

Revisiting the penalties doctrine: Paciocco v ANZ

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Introduction

- 1 The recent decision by the High Court in *Paciocco v Australia and New Zealand Banking Group Limited*¹ should bring to an end uncertainty surrounding the doctrine of penalties. A majority of the High Court found that late payment fees charged by the respondent (ANZ) to customers, upon a failure of the customer to meet the minimum monthly payment due, did not constitute a penalty.
- 2 The majority of the High Court (French CJ, Kiefel, Gageler and Keane JJ) held in separate reasons that the late payment fees were not penalties at law or in equity. The majority judgments were given by Kiefel J (with whom, on the “penalty” question, French CJ agreed), Gageler J, and Keane J, each of whom applied slightly different tests in reaching the conclusion that the fee was not a penalty.

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¹ [2016] HCA 28

- 3 To my mind, the significance of the High Court's decision lies in the following eight points:
- 1) the penalty doctrine remains alive and well, but as an exception to the general principle of freedom of contract that the Courts should recognise and uphold.
 - 2) It remains so both at common law and in equity.
 - 3) The focus of the inquiry, informed by equity, is on the punitive or penal character of the provision.
 - 4) The assessment of the character of the provision directs attention to all aspects of "loss", or "damage" (in the singular, and in the broader sense).
 - 5) "Loss" equates to the "value of the infringement of the [legitimate] interests protected by" the alleged penalty.
 - 6) The assessment of the interests protected by the alleged penalty may (and in many cases will) look well beyond *Hadley v Baxendale*² foreseeability; indeed, it may go beyond losses that are in any real way capable of assessment in money.
 - 7) At a level of some generality, the parties are the best judges of their own interests, and the courts should not be astute to interfere.
 - 8) Mere disproportion is insufficient. To amount to a penalty, the sum must be extravagant, or out of proportion, or exorbitant, compared to the maximum loss (in the wide sense) likely to be suffered.
- 4 Despite the insistence on point (2) (the topic of debate and criticism – see at [75]-[82] below), the majority judgments recognise, by implication rather than positive statement, that the potential for relief in equity but not at law is limited. I add that the inquiry, although of necessity conducted after the event, is prospective – looking forward from the time to contract was made. It is thus not

² (1854) 9 Ex 341

something tending to nicety of analysis, or precision of calculation. It is in a real sense impressionistic.

- 5 This paper seeks to discuss the reasoning of the High Court in *Paciocco*, and the significance of the decision for practitioners. The decision provides clarity as to the state of the doctrine of penalties in Australia, and appears to have significantly narrowed the practical operation of the doctrine.

Litigation History

Andrews v ANZ

- 6 *Andrews v Australia and New Zealand Banking Group Ltd*³ commenced as a representative action brought in the Federal Court by approximately 38,000 customers of ANZ. The customers alleged that certain fees charged by ANZ were void or unenforceable as penalties. There were five categories of fees alleged to be penalties. These fees were: “fees for overdrafts, overdrawn accounts, dishonour fees and overlimit credit card accounts”.⁴
- 7 It is not necessary to recount the history of the *Andrews* litigation in significant detail, as I have previously spoken about, and published a paper on this, earlier this year.⁵
- 8 Gordon J heard the matter at first instance. The case was conducted in a way that asked her Honour to consider the penal character of those fees, by answering three separate questions.
- 9 Gordon J ultimately found that the Late Payment Fees, the subject of today’s discussion, were “capable of being characterised as a penalty”.⁶ Her Honour expressed her conclusion in that way because of the wording of the three questions her Honour was asked to consider.

³ (2012) 247 CLR 205

⁴ *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205

⁵ Robert McDougall, ‘Penalties in Commercial Contracts since *Andrews v ANZ*’, paper delivered at the Annual One Day CLE Seminar: Business Law, Saturday 12 March 2016

⁶ *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53, [5]

- 10 It was this answer that was the subject of ANZ's appeal to the Full Federal Court, which was removed into the High Court. The High Court concluded that the late payment fees were capable of being characterised as penalties, but declined to decide whether they were, in fact, penalties. This question was remitted to the Federal Court for consideration in light of the High Court's findings.
- 11 The High Court held, among other things, that the equitable doctrine of penalties had not been subsumed into the common law, with the equitable doctrine remaining alive and well, and that contractual breach is not the sole method by which the penalty doctrine can be engaged.
- 12 The test, as to when a contractual provision will be a penalty, derived from the High Court's decision in *Andrews* is as follows⁷:

In general terms, a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation.

- 13 That test was revisited, and in my view significantly clarified, in *Paciocco*.

Paciocco v ANZ – Federal Court

- 14 The High Court in *Andrews* remitted the case to Gordon J for consideration of whether the late payment fees were penalties. The remitted proceeding was led by Mr Paciocco and his company, Speedy Development Group Pty Ltd. The applicants contended that the late payment fees were penalties and further, were void or unenforceable as they breached various statutes. This paper focuses solely on the penalties claim.

⁷ *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, [10]

- 15 The primary issue for Gordon J was whether each late payment fee was a penalty at law and/or in equity. Since the High Court's ruling meant that the late payment fees could be characterised as penalties, the primary question for decision, her Honour said, was "to what extent (if any) did the amount stipulated to be paid exceed the quantum of the relevant loss or damage which can be proved to have been sustained by the breach, or the failure of the primary stipulation, upon which the stipulation was conditioned"⁸.
- 16 Her Honour held that "at law and in equity, the collateral stipulation was, as a matter of substance, to be viewed as security for, or in terrorem of, the satisfaction of the primary stipulation".⁹ This conclusion, her Honour thought, necessarily flowed from the test enunciated by the High Court in *Andrews*.
- 17 Gordon J stated that the relevant loss or damage suffered by ANZ is to be assessed on a forward-looking basis, in order to determine whether the particular late payment fee was extravagant or unconscionable in comparison with the greatest conceivable loss so proved.
- 18 Expert evidence was adduced by both parties, with the findings of both experts varying considerably. Mr Inglis was engaged by ANZ, whilst Mr Regan was engaged by Mr Paciocco. Gordon J preferred the evidence given by Mr Regan, and his methodology for calculating the loss or damage suffered by ANZ. The primary reason for the variance in the calculations and methodology employed by both experts was the form of the question each was asked to consider.
- 19 Mr Regan was asked to consider the loss or damage actually suffered by ANZ. He calculated the relevant loss or damage suffered as "no more than \$3"¹⁰. The relevant late payment fee charged, of either \$20 or \$35, was thus both extravagant and unconscionable and was therefore a penalty.

⁸ *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249, [139]

⁹ *Ibid*, [116]

¹⁰ *Ibid*, [173]

- 20 Mr Inglis was asked to “assess the maximum amount of costs that ANZ could conceivably have incurred as a result of late payments”¹¹. Gordon J found that the evidence of Mr Inglis was of no utility and provided little assistance to the Court, as it was a “theoretical accounting” exercise¹². Her Honour found that the inclusion of costs relating to provision for bad or doubtful debts and regulatory capital in that assessment could not be “directly or indirectly related to any of the late payments by Mr Paciocco”¹³.
- 21 As a result, her Honour found that the late payment fee was extravagant and unconscionable and therefore unenforceable as a penalty.

Paciocco v ANZ – Full Federal Court

- 22 ANZ appealed against Gordon J’s finding that the late payment fees constituted penalties at common law and in equity. The Full Court of the Federal Court agreed that the late payment fees were at first blush penal in nature, but said that the relevant test was then whether “the stipulation was extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to follow from such a breach”¹⁴. This test was to be resolved by an analysis as at the time of entry into the contract, looking forward over the life of the contract.
- 23 The Full Court thought that Gordon J had in reality undertaken an after the event analysis in determining whether the fee was prima facie a penalty, and had erred in doing so. The correct approach, the Court held, was to assess the loss at the time of entry into the contract, considering what losses might follow from late payment. Their Honours said Gordon J erred in limiting her consideration to the actual damages that were likely to be suffered.
- 24 Upon finding that Gordon J had erred in her approach to the assessment of the loss, the Full Court turned to an assessment of whether the fee was properly characterised as extravagant or unconscionable.

¹¹ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28 [231], citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 [133]

¹² *Ibid*, [138]

¹³ *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249, [155]

¹⁴ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584, [92]

- 25 Allsop CJ (with whom Besanko and Middleton JJ agreed, although giving separate reasons) held that Mr Regan’s evidence could not support the conclusion that the late payment fees were extravagant or unconscionable. There were two reasons. First, Mr Regan had failed to undertake a forward-looking analysis, and had instead assessed the actual damage caused by the breach. Second, he had not taken into account the full range of likely damage.
- 26 The Full Court preferred the evidence of Mr Inglis, calculated on a forward-looking basis. His calculations took into account provisioning costs, regulatory capital costs, and collection costs as costs that might conceivably be incurred by ANZ. His calculation of the range of likely losses showed that the late payment fees should not be classified as penalties, as “the fees were not demonstrated to be extravagant, exorbitant or unconscionable”¹⁵. The costs likely incurred by ANZ as a result of late payment were a “legitimate business cost”¹⁶, and real costs of running a bank.

The High Court’s decision in *Paciocco v ANZ*

- 27 Both ANZ and Mr Paciocco sought special leave to appeal to the High Court against the findings of the Full Federal Court. Special leave was granted by the High Court on 11 September 2015. The appeals were heard by 5 members of the High Court on 4th and 5th February 2016. The High Court handed down judgment on 27 July 2016.
- 28 This paper concerns only the penalty issue: Mr Paciocco’s and SDG’s appeal arguing that the late payment fees are penal in nature. There was also an appeal against the finding that the late payment fees did not breach any relevant statutory proscription. Both aspects of their appeal were dismissed by the High Court.

¹⁵ Ibid, [187]

¹⁶ Ibid

- 29 There were three elements of the penalty appeal¹⁷:
- 1) What is the current status of the second *Dunlop* test, which was the subject of contention in previous proceedings?
 - 2) What is the relevance of the tests of remoteness of damage in determining whether a particular late payment fee is a penalty or a genuine pre-estimate of loss?
 - 3) What evidence can be taken into account when determining whether a stipulated sum is penal?
- 30 The principal contention of the appellants, as summarised by Keane J, was as follows¹⁸:
- The appellants argued that the Full Court erred in assessing the greatest loss that ANZ could conceivably have suffered as a result of the late payments by taking into account heads of loss that would not be compensable at law in an action for damages for breach of contract.
- 31 This contention raises two substantial issues. First, what is the proper test to be applied when determining if a particular sum is a penalty? Secondly, what evidence can be taken into account in calculating that sum? Both these issues will be addressed in this paper.
- 32 The High Court (French CJ, Kiefel, Gageler, Keane and Nettle JJ) handed down separate judgments. The majority of the High Court (French CJ, Kiefel, Gageler and Keane JJ) dismissed the appeals, finding in favour of ANZ. Nettle J found in favour of Mr Paciocco and SDG, and would have allowed the appeal. In substance, his Honour agreed with the findings of Gordon J. French CJ delivered short reasons and agreed with the reasoning of Kiefel J in relation to the penalties appeal.
- 33 The majority upheld the decision of the Full Federal Court, that the late payment fees were not penalties. The majority agreed with the Full Court that

¹⁷ Transcript of Proceedings, *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCATrans 009 (4 February 2016) 8.

¹⁸ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [244]

the purpose of the late payment fees was not to punish the customer, but to recoup legitimate business costs of ANZ, and that the sum was not out of all proportion to the interests that it was intended to protect. In so finding, the majority of the High Court preferred the evidence of Mr Inglis, and his assessment of the relevant interests as including provisioning costs, regulatory costs and collection costs. Their Honours found that the correct approach was to assess the loss on a forward-looking basis, as Mr Inglis had done, and it was irrelevant whether the fee was considered to be a genuine pre-estimate of damage at the time each contract was made.

34 The majority discussed in detail the criteria derived from Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*¹⁹, as useful in determining whether a stipulated sum is a penalty. His Lordship's guidelines in effect became definitive, treated as though they represented statutory criteria rather than a conceptual and analytical framework. For convenience, I set out at this point what his Lordship said²⁰:

1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.
3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making the contract, not as at the time of the breach.
4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

¹⁹ [1915] AC 79

²⁰ *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1915] AC 79, 86-88

- (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
- (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable, – a subject which much exercised Jessel MR in *Wallis v Smith* – is probably more interesting than material.
- (c) There is a presumption (but not more) that it is penalty when “a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage”.

On the other hand:

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

The reasoning of the majority judgments

Kiefel J

35 Kiefel J set out a detailed analysis in support of her conclusion that the late payment fee is not a penalty. Her Honour undertook a review of the history of the doctrine of penalties in order to determine the appropriate test to be applied to assess the penal nature of the stipulated sum.

36 In relation to the *Dunlop* criteria, Kiefel J stated that the “aspect of *Dunlop* which assumes particular importance in this case is the recognition that a sum stipulated for payment on default may be intended to protect an interest that is different from, and greater than, an interest in compensation for loss caused

directly by the breach of contract”.²¹ The relevant principles in *Dunlop* were said by Kiefel J to continue to apply, and were not disturbed by this Court in *Andrews*, but they should not be taken to limit or confine the operation of the penalty doctrine.²²

37 The proper question, her Honour stated, based on the authorities since *Dunlop*, is (on the particular facts proved) “whether a provision for the payment of a sum of money on default is out of all proportion to the interests of the party which it is the purpose of the provision to protect”²³. The words “out of all proportion” were also considered by other members of the High Court as the appropriate test.

38 In regards to “test” 4(a) in *Dunlop*, Kiefel J detailed the history of the law of penalties, with a particular focus on the words “extravagant” and “unconscionable”, and stated that such words are used to “describe the plainly excessive nature of the stipulation in comparison with the interest sought to be protected by that stipulation”²⁴. Her Honour noted that the “test” 4(b) is “merely a corollary” of the prior “test”, and is “confined to the simplest of cases”²⁵. In general, this test only applies where losses can be clearly identified as at the time of entry into the contract.

39 It appears from the reasoning of Kiefel J, that a sum will be held to be “extravagant and unconscionable” when it is “out of all proportion to the interests protected”. Her Honour discussed the *Clydebank*²⁶, *Ringrow*²⁷ and *Cavendish*²⁸ cases, agreeing with the last to the extent that Lord Neuberger PSC and Lord Sumption JSC said that the proper test is whether the sum is

²¹ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [26]

²² *Ibid*, [27]

²³ *Ibid*, [29]

²⁴ *Ibid*, [34]

²⁵ *Ibid*, [35]

²⁶ *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC

6

²⁷ *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656

²⁸ *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67

“out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”²⁹.

- 40 Applying that test, Kiefel J turned to consider the legitimate interests of ANZ. Her Honour noted that the fact that ANZ had admitted that it had not calculated its loss by reference to any attempted pre-estimate of damage, does not automatically mean the stipulated sum is a penalty, nor does it necessarily give rise to a presumption that the stipulated sum is a penalty. Her Honour stated that “the distinction drawn by Lord Dunedin between liquidated damages and a penalty, while useful, should not be understood as a limiting rule”³⁰.
- 41 An assessment of the legitimate interests of ANZ involved an analysis of the expert evidence given by both Mr Inglis and Mr Regan, as to the relevant loss or damage said to be suffered by ANZ. Kiefel J noted that as a result of the differing instructions given to both experts, Mr Regan only calculated the operational costs to ANZ of charging the late payment fee, whereas Mr Inglis also calculated the costs to ANZ’s financial interests.³¹
- 42 Kiefel J found that the primary judge had erred in overlooking the potential costs to be incurred by ANZ, calculated on a forward-looking basis. Her Honour said that the assessment of loss, notionally made at the time the contract is entered into, should “acknowledge that an effect upon the ANZ’s interests may include the provision that it has to make concerning its overall position”³², as was the effect of Mr Inglis’ evidence.
- 43 Significantly, Kiefel J found that Gordon J erred in excluding loss provisions and regulatory capital costs from the assessment of loss or damage. Kiefel J noted Gordon J’s view that “loss provisions and regulatory capital costs are part of the costs of running a bank in Australia”³³. Kiefel J stated that the

²⁹ Ibid, [32]

³⁰ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [29]

³¹ Ibid, [59]

³² Ibid, [62]

³³ Ibid, [65], citing *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249, [155]

proper question is “not what the ANZ could recover in an action for breach of contract, but rather whether the costs to it and the effects upon its financial interests by default may be taken into account in assessing whether the Late Payment Fees are penalties”³⁴. Her Honour said that the evidence of Mr Regan was inadequate as it did not address the wide range of damage likely to be incurred by ANZ.

44 Kiefel J held that, once all relevant aspects of loss were taken into account, the late payment fee could not be considered “out of all proportion to the interests so identified”³⁵.

45 Kiefel J stated that “the effect of Mr Inglis’ evidence was to identify potential costs to the ANZ, from late payments, which reflect injuries to its financial position. They were real because they had to be taken into account by ANZ”³⁶.

46 As to the legitimate interests held by ANZ, her Honour stated that “ANZ had an interest in receiving timeous repayment of the credit that it extended to its customers, including the appellants”³⁷.

Gageler J

47 Gageler J delivered detailed reasons dealing with the penalty issue. His Honour, similar to Keane J, placed significant emphasis on whether the purpose of the late payment fee was to punish. Gageler J stated³⁸:

To ask whether a stipulated payment is a genuine pre-estimate of the innocent party’s probable or possible interest in the due observance of the principal contractual stipulation is to ask whether an interest which the innocent party has in the observance of that principal stipulation explains the stipulation for payment as having a purpose other than to punish the offending party.

³⁴ Ibid, [65]

³⁵ Ibid, [68]

³⁶ Ibid, [68]

³⁷ Ibid, [58]

³⁸ Ibid, [159]

- 48 His Honour said that the focus is on whether the stipulation has some purpose other than to punish. The relevant indicator for determining whether a stipulation has the sole purpose of punishment is whether the “negative incentive to perform” is “so far out of proportion with the positive interest in performance that the negative incentive amounts to deterrence by threat of punishment”³⁹. Of necessity, that inquiry directs attention to the full range of legitimate interests that the provision in question is intended to protect.
- 49 This gave rise to a consideration of whether the late payment fee served to protect a legitimate, or positive, interest of ANZ. A party seeking to identify its legitimate interests is not “limited by considerations of common law causation of damage” that would be sustained “as the direct result of that breach”⁴⁰. It is irrelevant whether the loss or damage at the time were foreseeable “to the other party”⁴¹.
- 50 Gageler J discussed at length the principle stated in *Dunlop*, stressing that the words of Lord Dunedin are not to “be understood as having the character or effect of an operative legal rule”⁴². Further, his Honour said, “the words ‘test’ and ‘presumption’ ... were not used to import either a legal criterion or a shift in the evidentiary or persuasive onus”⁴³. Whilst the utility of Lord Dunedin’s indicia should not be understated, his Honour notes that their usefulness has sometimes afforded them “a quasi-statutory status” which has “obscured [their] essential meaning”⁴⁴.
- 51 Gageler J said that the facts of both *Clydebank* and *Dunlop* “sufficiently illustrate that interests of the innocent party beyond the protection of an award of unliquidated damages in the event of a breach of contract can justify a different conclusion”⁴⁵.

³⁹ Ibid, [164]

⁴⁰ Ibid, [161]

⁴¹ Ibid, [162]

⁴² Ibid, [147]

⁴³ Ibid, [149]

⁴⁴ Ibid, [152]

⁴⁵ Ibid, [161]

52 It is instructive to look at the way that Gageler J utilised, with evident approval, the reasoning in the *Clydebank* case. In that case, House of Lords held that the “penalty” for late delivery of war ships reflected the importance of the agreement negotiated by the parties, in particular during a time when the Spanish Government was attempting to suppress an insurrection in Cuba.⁴⁶ The Lord Ordinary (Lord Kyllachy) stated at first instance that the shipbuilders failed to establish “that the £500 per week was exorbitant and unconscionable”⁴⁷. The Lord Ordinary said that in some cases the “amount stipulated might be such as to make it plain that it was merely stipulated *in terrorem*, and could not possibly have formed a genuine pre-estimate”⁴⁸ of damage. This principle was affirmed by the House of Lords on appeal.⁴⁹ If that is the case, it is an indicator that the amount stipulated is a penalty. However, as Lord Dunedin noted in *Public Works Commissioner v Hills*⁵⁰ by reference to *Clydebank*, “the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made”⁵¹.

53 In determining whether the late payment fee was a penalty, Gageler J asked whether the late payment fee was properly characterised as⁵²:

having no purpose other than to punish an account holder in the event of late payment; or conversely serving the purpose of protecting ANZ’s interests in ensuring that consumer credit card account holders made the minimum monthly payment by the due date.

54 His Honour analysed that question by reference to the legitimate interests held by ANZ. His Honour noted that Mr Inglis “identified three categories of

⁴⁶ *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6

⁴⁷ *Yzquierdo y Castaneda v Clydebank Engineering and Shipbuilding Co* (1903) 5 F 1016, 1024

⁴⁸ *Ibid*, 1022

⁴⁹ *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, 19

⁵⁰ [1906] AC 368

⁵¹ *Ibid*, 376

⁵² *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [167]

costs as having been incurred by ANZ in connection with the occurrence of the events that gave rise to an entitlement to charge the late payment fee”⁵³.

55 Gageler J summarised the effect of each category of costs. The provisioning costs were legitimate business costs of ANZ as the “probability of default increased with late payment” and “late payment of balances contributed to the overall level of the expense required to be recognised”⁵⁴. Regulatory capital costs are capital amounts that financial institutions, such as ANZ, are required to hold “as a buffer against unexpected losses”. These were held to be legitimate costs capable of inclusion, as the amount “required to be held increased with the probability of default associated with late payment”⁵⁵. The third category, operational costs, was also assessed by Mr Regan. These are costs attributable to collection activities. However, unlike Mr Regan, Mr Inglis made a further allowance “for the recovery of a proportion of common costs and of fixed costs associated with overall collection activities”⁵⁶. This was accepted by Gageler J.

56 Gageler J said that Mr Inglis’ categories all amounted to legitimate business costs of ANZ that could be the subject of protection or recoupment out of the late payment fee. Relevantly, his Honour noted, Mr Regan’s evidence was limited in utility as his calculations “were not sufficient to indicate the totality of ANZ’s interests in ensuring that the stipulation for payment of a minimum monthly payment by the due date was observed”⁵⁷.

57 Gageler J stated that it is also necessary to consider the fact that the “primary contractual stipulation consisted only in the payment of money, and ... the amount of the late payment fee did not vary according to the amount overdue or the length of delay in payment”⁵⁸. These indicia, his Honour said, cannot be ignored when considering “the totality of the circumstances”⁵⁹. However, his

⁵³ Ibid, [98]

⁵⁴ Ibid, [99]

⁵⁵ Ibid, [100]

⁵⁶ Ibid, [101]

⁵⁷ Ibid, [170]

⁵⁸ Ibid, [168]

⁵⁹ Ibid, [168]

Honour did not consider that these circumstances should be given much weight, as on balance, the minimum monthly payment was small when compared to the closing balance of the account, and the account holder was ultimately in control of the balance of the card, concerning repayments and cancellation options for the card.⁶⁰

58 Gageler J concluded that the assessment of loss and damage calculated by Mr Inglis properly quantified the likely cost of injury to ANZ's legitimate interests. The additional categories of costs included by Mr Inglis "represented commercial interests which ANZ had in ensuring that its credit card customers, as a cohort, made minimum monthly payments by the due date"⁶¹.

59 Gageler J summarised the balance between the legitimate interests of ANZ and the amount of the alleged exorbitant sum as follows⁶²:

Each category of costs identified by Mr Inglis represented a commercial interest of ANZ in ensuring observance by its consumer credit card customers of the principal stipulation in each of their contracts for payment of the minimum monthly payment by the due date. The customers' grounds of appeal to this Court do not encompass any challenge to Mr Inglis' evidence of their quantification. In light of those interests, it cannot be concluded that the inclusion in the credit card contracts of the stipulation for charging and payment of the late payment fee properly had no purpose other than to punish the account holder in the event of late payment. The stipulation was not merely in terrorem; the late payment fee was not just a punishment.

60 As demonstrated above, Gageler J's reasons focused on whether the purpose of the late payment fee served a legitimate interest or whether it was solely to punish. His Honour assessed ANZ's interests, ultimately finding that punishment was not the sole purpose of the late payment fee, and therefore it was not a penalty.

⁶⁰ Ibid, [168]

⁶¹ Ibid, [172]

⁶² Ibid, [176]

Keane J

- 61 Keane J took perhaps the widest view of protectable interests, in finding that the late payment fee was not a penalty. As Gageler J had done, Keane J assessed whether the purpose of the late payment fee was to punish or whether it could be properly considered to serve the legitimate interests of ANZ. His Honour's identification of those legitimate interests went further than his colleagues had done.
- 62 Keane J noted that the appellants placed significant weight on proposition 4(b) in *Dunlop*, which his Honour said was "out of step"⁶³ with both the rationale of the penalty rule and with authority. His Honour said that the appellants' case must depend on proposition 4(a). As Allsop CJ in the Federal Court had said, and Keane J agreed, "the fee may or may not, in fact, be greater than the sum due; [but] that does not appear on the face of the provision"⁶⁴. Therefore, "the late payment fee was not necessarily a demand for payment of a larger sum upon failure to pay a smaller sum"⁶⁵. Keane J noted that the second proposition (4(b)) does not take into account the greater loss to be suffered by a debtor, which extends beyond "the mere fact of non-payment of the sum due on the due date"⁶⁶.
- 63 In relation to *Dunlop* proposition 4(a) and the use of the terms "extravagant" and "unconscionable", Keane J said that they "are not used in contradistinction to reasonable, much less as free-standing criteria of invalidity"⁶⁷, and further, they "function as pointers towards the punitive purpose which imbues the challenged provision with the character of a punishment"⁶⁸.
- 64 Keane J agreed with the reasoning of Lord Hodge JSC in *Cavendish*, where his Lordship stated that the correct test is "whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or

⁶³ *Ibid*, [262]

⁶⁴ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 321 ALR 584, [137]

⁶⁵ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [262]

⁶⁶ *Ibid*, [263]

⁶⁷ *Ibid*, [268]

⁶⁸ *Ibid*, [268]

unconscionable when regard is had to the innocent party's interest in the performance of the contract"⁶⁹.

65 Keane J stated that the foundation of the appellants' claim, "that the contractual purpose which characterised the late payment fee charged by ANZ was the punishment of its customers" was "fraught with difficulty once it is accepted that the bank's legitimate interests are not confined to the reimbursement of the expenses directly occasioned by the customer's default"⁷⁰.

66 Keane J said that the "legitimate interest of ANZ protected by the late payment fee cannot be apprehended without an understanding of the commercial context in which that interest requires protection"⁷¹. His Honour found that a bank, such as ANZ, had a "multi-faceted interest in the timely performance of its customers' obligations as to payment"⁷². The inherent circumstances in this case, included that ANZ is a financial institution which provides financial accommodation to many customers on standard terms.⁷³ The agreement to pay the late payment fee "enabled the bank to provide accommodation to each customer"⁷⁴. Importantly, Keane J stated⁷⁵:

The fixing of risk and reward on each side of each transaction reflected the circumstance that it was one of many transactions and that the very multiplicity of these transactions was a factor bearing upon the pricing of each facility to each of many customers.

67 ANZ had an interest in ensuring timely repayments by its customers so that it could "pursue more profitably its business of lending to its customers", than it otherwise would be able to. A purpose of the late payment fee is therefore to ensure that ANZ remains a profitable institution for its shareholders. As noted

⁶⁹ *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, [255]

⁷⁰ *Ibid*, [216]

⁷¹ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [272]

⁷² *Ibid*, [271]

⁷³ *Ibid*, [273]

⁷⁴ *Ibid*, [273]

⁷⁵ *Ibid*, [273]

by Keane J, “[i]f a bank’s customers comprised only borrowers who paid on time ... the bank’s freedom from the risks associated with late payment would enable it to maximise its revenues”⁷⁶ as it would be able to secure more customers, thereby generating higher revenues. As such, “the maintenance ... of ANZ’s revenue stream” is a legitimate purpose of the late payment fee.⁷⁷ His Honour stated that⁷⁸:

the late payment fee is readily characterised by the purpose of ensuring that ANZ’s revenues are maintained at the level of profitability required by its shareholders.

68 After outlining the legitimate interests held by ANZ, Keane J found that even if he were to accept the evidence of Mr Regan as opposed to Mr Inglis, that evidence was “not apt to demonstrate the gross disproportion required to establish the punitive character of the late payment fee”⁷⁹. Ultimately, his Honour accepted the evidence of Mr Inglis as demonstrating a legitimate interest of ANZ, and not satisfying the requisite test for the sum to be punitive and grossly disproportionate.

Nettle J’s dissenting judgment

69 Although Nettle J dissented as to the outcome of the appeal, his Honour agreed that the “*Andrews* and *Cavendish* formulations accord with *Dunlop*”⁸⁰. However, his Honour then stated that this was not one of the types of case to which the *Dunlop* test can easily apply, and asked whether it was one of the “more complex types of cases ... which necessitate considerations beyond a comparison of the agreed sum and the amount of recoverable damages”⁸¹.

70 Nettle J substantially agreed with the reasoning of the primary judge, that this was the type of case which also engaged proposition 4(c) of *Dunlop*, which in turn gave rise to a presumption that the payment was penal. In regard to proposition 4(a), his Honour agreed with a submission put by the appellants

⁷⁶ Ibid, [278]

⁷⁷ Ibid, [216]

⁷⁸ Ibid, [216]

⁷⁹ Ibid, [279]

⁸⁰ Ibid, [319]

⁸¹ Ibid, [322]

that the “Full Court erred in taking into account forms of projected losses which might be conceived of as bearing some possible relationship to the breach but which at law are regarded as too remote to be recoverable”⁸². His Honour found that, in accordance with the principles enunciated in *Ringrow*, this was the type of case where the late payment fee “was out of all proportion to the amount recoverable as unliquidated damages”⁸³.

71 Nettle J considered that “the primary judge did not take an ex post approach to the identification of conceivable loss” but rather, that “[her Honour] approached the task ex ante in accordance with *Dunlop* tests 4(a) and 4(c)”⁸⁴. His Honour contended that the issue is one “whether there is any evidence ... sufficient to rebut the presumption”⁸⁵ that arises from *Dunlop* test 4(c).

72 In relation to the identification of ANZ’s legitimate interests, Nettle J remarked that “there is no evidence or other indication of any interest to be protected by the timeous performance of the Monthly Payments obligation apart from the avoidance of costs”⁸⁶. His Honour said that “the only evidence offered in support of the late payment fee was Mr Inglis’ projections as to what he termed the greatest amount of costs which could conceivably have been, but which were not in fact, incurred”⁸⁷.

73 Nettle J said that the acceptance of Mr Inglis’ evidence, and allowing the Bank “to impose a late payment fee wholly disproportionate to the greatest loss ... would be in effect to abandon a large part of the existing law relating to penalties”⁸⁸. His Honour concluded that the evidence of Mr Inglis should not be accepted, and the costs which he included were “simply an estimate of what might or might not one day prove to be the case ... [which] is not

⁸² *Ibid*, [340]

⁸³ *Ibid*, [343]

⁸⁴ *Ibid*, [345]

⁸⁵ *Ibid*, [348]

⁸⁶ *Ibid*, [324]

⁸⁷ *Ibid*, [326]

⁸⁸ *Ibid*, [334]

recoverable as damages”⁸⁹. The estimates provided by Mr Inglis, Nettle J said, were “untethered from reality”⁹⁰ and should not be accepted.

74 In concluding that the late payment fee was a penalty, Nettle J stated⁹¹:

In this case, the contract is a standard-form consumer credit contract and the Bank’s bargaining power was such that Mr Paciocco had no opportunity to negotiate the terms. That consumer relationship, combined with the fact that the late payment fee of \$35 (or \$20 as it later became) was extravagant or otherwise out of all proportion to the \$6.90 of costs which might conceivably have been recoverable as damages for breach of contract, warranted the primary judge’s conclusion that the late payment fee was a penalty.

The significance of the High Court’s decision

Reconciling Andrews and Paciocco

75 Prior to *Andrews*, it appeared relatively settled law that the penalties doctrine was only applicable in the event of a breach of a primary or collateral contractual stipulation. However, the High Court in *Andrews* held that it is not correct that “in a simple contract the only stipulations which engage the penalty doctrine must be those which are contractual promises broken by the promisor”⁹². The High Court stated that contractual breach is not the sole method by which the penalty doctrine can be engaged. This appeared to widen the application of the penalties doctrine, from what was previously a relatively confined application.

76 It was believed that prior to *Andrews*, there existed reasonable certainty, from a drafter’s perspective, as to what would engage the penalty doctrine. The *Andrews* decision received extensive criticism from academics and commentators, with critics asserting that the High Court failed to consider the implications or effect that the decision might have on commercial contracts in the future. As noted by Carter, “no lawyer ... in the country could feel

⁸⁹ *Ibid*, [352]

⁹⁰ *Ibid*, [369]

⁹¹ *Ibid*, [371]

⁹² *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, [45]

comfortable in making a judgment as to the efficacy of any provision that might fall within the reach of the initial criteria”⁹³.

77 However, as I noted in my earlier commentary on this topic,⁹⁴ I find it difficult to see that the practical effects of *Andrews* are as extreme as some commentators expressed. It appears that to a certain extent the High Court shares a similar view, as Gageler J noted in his reasons that he did not agree that *Andrews* involved a radical departure from the previous state of the law.⁹⁵

78 The High Court in *Paciocco* affirmed the decision and the statement of principle by the Court in *Andrews*, and noted that the parties had agreed “that the governing principles are to be found in *Andrews* and *Dunlop*”⁹⁶. French CJ and Gageler J made reference to the reception of *Andrews* by the Supreme Court of the United Kingdom in *Cavendish*. None of the other judges of the High Court engaged with the commentary in *Cavendish*.

79 French CJ delivered a short judgment, agreeing with the reasoning of Kiefel J in relation to the penalties appeal. His Honour discussed the current state of the law of penalties, and discussed the divergence of Australian and United Kingdom law on this particular area. His Honour made reference to the UK decision of *Cavendish*, noting that “a difference has emerged since the decision in *Andrews* between the Supreme Court of the United Kingdom and this Court in relation to the scope of the law relating to penalties”⁹⁷. Whilst his Honour remarked that “[a]ll of the common law jurisdictions are rich sources of comparative law whose traditions are worthy of the highest respect, particularly those of the United Kingdom as the first source,”⁹⁸ his Honour emphasised that over time the laws of Australia and the UK have diverged in many areas, and it was important to remember that they remain distinct jurisdictions. Following the introduction of the Australia Acts and the abolition

⁹³ J W Carter et al, ‘Contractual Penalties: Resurrecting the Equitable Jurisdiction’ (2013) 30 *Journal of Contract Law* 99, 112

⁹⁴ Robert McDougall, ‘Penalties in Commercial Contracts since *Andrews v ANZ*’, paper delivered at the Annual One Day CLE Seminar: Business Law, Saturday 12 March 2016

⁹⁵ *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [122]

⁹⁶ *Ibid*, [115]

⁹⁷ *Ibid*, [6]

⁹⁸ *Ibid*, [10]

of appeals to the Privy Council, the common law of England remained a “source of law for legal development in Australia, but not the only source”.⁹⁹ His Honour did not think it necessary to consider whether the United Kingdom’s view of *Andrews* was correct.

80 Gageler J also dealt with the reception of *Andrews* in *Cavendish*. The Supreme Court in *Cavendish* held “that only a detriment imposed on breach of contract can amount to a penalty”¹⁰⁰. Lord Neuberger PSC and Lord Sumption JSC stated that *Andrews* involved “a radical departure from the previous understanding of the law”¹⁰¹, by expanding the penalties doctrine to not only apply to breaches of contract. Gageler J responded explicitly to that statement. His Honour said that, “[t]o the extent that the statement refers to the common law of Australia, the statement is wrong and appears to be based on a misunderstanding of *Andrews*”¹⁰².

81 Gageler J discussed the state of the penalties doctrine prior to *Andrews*, in particular the comments made in *AMEV-UDC Finance Ltd v Austin*¹⁰³ concerning whether the equitable doctrine had withered on the vine. His Honour stated that “for an equitable doctrine to wither is not necessarily for an equitable doctrine to die. On that basis, “*Andrews* did nothing to disturb the settled understanding in Australia that a contractual provision imposing a penalty is unenforceable at common law without the discretionary intervention of equity”¹⁰⁴. However, as French CJ noted, that case “came to this Court as one involving characterisation of a provision for payment of a fee which was, if enforceable, enlivened upon a breach of contract”¹⁰⁵. It was therefore unnecessary for the High Court to engage in great detail with the apparent expansion of the doctrine in *Andrews*.

⁹⁹ *Ibid*, [9]

¹⁰⁰ *Ibid*, [120]

¹⁰¹ *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, [41]

¹⁰² *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [121]

¹⁰³ (1986) 162 CLR 170

¹⁰⁴ *Ibid*, [122]

¹⁰⁵ *Ibid*, [5]

82 Gageler J affirmed that the significance of the decision of *Andrews*¹⁰⁶:

lies in its explanation of the conception of a penalty as a punishment for non-observance of a contractual explanation, in its explanation of that conception of a penalty as a continuation of the conception which originated in equity, and in its endorsement of the description of the speech of Lord Dunedin in *Dunlop* as ‘the product of centuries of equity jurisprudence’.

Common threads of the majority judgments

83 The key conclusion coming from the majority judgments in *Paciocco* in the High Court, in regard to what evidence can be considered, is that “damage” goes well beyond loss that is recoverable on breach of contract. The focus is on the nature of the interests protected by the penalty clause. Their Honours were very clear in noting that “the question is not what the ANZ could recover in an action for breach of contract, but rather whether the costs to it and the effects upon its financial interests by default may be taken into account in assessing whether the Late Payment Fees are penalties”¹⁰⁷. It is for that reason that four judges of the High Court preferred, although giving different reasons, the evidence of Mr Inglis.

84 The key difficulty for the High Court in this case was that the interests to be protected of, and hence the loss or damage alleged to be likely to be suffered by, ANZ were difficult to identify with certainty. That having been said, Kiefel J noted that “[t]he ANZ’s interest in this case are not as diffuse as those considered in *Dunlop*, *Clydebank* and *Cavendish*”¹⁰⁸.

85 Whilst the verbal formulations of the tests proposed by the majority in the High Court differ slightly, the key question to be asked is whether ANZ had a legitimate interest in charging the late payment fee? This goes to the question of whether the sole purpose of the late payment fee was to punish the customer. The majority judgments are clear in stating that this question should be answered in the affirmative.

¹⁰⁶ Ibid, [127]

¹⁰⁷ Ibid, [65]

¹⁰⁸ Ibid, [57]

- 86 One of the difficulties with the High Court's decision is that the majority judges who allowed the appeal, all gave separate reasons, leaving it difficult to determine a clear ratio or principle. However, the three principal majority judgments all affirm the necessity of assessing the alleged penalty by reference to all legitimate interests that might be infringed on breach. The question is not confined to damages recoverable on breach on the basis of *Hadley v Baxendale*¹⁰⁹ principles. I think there is a clear common thread, capable of application in other cases.
- 87 Further, I think, the majority's citation, with evident approval, of the tests applied in and outcomes of *Clydebank*, *Dunlop* and *Cavendish* suggests that the legitimate interests to be taken into account may well range beyond the purely monetary. In those cases, the interests were, respectively:
- (1) The Spanish Government's interest in having modern warships available;
 - (2) Dunlop's interest in the orderly marketing of its products; and
 - (3) Cavendish's interest in enforcing the covenants to protect the goodwill of its business.
- 88 To my mind, one of the difficulties with the apparent widening of the range of interests that may be protected by a stipulated sum, beyond the scope of traditional damages where compensation is recoverable for breach of contract, is that the penalty doctrine is more likely to be invoked. The majority judgments recognise that the legitimate interests of a party may extend beyond damages recoverable for breach of contract. However, where the "damage" or protected interests are "diffuse", it is more difficult to assess the extravagance (or otherwise) of the stipulated sum. Thus, it may be more likely that the question of penalty will arise. However, equally, those should be the circumstances where the courts should recognise the principle of freedom of contract. Where the parties have entered into their agreement freely and openly, including the stipulated sum, the courts should take the view that the

¹⁰⁹ (1854) 9 Exch 341

parties are the best judges of their respective interests. Perhaps a less liberal view should be taken to contracts of adhesion, on a “take it or leave it” basis, where in reality there is no open and balanced negotiation.

- 89 Nonetheless, the decision of the High Court in *Paciocco* has reaffirmed the importance of the principle of freedom of contract, which the same Court in *Andrews* was said to have failed to consider. The decision in *Paciocco* is likely to leave parties with greater certainty as to their abilities to contract between themselves, without fear of liquidated damages being held to be void or unenforceable.
- 90 Lord Neuberger PSC and Lord Sumption JSC in *Cavendish* said, with respect correctly, that “the penalty rule is an interference with freedom of contract”¹¹⁰. In addition, their Lordships said, “it undermines the certainty which parties are entitled to expect of the law”¹¹¹. It is perhaps for this reason that the courts have not lightly applied the penalties doctrine, and there has always existed a strict test to determine whether a particular term in a contract is void or unenforceable as a penalty.
- 91 It has been contended that the decision of the High Court in *Andrews* and the potential widening of the law of penalties, had unfairly encroached on the well-entrenched principle of freedom of contract between parties. Whilst the Court in *Paciocco* confirmed the principles enunciated in *Andrews*, it was keen to assert that the principles of freedom of contract and commercial certainty remain considerations of fundamental importance.
- 92 As affirmed by Keane J, “[g]iven the importance of the values of commercial certainty and freedom of contract in the law, the courts will not lightly invalidate a contractual provision for an agreed payment on the ground that it has the character of a punishment”¹¹². His Honour then continued, explaining that “if the provision is not distinctly punitive in its character, the rule does not operate to displace the parties’ freedom to settle for themselves the

¹¹⁰ *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67, [33]

¹¹¹ *Ibid*, [33]

¹¹² *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28, [220]

contractual allocation of benefits and burdens and the rights and liabilities following a breach of contract”¹¹³. He referred to authority which emphasised “that the rule against penalties operates as an exception to the primacy otherwise accorded to considerations of certainty and freedom of contract where neither party is under a relevant disability”.¹¹⁴ It is clear that in this case, Mr Paciocco was under no such disability.

93 Despite the fact that one party was a large corporation in this case, the majority thought there was no inequality of bargaining power between the parties. It was only Nettle J who thought that ANZ’s “bargaining power was such that Mr Paciocco had no opportunity to negotiate the terms”¹¹⁵. A possible explanation for this view is that the stipulation is found in a standard form contract, which is similar in form if not detail to those of other financial institutions.

94 However, the evidence suggests that Mr Paciocco entered into the agreements freely and voluntarily, and as identified by Keane J, “a voluntary and self-interested choice” to enter into the contracts “is the opposite of the rational response which one might expect to be generated by a penal provision, given that the characteristic purpose of a penalty is to deter non-compliance”¹¹⁶. His Honour said that “there is no reason to regard Mr Paciocco’s choice to incur the fee as other than a rational economic choice on his part”¹¹⁷.

95 As was made clear more than once, mere disproportion will not suffice to demonstrate penalty. The adjectival characterisations – “extravagant, out of all proportion, etc” – are fundamental.

96 The High Court’s decision will provide greater certainty as to the state of the law since the decision in *Andrews*. The High Court’s judgment is clear as to

¹¹³ Ibid, [221]

¹¹⁴ Ibid, [251]

¹¹⁵ Ibid, [371]

¹¹⁶ Ibid, [219]

¹¹⁷ Ibid, [219]

the effect of late payment fees, and has left a very narrow margin for other cases to be successful.

- 97 Whilst it is difficult to assess at this point the effect that this decision might have, practitioners should exercise significant caution in drafting and reviewing contracts, particularly when reviewing liquidating damages clauses.

Conclusion

- 98 Whilst *Andrews* widened the operation of the penalties doctrine by extending it beyond breach of contract, and this principle was affirmed in *Paciocco*, the practical operation of the doctrine of penalties has been narrowed. The High Court in *Paciocco* expanded the range of what might constitute a legitimate interest. Applying the approach of the majority High Court, the party which has stipulated for a liquidated damages sum can argue, after the event but by reference to the position immediately before the contract was made, that it is compensation for a legitimate cost, or protection of a legitimate interest in the performance of the contract.
- 99 The significance of the High Court's decision lies in the broad range of legitimate interests that a court is able to take into account when determining whether a particular stipulated sum is a penalty. The relevant loss or damage said to be suffered is to be calculated at the time of entry into the contract, on a forward-looking basis. In addition, the relevant loss or damage does not have to be calculated by reference to a genuine pre-estimate of loss. The courts should give consideration to the nature of the agreement entered into between the parties, and should be astute to interfere with such agreements.