the breach of a separate contractual obligation or other legal obligation. These offer exceptions to the traditional rule.

The most common exception is where the breach of the contract itself constitutes a tortious act. In *Vernon Fire and Casualty Insurance Co. v. Sharp*, the insurer's conduct amounted to "heedless disregard of the consequences, malice, gross fraud or oppressive conduct." The court awarded punitive damages against the insurer in a contract action on the same standard as that used in the ordinary tort case. Further support is derived from the decision of the Supreme Court in *Boise Dodge, Inc v Clark*, as discussed above.

Another exception is where in addition to the contractual relationship between the parties, there is also an incidental non-contractual relationship between them. This is where the wrong complained of is at the same time an "independently actionable wrong", such as the breach of a duty of good faith as in *Whiten*. Even though arguably, *Whiten* is not a true authority for the availability of punitive damages in a purely contractual context, the case lends support for a more liberal approach to punitive damages where the breach of contract is concurrently an independently actionable wrong. As expected in this unsettled state of the law, the Singapore Court of Appeal took the view that the existence of such a duty would not, on its own, justify an award of punitive damages in the event of a breach.

The availability of punitive damages for egregious breaches of contract amounting to bad faith, particularly in insurance contracts, is apparent from a string of Californian cases, notably *Gruenberg v. Aetna Insurance Co.* There, the Californian Supreme Court upheld the award of punitive damages for the defendant insurers’ bad faith failure to pay fire insurance claims. Although the claim arose from a breach of an insurance contract, the basis of the award of punitive damages was the breach of an implied obligation imposed by the law to deal fairly and in good faith with the insured.

Other exceptional cases include a breach of promise to marry. In this case, the interest violated is said to be more akin to tort and the difficulty of assessing the injury suffered justified the award of punitive damages.

Punitive damages have also been awarded against public service companies for breach of duty. Apart from the contractual relationship between the public service company and its customer, it was the breach of the incidental, non-contractual relationship between the parties namely, the failure to discharge public duties, and the desire to punish and protect against the abuse of economic power, that justified the award of exemplary damages.

Lastly, punitive damages as an exception to the general rule have been awarded where the contract breach is accompanied by fraudulent conduct. In the landmark case of *Welborn v. Dixon*, the plaintiff conveyed land as security for a loan from the defendant. The parties agreed that the defendant would reconvey the property upon timely repayment of the debt. The defendant, in breach of the agreement, conveyed the property to a third party *bona fide purchaser* whereupon the plaintiff brought action seeking both compensatory and punitive damages. The South Carolina court declared that "there is no doubt as to the general principle, that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages . . . . When, however, the breach of the contract is accompanied with a fraudulent act, the rule is well settled . . . that the.

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22 316 N.E.2d 381 (Ind. Ct. App. 1974), Indiana Court of Appeals
23 As stated by the Supreme Court in Canada in *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085
defendant may be made to respond in punitive as well as in compensatory damages.” Although the decision has been followed in a number of cases, it is uncertain what standard of fraudulent conduct is required. As pointed out, 28 cases awarding punitive damages for purported fraudulent breaches of contract are hopelessly contradictory. In contrast to Welborn, it was observed in Sylvan that fraud in and of itself was not sufficient to justify an award of punitive damages, particularly in the commercial context.

Even if the approach to punitive damages is liberalised, the difficulty of devising clear criteria for determining what egregious conduct justifies the award of punitive damages and the quantum of such awards remains. What kind and degree of outrageous, reprehensible commercial behaviour justifies judicial condemnation? Is it evil-intent, coercion, violence, malicious or oppressive breach, gross negligence, recklessness, dishonesty or even fraudulent conduct? Determining when commercial conduct has crossed the line from self-interested behaviour (tolerated by the parties in a contractual context) to high-handed, outrageous and reprehensible conduct can be subjective and difficult.

What measure of punitive damages is required to mark the court’s disapprobation of the egregious conduct? It is ultimately a question of fact and degree for judicial determination, and may vary from case to case and from court to court. This is evident in Whiten itself where the trial judge’s award of Canadian $1million was reduced to a tenth by the appellate court but restored by the Supreme Court. By contrast, the Singapore Court of Appeal would not have awarded punitive damages on the facts of Whiten.

The lack of a pecuniary basis for assessing punitive damages by reference to the defendant’s conduct and the need to punish and deter him was addressed in Whiten where the court laid down general principles which provide some guidance. These state that in setting the quantum, the court should be guided by the principle of rationality. The award is rational if it is no larger than the minimum necessary to achieve one or more objectives (punishment, deterrence and denunciation) of awarding punitive damages. A rational award is one that accords with the principle of proportionality. Proportionality is determined by reference to factors such as blameworthiness of the defendant’s conduct, vulnerability of the plaintiff, harm directed at the plaintiff, need for deterrence, other penalties, both civil and criminal inflicted or likely to be inflicted for the defendant’s misconduct and the advantage wrongfully gained by the defendant from the misconduct. Not surprisingly, and consistent with its stand, the Singapore Court of Appeal did not find the Whiten principles persuasive.

On the other hand, allowing courts to retain the discretion to award punitive damages in exceptional cases will provide redress for wrongs where there might be no remedy in contract but where there is a remedy for concurrent liability for another wrong involving high-handed and reprehensible conduct. Even the Singapore Court of Appeal conceded the future possibility of awarding punitive damages in a purely contractual context where a particularly outrageous breach required a departure from the general rule.

Moreover, liberalising the availability of punitive damages may have the effect of addressing the inequality of bargaining power by checking the abuse of superior bargaining power by big corporate players against smaller players in breach of contract cases. This is evident from the award of punitive damages against public service companies, as seen above.

This paper draws support from decisions in major common law jurisdictions in proposing that the availability of punitive damages should be liberalised in exceptional circumstances on the basis of the principles and policies suggested above and on alternative grounds other than purely contractual breaches. This should not open the floodgates as feared. Imposing punitive damages for breach of commercial contracts is a radical and draconian measure. In doing so, courts are likely to exercise restraint, caution and deliberation and only in exceptional cases of particularly egregious breaches which justify a departure from the traditional rule.