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EQUITABLE RELIEF FOR BREACH OF CONTRACT

Wisanggeni Lauw v. Full Fledge Holdings Ltd. and Another Appeal[1]

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Although the Court of Appeal has previously provided judicial guidance on the grant of interim mandatory injunctions (see, *e.g.*, *Chuan Hong Petrol Station Pte. Ltd. v. Shell Singapore (Pte.) Ltd.*;[2] *Singapore Press Holdings Ltd. v. Brown Noel Trading Pte. Ltd. & Ors.*,[3] and most recently, *Chin Bay Ching v. Merchant Ventures Pte. Ltd.*[4]), it is remarkable that local authority on grants of final mandatory injunctions is almost non-existent. Indeed, in a recent work on *The Law and Practice of Injunctions in Singapore*,[5] there appears to be no specific reference to such injunctions. In relation to breaches of contractual obligations, this may be a matter of little note since the assistance of equity will be neither necessary nor sought given the adequacy of contractual damages as a remedy for most instances of breach. Nevertheless, in a series of unreported decisions, the High Court and the Court of Appeal may have made some rather surprising inroads into this small patch of wilderness in Singapore's legal landscape.

The dispute between Wisanggeni Lauw and Full Fledge Holdings arose, primarily, from the factual question as to whether Lauw, an Indonesian national, had entered into a contractual agreement on terms set out in a letter to transfer certain shares in a Singapore-listed company to either Full Fledge Holdings or its nominees. The letter read as follows, "I, Wisanggeni, hereby irrevocably undertake to transfer 10,625,000 shares of PLHL[6] to Bank of China, Singapore to secure the facilities granted by Bank of China to Mr Kang Hwi Wah. I also undertake the followings [sic]: . . . (b) to guarantee the minimum market value of [the disputed shares] at $0.17 cents [sic]

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1 [2005] SGCA 21[*Wisanggeni Lauw* (C.A.)].

2 [1992] 2 S.L.R. 729.

3 [1994] 3 S.L.R. 151.

4 [2005] 3 S.L.R. 142 [*Chin Bay Ching*]; [2005] SGCA 29.

5 D. Koh *et al.*, *The Law and Practice of Injunctions in Singapore* (Singapore: Sweet & Maxwell Asia, 2004).

6 The name of the company which issued the disputed shares was, initially, Poh Lian Holding Ltd. ("PLHL"). By the time of trial, its name had been changed to United Fiber System Ltd. ("UFS") and in consequence, the disputed shares were referred to as "UFS shares" in the proceedings.

i.e. that the said shares ... shall have a market value of not less than $0.17 cents [sic] at the end of 12 months from today." Lauw appended his signature to this letter which was dated 28 June 2002. Presumably, therefore, the likeliest construction to be placed on this document is that the "guarantee" undertaking would expire on 28 June 2003.

Full Fledge brought an action against Lauw for his failure to transfer the above-mentioned shares. Lauw disputed that there was any enforceable contractual obligation for him to do so. He pleaded that (a) there was no consideration in support of the agreement between the parties; (b) the agreement had been repudiated by the plaintiffs, that repudiatory breach being accepted by the defendant; (c) the agreement had been discharged by mutual agreement; and (d) the transfer to Bank of China, was on an *ex gratia* basis. None of these found favour with the trial judge.

While noting that the difficulty with the case lay in there being no written agreement, Kan J. declared himself, "unable to accept either parties' version as to the exact terms agreed upon".[7] Without explicitly making any finding as to what the terms of the agreement were, Kan J. was nevertheless satisfied that there *was* an agreement of which Lauw was in breach. In the learned judge's view, Lauw's pleaded defences (b), (c) and (d) (as listed above) were of no avail as Lauw had adduced no evidence in their support. As for the defence that the agreement lacked consideration, Kan J. observed that it was, "misconceived in law. A failure by one party to perform a contractual undertaking cannot support a defence that the contract is not supported by consideration. A promise to do something (*e.g*. provide funds) in exchange for a reward (*e.g*. the shares) constitutes the consideration to the agreement".[8] This suggests Kan J. implicitly found that *executory* consideration had been furnished by Full Fledge, and that was sufficient consideration in support of its agreement with Lauw. In consequence, Lauw's defence on this limb was also fruitless.

At the conclusion of this first hearing, Kan J. ordered Lauw to transfer 10,625,000 shares in accordance with the arrangement described in the 28 June 2002 letter.[9] Unfortunately, the parties could not agree on the terms of the judgment to be drawn. Thus it was that counsel for the plaintiffs applied for a supplementary hearing, requesting that the judgment be drawn up to include further reliefs set out in further submissions to Kan J. Notably, counsel sought to include in the draft judgment an order that Lauw be obliged to guarantee the minimum market value of the disputed shares at S$0.17 per share. Counsel also prayed for damages to be assessed.

In the grounds of decision for this supplementary hearing,[10] Kan J. ruled that the judgment was *not* to be drawn up in this fashion. In the learned judge's view, "... the guarantee was set out and delivered in the letter of 28 June itself. No further order for its delivery is needed."[11] It was therefore unnecessary to make any orders pertaining to the guarantee. As for the prayer for damages to be assessed, that was

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[7] [2004] SGHC 141 [*Wisanggeni Lauw* (H.C.)], at para. 27.

[8] *Ibid*. at para. 34.

[9] *Ibid.* at para. 49.

[10] *Full Fledge Holdings Ltd. v. Wisanggeni Lauw (No. 2)* [2004] SGHC 209 [*Wisanggeni Lauw (No. 2)* (H.C.)].

[11] *Ibid*. at para. 7.

rejected on the basis that no evidence had been led as to the share price on 28 June 2002.

An appeal and cross-appeal were lodged by Lauw and Full Fledge out of these proceedings. Lauw appealed against the trial judge's rulings that his four defences were either wrong in law or had not been substantiated by any evidence—but the trial judge's findings were upheld by the Court of Appeal, noting that on the evidence tendered, these were findings it would have come to itself.[12] Full Fledge Ltd. cross-appealed on the trial judge's refusals to order an assessment of damages, and to order Lauw to provide the guarantee mentioned in the 28 June 2002 letter.

The Court of Appeal allowed Full Fledge's cross-appeal on the first point and directed that the judgment be drawn up incorporating an order for assessment of damages.[13] It also allowed the cross-appeal on the guarantee point. In the opinion of the Court of Appeal, ". . . it would only be *fair* if Lauw be required to give a *similar* guarantee for a *similar* length of time *effective from the date of this judgment*".[14]

Two points may be made in relation to the proceedings in both the High Court and the Court of Appeal. The first relates to the equitable relief granted by the trial judge, ordering Lauw to transfer the 10,625,000 disputed shares. The second and more difficult point, relates to the equitable relief granted by the Court of Appeal, ordering Lauw to furnish the guarantee on the basis and in the manner highlighted above.

On the first point, it may be noted in the admirably succinct grounds of decision in relation to the very first hearing in the court below,[15] Lauw was ordered to transfer the disputed shares without any apparent finding that Full Fledge Ltd. had provided any *executed* consideration. It is true that counsel for the plaintiffs had amended its pleadings to argue that the share transfer was not just in consideration of incoming funds, but also for assistance in identification of a suitable takeover target company[16]—and, consideration in the latter form must have been executed since a suitable takeover target company *was* identified. But there was no clear finding by the trial judge that the agreement between the parties did, in fact, take this form. Nor was there any mention in the grounds of decision for either the first or the supplementary hearing as to what else might have amounted to executed and thus, *valuable* consideration.

Given that equity only acts to specifically enforce contracts supported by *good and valuable* (as opposed to merely executory) consideration, it is striking that the court does not appear to have been concerned to make a specific finding on this crucial issue. There is certainly no local authority in support of the proposition that specific performance may be ordered even in the absence of executed consideration. So we must, it seems, assume that executed consideration *was* found by the trial judge on the facts of the case in support of its order that Lauw transfer the 10,625,000 UFS shares, albeit implicitly.

Of even greater concern is the manner in which the Court of Appeal appears to have conceived its equitable jurisdiction in relation to its order for Lauw to guarantee

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[12] *Wisanggeni Lauw* (C.A.), *supra* note 1 at para. 33.
[13] *Ibid*. at para. 36.
[14] *Ibid.* at para. 37.
[15] *Wisanggeni Lauw* (H.C.), *supra* note 7.
[16] *Ibid.* at para. 5.

the share price. While accepting that this was a difficult point as the deadline of 28 June 2003 (the expiry date of the guarantee had Lauw performed the terms of the contract fully) had long passed, the Court of Appeal nevertheless took the view that:

> There is no logic or reason why Lauw should be relieved of his undertaking on account of his own breach. The guarantee was to safeguard the interest of Full Fledge and we can see no grounds why Full Fledge should be deprived of this safeguard.[17]

And, as noted above, it was the Court's opinion that it would only be *fair* to require Lauw to provide a guarantee similar to the one promised in his agreement with Full Fledge.[18]

The exercise of the Court's discretion in this manner is particularly arresting given its observation that as the market price of the shares in question well exceeded the guaranteed price of $0.17 per share, the guarantee given by Lauw, "... could well be rendered *academic*".[19] It is unclear, however, as to what form the evidence as to "market price of the shares" took—to wit, market price for what *period* of time? Presumably the Court of Appeal had in mind the market price of the shares at the time of appeal? Certainly, no mention was made in the Court of Appeal's grounds of decision as to whether evidence of the state of the market during the period from 28June 2002 until 28June 2003 was adduced before it. Neither was there any reference to such facts at trial. This is unsurprising since the court below appears to have construed the guarantee obligation as simply being a guarantee that the share price would not be less than $0.17 per share *on* 28 June 2003,[20] being the day following the lapse of the 12 month period commencing on 28 June 2002, and *not* as a guarantee as to the share price on the expiry of 12 months from the date of *transfer* (whenever that might be). Keeping in mind these problems with the findings of fact, the following questions present themselves.

First of all, it is not easy to characterise the order made by the Court of Appeal as to Lauw's provision of a guarantee for the share prices to be an order for specific performance. "A decree of specific performance is an order of the court compelling the defendant personally to do what he has promised to do".[21] But on a plain reading of the agreement, Lauw appears only to have undertaken to guarantee the share price, "at the end of 12 months from *today*" [emphasis added], *i.e*. 28 June 2002, the date of the letter, and *not* at the end of 12 months from such time as the shares might be transferred. It is apparent that the trial judge construed the relevant portion of the 28 June 2002 letter to mean that Lauw had guaranteed that the share price would not fall below $0.17 per share *on* 28 June 2003,[22] and for no other date. While accepting this finding,[23] the Court of Appeal appears not to have appreciated its significance, for, if

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[17] *Wisanggeni Lauw* (C.A.), *supra* note 1 at para. 37.

[18] *Ibid.* at para. 37.

[19] *Ibid*. at para. 38, emphasis added.

[20] See *Wisanggeni Lauw (No. 2)* (H.C.), *supra* note 10 at para. 9, noting that no evidence was led as to the share price on that day; in contrast, for the Court of Appeal's rather different interpretation of the first instance findings, see *Wisanggeni Lauw* (C.A.), *supra* note 1 at para. 21.

[21] D. Hayton & C. Mitchell, *Hayton & Marshall's Commentary and Cases on the Law of Trusts and Equitable Remedies*, 12th ed. (London: Sweet & Maxwell, 2005) [*Hayton & Marshall*], at paras. 14-130.

[22] See *Wisanggeni Lauw (No. 2)* (H.C.), *supra* note 10 at paras. 8, 9.

[23] See *Wisanggeni Lauw* (C.A.), *supra* note 1 at para. 34.

that is all the *contract* required, how is it that Lauw could be ordered to specifically perform a quite *different* act, namely, to, ". . . provide a guarantee that the share price of the UFS shares would not fall below 17 cents per share at the expiry of the period of one year from the date of this[24] judgment"?[25]

The order made by the Court of Appeal is only explicable as being one for specific performance if one assumes that the Court implicitly found that the contract required Lauw to guarantee the share price of the disputed shares on the expiry of 12 months *following transfer* thereof. In effect, this would amount to an overruling of the trial judge's findings on the point. On a reading of paragraph 9 of Kan J.'s grounds of decision in the supplementary hearing,[26] it is implicit that he construed the agreement as requiring Lauw to guarantee the share price *on* 28 June 2003, as opposed to any later date. On this close reading, it is difficult to see how one might construe the plain words of the 28 June 2002 letter as meaning that Lauw was to guarantee the share price for any period of time beyond the 12 months commencing from 28 June 2002.

Though not expressly referred to as such, failing an implied overruling of the trial judge's findings on the lines surmised above, the Court of Appeal's order can only be viewed as a mandatory injunction. Without finding that the contract was for Lauw to guarantee the share price on the expiry of 12 months starting from the date the shares were actually transferred, the Court of Appeal's order cannot be taken to be an order for Lauw to specifically perform the guarantee obligation evidenced by the 28 June 2002 letter. It can only have been a mandatory injunction, granted on the basis of Lauw's breach of contract. If so, it means that the Court of Appeal would not have been concerned with the rather more numerous equitable restrictions as would have been applicable had specific performance been ordered: the restrictions on the grant of injunctions are fewer in number.[27]

It is beyond doubt that the High Court does have the jurisdiction to grant mandatory injunctions: see section 18 of the *Supreme Court of Judicature Act*[28] read with paragraph 14 of the First Schedule thereto. As for the Court of Appeal, on appeal (which operates by way of a re-hearing), it has all the powers of the High Court: see section 37(2) of the *Supreme Court of Judicature Act*. And, as *Chin Bay Ching* demonstrates, paragraph 14 should not be read so restrictively as to thwart its plain meaning.[29]

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[24] The grounds of decision of the Court of Appeal does not mention this, but presumably, because of the difficulties with drawing up the judgment leading up to the appeal, the disputed shares had yet to be transferred, pending the outcome of the appeal. It is otherwise difficult to see why the Court of Appeal would have ordered the guarantee period to commence from the date of its judgment had the shares been transferred at an earlier period in time.

[25] *Wisanggeni Lauw* (C.A.), *supra* note 1 at para. 37. It should be noted that the phrasing used by the Court is somewhat ambiguous. Apart from the reading taken in the main text, one might alternatively read the order as requiring Lauw to guarantee that the share price would not fall below $0.17 per share within the *period* of one year following the date of the judgment. Such a construction would, of course, still be subject to the same criticisms discussed in the main text: simply put, the trial court did *not* construe the guarantee in such a manner, and there is no explicit finding by the Court of Appeal otherwise.

[26] *Wisanggeni Lauw (No. 2)* (H.C.), *supra* note 10.

[27] For a comparison, see *Hayton & Marshall*, *supra* note 21, at paras. 14-13 to14-25 as to injunctions, and paras. 14-133 to14-156 as to specific performance.

[28] Cap. 322, 1999 Rev. Ed. Sing.

[29] *Supra* note 4 at paras. 22–24.

Although the source of the jurisdiction is statutory, it is submitted that the exercise of this jurisdiction cannot much differ from the exercise of such jurisdiction by the English High Court, given that paragraph 14 of the First Schedule implicitly rides on the conception of equity as prevails under English law, for what else can "equity" within that paragraph refer to save the English conception thereof? This is consistent with the use of precedent by the Court of Appeal, given its reference and reliance in *Chin Bay Ching* on English authorities, and Malaysian authority also relies on English cases. If so, it follows that the injunction could not have been granted by the Court in its exclusive equitable jurisdiction since it was not granted in support of any equitable right. The injunction was granted in the Court's auxiliary jurisdiction in support of a common law right, *i.e*., in relation to Lauw's breach of contract.

Of the restrictions on the exercise of this auxiliary jurisdiction, one long-standing rule is clear: in common with all exercises of equity's remedial armoury, if damages would adequately remedy the breach by the defendant, the plaintiff will be restricted to that remedy; an injunction will lie only if damages are inadequate.[30] Were this a case where the Court was exercising its exclusive equitable jurisdiction, this would be a non-issue since it is generally presumed that common law damages are inadequate to remedy the breach of an equitable right.[31] But the obligation in question clearly stemmed from a common law contractual right. So the preliminary issue remains: would damages have been an adequate remedy for the breach of the obligation to provide a guarantee? This depends on how the obligation is conceived. If it is conceived as being an obligation to guarantee the share price *on* 28 June 2003, it is difficult to see how or why damages would *not* have been an adequate remedy. Certainly, historical evidence of the market price of the disputed shares could have been obtained, and any losses suffered as a result of the non-provision of the guarantee on such date in the past ought surely to have been remediable in money-damages?

It is true that there is some academic debate as to whether this rule continues to exist,[32] and certainly, in relation to restraining trespass to land, the decisions seem to disregard adequacy of damages as a bar to granting an injunction.[33] But, as the editors of *Hayton & Marshall* note, the seeming relaxation of the requirement that damages be inadequate in such cases may well stem from the fact that in many such cases, the wrong (trespass to land) is, "*threatened* (*i.e*. future, rather than present or past) and this allows the *quia timet* jurisdiction to be invoked".[34]

In relation to cases of threatened wrongdoing, *Hayton & Marshall* observes that the "inadequacy of damages" requirement does indeed appear to diminish to vanishing point. Yet this was not the case in *Wisanggeni Lauw.* On the trial judge's view, the obligation was to guarantee the share price on 28 June 2003. It is not obvious that Lauw was under any obligation to provide a guarantee of the share price on the expiry of 12 months from the date of *transfer* of the disputed shares, as the Court of Appeal appears to have assumed. If it were, Lauw's breach would be rather more straightforwardly classed as a *future* breach—and thus the *quia timet* jurisdiction

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[30] See *e.g*. *Imperial Gas Light & Coke Co v. Broadbent* (1859) 7 H.L.C. 600, 612; 11 E.R. 239, 244; *Director of Public Prosecutions v. Jones* [1999] 2 A.C. 240.

[31] See the Malaysian Court of Appeal decision of *ESPL (M) Sdn. Bhd. v. Radio & General Engineering Sdn. Bhd.* [2005] 2 M.L.J. 422, at para. 35.

[32] See *e.g*. D. Laycock, "The Death of the Irreparable Injury Rule" (1990) 103 Harv. L. Rev. 688.

[33] See *e.g*. *Jaggard v. Sawyer* [1995] 1 W.L.R. 269.

[34] *Hayton & Marshal*, *supra* note 21 at para. 14-14.

might be asserted. But this was not obviously apparent on the face of the contract, nor was there any finding by either the High Court or the Court of Appeal that the contract should be so construed.

On the basis, then, that this was not a case where the *quia timet* jurisdiction was involved, some evidence as to the inadequacy of damages for breach of the obligation in question would appear to be necessary before any mandatory injunction is issued. Yet despite the lack of any evidence as to the state of the market for the shares on 28 June 2003, the Court of Appeal was of the view that a mandatory injunction should issue so as to compel the defendant to guarantee the minimum share price of the disputed shares upon the expiry of 12 months following judgment. As to the Court of Appeal's observation that such injunction might be rendered academic,[35] that is, perhaps, irrelevant. That might arguably demonstrate that damages would be inadequate, had the defendant been obliged to provide a guarantee as to the share price upon the expiry of a year following the date of *transfer* of the shares. But, as noted above, such was not the construction applied to the contract between the plaintiff and defendant.

But perhaps the rather plain and straightforward reading of the Court of Appeal's grounds of decision is too simplistic. Perhaps one should read between the lines and assume that the Court of Appeal did implicitly overrule the trial judge's construction of the terms of the agreement between Lauw and Full Fledge, substituting its own construction. So let us assume, for the sake of argument, that on its proper construction, the agreement obliged Lauw to provide a guarantee for the price of the shares upon expiry of a year from the date of their transfer. Coupled with our earlier assumption that valuable (*i.e.* executed) consideration of some sort had been furnished by Full Fledge, surely all obscurity will be overcome? Attractive as this may sound, these assumptions merely back us into another analytical cul-de-sac.

Firstly, the trial judge's reasons for rejecting Full Fledge's prayer that Lauw be ordered to give the guarantee bear repeating. In his judgment, this prayer was "... unnecessary because the guarantee was set out and delivered in the letter of 28 June itself. No further order for its delivery is needed".[36] It is instructive that the trial judge found that Lauw had *already* furnished the guarantee in executing and delivering the writing set out in the 28 June 2002 letter. It may be noted that the letter provided that Lauw would thereby "irrevocably undertake ... to guarantee the minimum market value ..." Yet in granting Full Fledge's cross-appeal, it seems the Court of Appeal must have found quite otherwise, that Lauw had *not* furnished any guarantee by his assent to the 28 June 2002 letter, evidenced by his signature. What does this mean? How might one intelligibly distinguish between an *undertaking* to guarantee and the guarantee itself, as the Court of Appeal appears to have done? The distinction is only intelligible if we take "guarantee" to mean not the guarantee *obligation* but the documentation thereof. In other words, the effect of the Court of Appeal's order was to compel Lauw to execute documentation as to his obligation to "guarantee" the share price—*i.e.* to compel Lauw's performance of his obligation to *execute a* guarantee. So the trial judge was also overruled on

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[35] *Wisanggeni Lauw* (C.A.), *supra* note 1 at para. 38.

[36] *Wisanggeni Lauw (No. 2)* (H.C.), *supra* note 10 at para. 8.

his finding that such an order was unnecessary, but closer examination of the equitable principles involved may reveal that the basis for such overruling is far from obvious.

Keeping in mind our assumption that some form of executed consideration must have been provided by Full Fledge so as to justify the grant of any equitable remedy in relation to the transfer of the 10,625,000 shares, it would seem to follow that this executed consideration ought also count as valuable consideration in support of any *undertaking* (*i.e*. promise) to execute a guarantee since both obligations were demanded of Lauw as part of the same contractual agreement. If so, the promise to execute a guarantee would be specifically enforceable upon the furnishing of valuable consideration. It is then apparent that the equitable maxim that "equity treats as done that which ought to be done" will apply in relation to such specifically enforceable promises: although *at law*, there would only be a promise to execute a guarantee, yet *in equity*, the obligation of guarantee would have already arisen. As such, despite the lack of any executed documentation for the guarantee (which, we are assuming, pertains to the share price on the expiry of 12 months from the time of transfer), since equity treats as done that which ought to be done, in equity, Lauw was already bound to "guarantee" the share price. There was, accordingly, no *need* for any further order for Lauw to *execute* guarantee documentation. There is thus more to support Kan J.'s appreciation and application of the maxim that, "Equity, like nature, does nothing in vain,"[37] than initially meets the eye. Even on the present assumption that the agreement was to be construed as a promise to provide a guarantee for the share price on the expiry of a year from the date of their transfer, that promise would have been specifically enforceable since it was supported by good and valuable consideration. It is unfortunate that these points appear not to have been brought to the attention of the Court of Appeal.

Lastly, a residual point: what was this "guarantee" that Lauw was ordered to provide really about? Clearly, it cannot be construed to refer to the strict legal conception of a guarantee, *i.e*. an undertaking of secondary liability should the primary promisor default in his primary obligations to the promisee. Given the context, it is hardly plausible that the guarantee was in the nature of a simple bet as to whether the share price would go above or below $0.17 per share within a specified time frame. Were that the case, it is mystifying as to what Lauw's obligations would have been had the share price fallen below $0.17 per share. It is far more plausible that Lauw intended to provide Full Fledge with a "put-option", exercisable on the expiry of 12 months after 28 June 2002,[38] or the date of their actual transfer.[39] In other words, Lauw would have no choice but to buy back the shares from Full Fledge at that price should Full Fledge elect to sell them back to Lauw. That damages for Lauw's failure to execute such a put-option would be difficult to ascertain at a *future* point in time is clear, since there is no way one can reliably predict movements in the price of publicly-traded shares. But this difficulty arises directly from the Court of

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[37] M. Woodley *et al*., *Osborn's Concise Law Dictionary*, 10th ed. (London: Sweet & Maxwell, 2005) at 162.

[38] On a plain reading of the 28 June 2002 letter.

[39] If we assume that the Court of Appeal applied the significantly wider construction noted in the three immediately preceding paragraphs.

Appeal having implicitly construed Lauw's agreement with Full Fledge as a guarantee of the price of UFS shares following expiry of 12 months from the time of their transfer and not the date of the agreement. In light of the difficulties which this construction of the agreement gives rise to, the Court of Appeal's reticence in *explicitly* setting out the basis for such an awkward construction can only be a matter of some regret.

Does this signal that henceforth, mandatory injunctions (or, for that matter, specific performance) may be ordered so long as the court takes the view that it would be "fair" to do so, regardless as to whether damages would have been an adequate remedy? It may be apposite to contrast the rather cursory treatment of the question in this case with the Court of Appeal's careful assessment of the facts in *Chin Bay Ching* in coming to a decision not to grant interlocutory mandatory injunctions to restrain defamatory communications by one of the parties. Of particular note, at paragraphs 42–44, the Court of Appeal accepted that in relation to the torts of libel and slander, at least, the essential conditions which have to be met before an (interim) prohibitory injunction is issued include: (a) whether further defamatory publication is threatened or intended by the defendant; and (b) such further publication would cause the plaintiff to suffer an injury which cannot be fully compensated in damages.[40]

Given the drastic nature of the remedy, whether in the form of a final or interlocutory injunction or an order for specific performance, it would be odd indeed if the pre-requirements to exercising the equitable jurisdiction in compelling remedial steps to reverse a tort (as in *Chin Bay Ching*) should be completely disregarded where the equitable discretion is to be applied to remedy a breach of contract (as in *Wisanggeni Lauw* (C.A.)). If it is the case that the Court of Appeal has drawn a distinction between the treatment of breaches of contract and the treatment of tort liability (which is, by no means clearly adverted to in either *Chin Bay Ching* or *Wisanggeni Lauw* (C.A.)), the question remains: why should a distinction be drawn? In principle, the equitable jurisdiction of the courts to issue injunctions cuts across all such distinctions at law.

As *Hayton & Marshall* pungently put it (in the context of specific performance):

> [w]hile the common law allows a defendant to choose to be a "bad man" and break his contractual obligations and pay damages for the privilege, where equity intervenes it will compel a defendant to be a "good man" and fulfil his obligations.[41]

But equity has never required that the good man go *beyond* his obligations: we are hardly within the realm of angels and saints.

In light of the above points, it is sincerely hoped that the courts will, at the earliest opportunity, clarify whether significant distinctions ought to be drawn between cases where the common law right infringed lies in contract or in tort when exercising their discretion to issue equitable specific relief. Further, clarification as to when a court might feel it to be "fair" to issue equitable remedies such as a final mandatory injunction (or an order for specific performance) and how this novel pre-requisite fits in with current learning on restrictions upon exercise of its equitable jurisdiction would not be amiss.

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[40] *Wisanggeni Lauw* (C.A.), *supra* note 1.

[41] *Hayton & Marshall*, *supra* note 21 at para. 14-130.