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REMEDYING THE UNCERTAINTY SURROUNDING PENALTIES AND LIQUIDATED DAMAGES

Case Comment: Denka Advantech Pte Ltd v Seraya Energy Pte Ltd

[2021] 1 SLR 631 / [2020] SGCA 119
Court of Appeal of Singapore
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA, Steven Chong JA
15 December 2020

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I. Introduction

1 In Singapore, the authority for penalty clauses had always been the seminal case of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* ("*Dunlop*").[1] Penalty clauses are contractual provisions which impose obligations to pay an extravagant sum of money in the event of a breach. The Penalty Rule is invoked to render such clauses unenforceable. In *Dunlop*, the House of Lords held that penalties are payments stipulated as *in terrorem* of the offending party, while liquidated damages are genuine covenanted pre-estimate of damages. Thus, liquidated damages are enforceable while penalties are not. This Penalty Rule only applies to secondary obligations and not primary obligations. Primary obligations refer to promissory terms of a contract which parties are bound to perform, while secondary obligations arise only when a party is in breach of their primary obligation. Only secondary obligations that are *in terrorem* of the party will thus not be enforceable. Furthermore, as noted by the Court of

[*] The authors of this article are grateful to the anonymous reviewer, Jeremy Chai, Soh Kian Peng and Don Ho for the guidance and thorough review of our piece so that we could produce a better script. All errors remain our own.
[**] See above.
[1] *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79.

Appeal in *Leiman, Ricardo v Noble Resources Ltd* ("*Leiman*"),[2] the Court's reluctance to intervene and regulate primary obligations is in accordance with the parties' freedom of contract.[3] To aid in the Court's determination of whether a clause is a penalty clause, Lord Dunedin provided four guiding principles in *Dunlop*:[4]

(i) A 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.

(ii) A provision would be penal if the breach consisted only in non-payment of money and it provided for the payment of a larger sum.

(iii) There is a rebuttable presumption that a provision would be penal if the sum stipulated for was payable regardless of the gravity of the breach.

(iv) A provision would not be penal because of the impossibility of precise pre-estimation in the circumstances of true loss.

2 However, recent foreign developments have made the applicability of this long-standing rule uncertain. In particular, there are two significant cases which have departed from *Dunlop:* the 2012 Australian High Court case of *Andrews and others v Australia and New Zealand Banking Group Limited* ("*Andrews*"),[5] and the 2015 UK Supreme Court case of *Cavendish Square Holding BV v Makdessi* ("*Cavendish*").[6] In *Andrews*, the High Court of Australia widened the scope of the Penalty Rule to cases where there was no breach of contract. In *Cavendish*, the UK Supreme Court chose to depart from *Dunlop* and formulated a new rule: penalties are secondary obligations that impose a detriment on the offending party that is disproportionate to any legitimate interest the innocent party may have in the performance of their primary obligation.

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2 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386.
3 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386, [100].
4 *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79, 87–88.
5 *Andrews and others v Australia and New Zealand Banking Group Limited* [2012] 247 CLR 205.
6 *Cavendish Square Holding BV v Makdessi* [2016] AC 1172.

3 Notably, prior to the present suit, the Singapore Court of Appeal in *Leiman*[7] recognised the changes to the Penalty Rule but declined to make a decisive conclusion on what the applicable test is in Singapore because based on the unique factual matrix presented before the Court, the clause in question was a penalty clause regardless of whether the *Dunlop* or *Cavendish* test was adopted.[8] Therefore, the present case provided the Court of Appeal with an opportunity to clarify whether Singapore should adopt the new changes, or to maintain its current legal position which is that in *Dunlop*.

II. Facts

4 The contention in the present case arose because of a liquidated damages clause in a contract. Seraya Energy Pte Ltd ("Seraya") was an electricity retailer and a subsidiary of YTL PowerSeraya Pte Ltd ("YTL"), an electricity generator. Denka Advantech ("DAPL") and Denka Singapore Pte Ltd ("DSPL"), collectively known as "Denka", entered into three electricity retail agreements ("ERAs") with Seraya which contained a liquidated damages ("LD") clause each. The LD clauses set out Seraya's express contractual right to damages if it terminated the ERAs under various scenarios, including a breach of obligation by Denka.

5 Concurrently, DSPL entered into a steam supply agreement ("SSA") with YTL. The SSA stipulated the minimum and maximum volume of steam to be purchased from YTL every month. Subsequently, DSPL requested for a reduction in the amount of steam it had to purchase. Hence, YTL offered a concession of the original terms ("Concession Terms"). Within the Concession Terms was an ancillary supplemental agreement ("ASA") to formalise the Concession Terms, but this was not executed.

6 When the market price fell such that it was significantly lower than the contractually stipulated price, Denka conveyed their intention to YTL to exit from the ERAs. Seraya and YTL understood this to be an act of repudiation, but Denka claimed that it was not bound by the ERAs because the ASAs were not executed. Seraya commenced an action

[7] *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386, [107].
[8] *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386, [107].

against Denka, claiming for liquidated damages due to the wrongful termination of the ERAs, or common law damages in the alternative.

III. High Court decision

A. Denka's liability

7 The High Court held that Denka was in repudiatory breach of the ERAs.[9] The Court found that the agreement to amend the SSA was subject to a condition subsequent, which was the entry into the ASA. However, this did not apply to the ERAs. Therefore, the non-execution of the ASA did not release Denka of its obligations under the ERAs. The Judge also rejected Denka's contention that they were induced into entering the ERAs by YTL's misrepresentation, and their attempt at implying a term to state that if the ASA was not signed, Denka could terminate the ERAs.[10]

B. Remedies

8 In concluding that the three ERAs had been validly terminated, the Judge affirmed the applicability of the Penalty Rule. As a matter of *stare decisis*, he was bound to follow the rule formulated in *Dunlop*.[11] He found that all three LD clauses were not genuine pre-estimate of Seraya's damages, rendering them penalty clauses which are unenforceable.[12] The Judge further considered, in *obiter*, the development of the Penalty Rule in *Cavendish* and noted that the LD clauses would still be penalties under that rule.[13] The Judge ultimately awarded Seraya unliquidated damages after considering Seraya's loss of profit, the unpaid amounts due and owed by Denka, and the fact that Seraya had already received $1.85m from three bank guarantees.

IV. Court of Appeal decision

9 On appeal, the main issues were whether Denka had breached the ERAs ("breach issue") and if so, whether the LD clauses were enforceable ("LD clauses issue").[14] As we shall see, the LD clauses issue

[9] *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2, [73]–[74].
[10] *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2, [118].
[11] *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2, [194].
[12] *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2, [200]–[208].
[13] *Seraya Energy Pte Ltd v Denka Advantech Pte Ltd* [2019] SGHC 2, [192].
[14] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [55].

triggered an inquiry into the state of the law with regard to the Penalty Rule.

A. Breach issue

10 The first issue was whether the ERAs were binding on Denka. As the contract did not expressly provide that the validity of the ERAs was dependent on the parties entering into the ASA,[15] Denka could not rely on the non-execution of the ASA as grounds to release itself from its obligations to purchase electricity.[16] As defence, Denka argued that Seraya had misrepresented the grounds for signing the ERAs, and a term stipulating that the ERAs were to be signed in return for the execution of the ASA should be implied . However, both arguments failed before the Court.

11 First, there was no misrepresentation made by Seraya that the execution of the ASA was necessary before the ERAs were valid. Even if such a representation was made, there were non-reliance clauses in the ERAs and there was no proof to show that such an intention stipulated by Seraya was false at the material time.[17]

12 Second, adopting the three-step test in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,[18] implication of a term which specifies that the validity of the ERAs is contingent on the entry into the ASA, into the ERAs would fail.[19] Under this test, implication will only be considered if: (a) the parties did not contemplate the gap ("true gap"),[20] it is necessary in the business or commercial sense,[21] and (c) the term to be implied was so obvious to the parties.[22] On the facts, the "true gap" test was not satisfied because it was clear from the provisions that the grounds for termination were contemplated and expressly provided for.[23] The implication of such a term into the ERAs would be irreconcilable with Denka's broader case because stipulating that a representation had been made would be suggesting that there was no

15 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [191].
16 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [192].
17 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [194].
18 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.
19 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [205].
20 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, [101].
21 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, [101].
22 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, [101].
23 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [201].

"true gap" *per se*. Even if the "true gap" test were passed, the term would fail on the other two limbs.[24]

13 Next, the Court addressed the issue of whether there was an obligation to purchase electricity under the ERAs. Even though there was an absence of a minimum quantity for the purchase of electricity, this did not undermine the certainty of the validity of the contract. The key obligation of the contract required Denka to purchase any electricity it needed for as long as the contract subsisted. The Court of Appeal decided that the ERAs, viewed in totality of the contract, did impose an obligation on Denka to continue to purchase electricity from Seraya as long as it needed electricity.[25]

14 Turning to the issue of breach and termination, the parties' correspondence were examined in detail by the Court. On 20 August 2014, DSPL had written to YTL stating that "the supply of steam and electricity shall cease under … the Concession Offer".[26] The Court held that this evinced DSPL's intention to renounce its performance of the ERAs. Thus, Seraya was able to invoke the common law right of termination for ERA 100.[27] Seraya's subsequent letter on 25 August 2014 indicated this intent and, as such, ERA 100 was terminated. Regarding ERA 99 and ERA 101, it was held that Seraya had exercised its right of termination under the terms of the respective contracts, this was categorised as a "Situation 1" scenario under the *RDC Concrete*[28] framework, which provides for various situations where an innocent party may elect to terminate the contract. Seraya had, during multiple correspondences, indicated its intention in invoking its contractual right of termination under ERA 99 and ERA 101.[29] Even though Seraya continued to supply Denka with electricity for some time, it was held that it did not constitute affirmation. The invoice for the electricity that was supplied was however not paid by Denka and this refusal to pay indicates an intent to repudiate the ERAs as had been indicated in the 20 August Letter.[30]

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24 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [198]–[202].
25 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [213].
26 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [31].
27 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [215].
28 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413, [90].
29 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [223].
30 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [229]–[231].

15 Therefore, the Court of Appeal endorsed the High Court Judge's decision that Denka was bound by all the three ERAs and had wrongfully repudiated them.

B. LD clauses issue

(1) Whether the clauses imposed a primary or secondary obligation

16 Before determining whether the LD clauses were penalties which are unenforceable, the Court had to first ascertain whether the clauses related to a secondary obligation.[31] The most contentious clause was found in the third ERA ("cl 5.3"), which stipulated that payment was to be made if the ERA was terminated for whatever reason.[32] Since the ERA could have been terminated via Denka's right of termination which involves a breach of contract, or via Denka's termination at any time by giving 30 days' written notice, the clause was a "hybrid" obligation which imposes a primary or secondary obligation depending on the trigger for termination.[33] However, since the event giving rise to termination was one of a breach of contract, cl 5.3 imposed a secondary obligation on Denka. Since the parties agreed that the other two LD clauses imposed secondary obligations, they were not in dispute. Hence, the requirement of a secondary obligation was satisfied.[34]

(2) Whether the clauses are enforceable as penalties

17 The next inquiry is to determine whether the clauses are penalties which are unenforceable. The Court of Appeal analysed and considered other tests, which are discussed below, before ultimately reaffirming the *Dunlop* test as being the applicable one in Singapore. Under the *Dunlop* test, a clause will be a penalty 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.[35] In determining Seraya's loss arising from the breaches of the ERAs, the Court of Appeal affirmed the High Court's decision to exclude the Contract for Differences ("CFD") in its consideration, which

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31 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [234].
32 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [243].
33 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [247].
34 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [249].
35 *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79, 87.

would otherwise reduce Seraya's loss. However, it should not be considered since the CFD was an internal arrangement that was not strictly enforced.[36] Next, the formula for calculating the liquidated damages was a reasonable percentage of Seraya's expected revenue over the remaining duration of the ERAs from the time of Denka's breach. This was not disproportionate to Seraya's expected loss.[37] Furthermore, the 40% multiplier relied on by Seraya was within the range of foreseeable loss incurred by Seraya and was supported by expert evidence.[38] Lastly, the clauses appeared to violate the single lump sum test as mentioned by Lord Dunedin in *Dunlop*.[39] However, this was not determinative because only a rebuttable presumption had arisen, and it was indeed rebutted in the present case.[40] Hence, the greatest loss test bears more weight than the single lump sum test, though it is not to say that the single lump sum test can never lead a court to decide that a LD clause is a penalty. In the circumstances, the presumption from the single lump sum test was rebutted considering their assessment of Seraya's loss. The single lump sum test was rebutted as the courts considered the greatest loss test which, to them, was of "overarching importance"[41]. The liquidated damages formula in the ERAs were assessed according to the remaining duration of the contracts from the date of termination. Hence, the liquidated damages formula should not be regarded as an "indiscriminate lump sum"[42]. Instead, it represented a genuine pre-estimate of the likely loss as it passed the greatest loss test.

18 Since the LD clauses were genuine pre-estimates of Seraya's loss, the Penalty Rule was not invoked and Seraya's appeal was allowed.

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36 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [255].
37 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [283].
38 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [293].
39 *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79, 87. According to Lord Dunedin, there is a presumption that a clause is penal where "a single lump sum is made 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".
40 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [305].
41 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [304].
42 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [306].

V. Analysis

A. The Penalty Rule is contingent on a breach of contract

19 In deciding whether the LD clauses were enforceable, the Court in *Denka* first disposed of the notion that the Penalty Rule could extend to situations where there was no breach of contract.[43] The abolishment of the requirement of a breach emanates from the High Court of Australia in *Andrews* and it was a consensus arrived at by solely based on historical grounds. Specifically, the Court in *Andrews* surveyed the development of the Penalty Rule and found that it had roots in equity, which was the basis for the expansion of the Penalty Rule.

20 One argument in support for *Andrews* is that the requirement of a breach as a pre-requisite may be redundant since the engagement of the Penalty Rule can easily be evaded by the careful wording of a contract. This was seen in *Lombard North Central Plc v Butterworth*[44] where the Court upheld the clause in question because it imposed a primary obligation and was not subject to the Penalty Rule. The Court arrived at this conclusion with great hesitation and dissatisfaction because the clause would have been found to be a penalty if not for the manner in which the contract was drafted.[45] Nonetheless, as emphasised in *Leiman*, the focus should be on the substance of a clause rather than its form.[46] Rather than relying solely on the words utilised, some relevant factors the Court will consider include: the overall context, parties' intentions, and whether the clause was included to secure an independent commercial purpose or to hold the innocent party *in terrorem*.[47] Hence, the Court of Appeal in *Denka* took this opportunity to reject the proposition in *Andrews*.[48]

21 In disagreeing with *Andrews*, the criticism by the Court of Appeal mirrored those made by the UK Supreme Court in *Cavendish*. The court in *Cavendish* gave the following reasons as to why the rule in *Andrews* should not be accepted:

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43 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [99].
44 *Lombard North Central Plc v Butterworth* [1987] 2 WLR 7.
45 *Lombard North Central Plc v Butterworth* [1987] 2 WLR 7, [17].
46 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386, [101].
47 *Leiman, Ricardo v Noble Resources Ltd* [2020] 2 SLR 386, [101].
48 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [99].

(i) Widening the scope of the Penalty Rule will give the courts greater discretion, resulting in uncertainty;[49]

(ii) The rule may infringe on parties' freedom of contract;[50] and

(iii) Having a breach of contract as a prerequisite is consistent with the principle that the Penalty Rule is applicable to secondary obligations only, and not primary obligations.[51]

22 Since the current prerequisite of a breach of contract is grounded on sound principles, the lack of justification for widening the scope of the Penalty Rule, beyond that of historical grounds, did not convince the Court in *Denka* to adopt the position in *Andrews*.

B. The problem with "legitimate interests"

(1) Vague definition of legitimate interests

23 One issue regarding legitimate interests and its application is its vague ambit. In deciding whether an innocent party has a legitimate interest in enforcing a clause, the courts have considered third-party interests, or interests that were arguably unknown to the other party, which the innocent party had not bargained for.[52] This was seen in *ParkingEye Ltd v Beavis*,[53] where the respondent was engaged by the landowner to manage a car park. The respondent displayed prominent signs which provided that users who stayed past the maximum stay in the car park would be charged £85. The appellant overstayed at the car park and was, therefore, in breach.[54] Here, it was held that the respondent had a legitimate interest in enforcing the parking charge despite it not suffering any loss, nor having proprietary interest in the car park.[55] Nonetheless, the legitimate interest arose from the agreement between the landowner and the respondent which authorised the latter to control

[49] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [82].
[50] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [82].
[51] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [92].
[52] Ben Dominikovich and Bell Gully, "Taking the sting out of the penalties rule" in *New Zealand Law Journal* [2021] NZLJ 27.
[53] *ParkingEye Ltd v Beavis* [2015] UKSC 67.
[54] *ParkingEye Ltd v Beavis* [2015] UKSC 67 [89]–[92].
[55] *ParkingEye Ltd v Beavis* [2015] UKSC 67 [99].

access to the car park.[56] Similarly, in *127 Hobson Street Ltd v Honey Bees Preschool Ltd*, ("*Honey Bees*")[57] the respondent failed to install a lift by the stipulated deadline and the appellant sought to enforce the indemnity clause.[58] It was held that the appellant had a legitimate interest which extended beyond just the punctual installation of the lift to protection of future growth prospects of their business.[59]

24 Therefore, there is no proper guidance by the precedents cases as to what constitutes a legitimate interest. This is undesirable in the commercial world where the need for certainty has been rehashed consistently. Businesses are not concerned about the law itself, nor the reasons for their formulation. Rather, what matters to them is what they have to follow. As Lord Mansfield CJ in *Vallejo v Wheeler* put it:[60]

> In all mercantile transactions the great object should be certainty, and, therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other, because speculators in trade then know what ground to go upon.

Whether or not a certain clause is a penalty or not affects the drafting of businesses' contracts. However, it is unclear whether a business' legitimate interest is, in fact, legitimate in the eyes of the court. Therefore, a vague conception of the law is unlikely to be welcomed.

(2) Inconsistency with the compensatory principle

25 Further, it is arguable that the legitimate interest test in *Cavendish* allows for recovery beyond compensation for losses. As the court in *Denka* held, where the prescribed amount is a sum that is not a genuine pre-estimate of loss, notwithstanding that it is commercially justifiable, this must necessarily be penal.[61]

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56 *ParkingEye Ltd v Beavis* [2015] UKSC 67 [99].
57 *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53.
58 *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [21].
59 *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [106].
60 *Vallejo v Wheeler* [1774] 1 Cowp 143.
61 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [152].

26 Following *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* ("*PH Hydraulics*"),[62] the law will, generally, refrain from awarding punitive damages in a purely contractual context. This is because the parties' intentions in setting the standard as they had will be undermined if the court were to measure a party's breach against what the court deems is proper commercial behaviour.[63] Further, as argued by Professor Weinrib, punishment is inconsistent with the bilateral nature of corrective justice.[64] Punishment only seeks to regulate one party's conduct, namely the contract-breaker. This focus on one party only is what contradicts corrective justice which seeks to restore the position of both parties. Hence, Professor Weinrib argues that punishment should be left to criminal law, as opposed to private law.[65]

27 On the other hand, Professor Weinrib has also argued that an award of compensatory damages is consistent with corrective justice.[66] A contract-breaker's gain from his wrongful conduct leads to a corresponding loss to the innocent party. Compensatory damages aim to restore both parties in a position as if the contract had not been breached. He argues that this encompasses an element of corrective justice, which aims to reverse both parties' unjust normative gain or loss, rather than any factual gains and losses. This normative aspect refers to the difference between what parties have and what they *should* have, while the factual aspect refers to the difference between what parties had and what they ultimately have after the breach.

28 Hence, in *Dunlop*, the requirement for a genuine pre-estimate of loss is synonymous with the principle that damages awarded for a breach of contract is to compensate the innocent party for his losses.[67] The aim is to place the innocent party in a position as if the obligations under the contract had been fully and precisely performed.[68]

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62 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129.

63 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129, [72].

64 E. J. Weinrib, *The Idea of Private Law* (Cambridge Mass; London: Harvard University Press, 1995), 135.

65 E. J. Weinrib, *The Idea of Private Law* (Cambridge Mass; London: Harvard University Press, 1995), 135.

66 E. J. Weinrib, *The Idea of Private Law* (Cambridge Mass; London: Harvard University Press,1995), 135.

67 See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [125].

68 See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [125]. It was explained that damages function to compensate an innocent party's expectation loss, which encompasses his total loss, including the expected profit he would have

29 One may argue that the approach in *Cavendish*, which involves upholding commercial realities, may not be at odds with ensuring compensation. This may occur where a party has a legitimate interest in enforcing the primary obligation, and both parties have agreed that the performance of that particular obligation was so important that the defaulting party's failure to perform justifies the sum of money, even though it may be more than a genuine pre-estimate of its losses. Nonetheless, this is problematic because it is available to any party to argue that the primary obligation was important to him. Following this line of reasoning, it is possible for all clauses to be regarded as liquidated damages clauses.

C. Relevance of performance interest

30 Further, peculiar in the present case was the Court's lack of consideration of performance interest. It has been suggested that the compensation principle has expanded to include greater interests that were once considered penal by considering parties' interest in performance of the contract.[69] However, this is not the case in Singapore.

31 In Singapore, a plaintiff's performance interest is only considered when he has not suffered any pecuniary loss. In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*,[70] the fact that the plaintiff had not suffered any financial loss was one factor in favour of an award of Wrotham Park damages, which is granted to protect and vindicate the plaintiff's performance interests. Similarly, in *Denka*, the court omitted to consider Seraya's interest in performance of the ERAs. This could be because the losses contemplated in cases involving penalty clauses only includes monetary loss as opposed to non-monetary loss. Further, the court in *Denka* regarded the non-pecuniary interests claimed in *ParkingEye*, which related to how the respondent sold its management services to landowners and how the charge formed part of the respondent's income stream, as having little connection with compensation for loss and instead related to non-compensatory interests.

received, as well as his expected expenses, which he would have recouped, had there been no breach of contract.

69 J. Palmer, "*Implications of the New Rule Against Penalties*" (2016) 47 VUWLR 287–308, 316.

70 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [220].

32 On the other hand, interest in the performance of the contract would suffice as legitimate interest in England.[71] Hence, given that performance interest is extremely wide and would be relevant in almost all contracts, the Court's omission to consider performance interest bolsters the argument that the position in Singapore is more certain that that in England.

33 While the position in Singapore affords more certainty, performance interest may still be a useful tool for the courts to provide a remedy for an innocent party. For example, in *Family Food Court (a firm) v Seah Boon Lock*,[72] the respondents would not be able to avail themselves to any remedies apart from the interest in the performance of the contract given that the loss was suffered by a non-contracting party. Furthermore, as suggested by Jessica Palmer,[73] the penalty doctrine is a "necessary protection of the court's remedial jurisdiction" for contracts to remain legally enforceable. This would mean that a consideration of performance interests would be beneficial, even if it sacrifices certainty afforded by the law.

D. Remnant significance of Cavendish *in the Singapore approach*

34 Notwithstanding the Court's rejection of the approach in *Cavendish*, the Court held that certain elements within the test are still relevant, such as the parties' relative bargaining power and commercial interests.[74] Nonetheless, they should be viewed with the ultimate focus on whether the clause concerned is a genuine pre-estimate of the likely loss.[75]

(1) Relative bargaining power

35 On bargaining power and legal representation, the Court of Appeal mirrored the proposition laid out in *Cavendish*. It was held that equal bargaining power was an important factor, and it is open to a party

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71 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [59].
72 *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272.
73 J. Palmer, "*Implications of the New Rule Against Penalties*" (2016) 47 VUWLR 287–308, 313.
74 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [153].
75 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [153].

to rely upon it in an argument.[76] Nonetheless, the Penalty Rule does not depend on any disparity of power of the contracting parties.[77]

(2) Commercial interests and the purpose of the underlying transaction

36 Regarding commercial interests and the purpose of the underlying transaction, the Court of Appeal in *Denka*[78] drew a parallel with the approach in *RDC Concrete*,[79] and particularly Situation 3(a) and 3(b). Situation 3(a) is concerned with the nature of the term breached,[80] while Situation 3(b) is concerned with the consequences of the breach.[81] According to the Court in *Denka*,[82] these considerations mirror the factors of commercial interest and the purpose for which the parties entered into the contract. These are equally applicable to the *Dunlop* approach because the *Dunlop* test places emphasis on a composite view of the parties' contract and the nature of the relationship.[83] This is similar to the approach in Australia before *Andrews*, where the nature of the relationship and the degree of disproportion between the stipulated sum and the loss likely to be suffered were the applicable elements in determining whether a clause is a penalty.[84]

VI. Conclusion

37 *Denka* serves as a clarification on two aspects of the Penalty Rule amidst the vast changes made in other jurisdictions. First, it rejects the notion in *Andrews* that the Penalty Rule can apply outside of situations where there is no breach of contract. Second, it continues to endorse the traditional *Dunlop* test in deciding whether a clause is penal. Additionally, it provides guidance on the applicability of factors such as the bargaining power of the parties and the underlying purpose of the contract. All in all, the approach taken in *Denka* is a sound one as it clarifies the boundaries of a liquidated damages clause, and it brings

[76] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [173].
[77] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [174].
[78] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [176].
[79] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413.
[80] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413, [97].
[81] *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413, [99].
[82] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [176].
[83] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [176].
[84] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, [176].

with it much certainty as to what stand Singapore law takes on the subject.

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