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High Court of Australia

Acron Pacific Ltd v Offshore Oil [1985] HCA 63; (1985) 157 CLR 514 (3 October 1985)

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ACRON PACIFIC LIMITED v. OFFSHORE OIL [1985] HCA 63; (1985) 157 CLR 514

Contract

High Court of Australia

Mason A.C.J.(1), Wilson(1), Brennan(1), Deane(2) and Dawson(1) JJ.

CATCHWORDS

Contract - Penalty - Moratorium deed - Compromise of dispute and grant of indulgence - Right of creditors to terminate moratorium upon expression of opinion by examining accountant - Whether right penal - Comparison of parties' positions before and after making deed - Whether provision for termination operates in substance to impose punishment.

HEARING

1985, September 18; October 3. 3:10:1985

APPEAL from the Supreme Court of New South Wales.

DECISION

MASON A.C.J., WILSON, BRENNAN AND DAWSON JJ.: Prior to 25 November 1982, the respondents Offshore Oil N.L., Aureole Investments Pty.Limited and Fire and All Risks Insurance Limited were the creditors of a number of companies which were members of the Brinds group of companies. The Brinds group included the first seven appellants and the fifth, seventh and eighth respondents.

2. It appears that there was some dispute as to the terms of the debts owed by the debtor companies to the creditor companies. On 25 November 1982, the creditors, the debtors and certain other parties executed a deed ("the Moratorium deed"), by cl.10.1 of which each of the debtors acknowledged:

" (i) to each of Offshore and Aureole that it is indebted in the amounts set out opposite its name in the First Schedule to the party therein specified and that such indebtedness is unconditionally repayable by such Creditor on demand and shall bear interest at the rate of 16% per annum from the 30th November, 1982 except in the case of the indebtedness of each of Acron, Fiji and Nadi Bay which shall bear interest at the rate referred to in the mortgage documents contemplated by Clause 20. the Second Schedule is now repayable in full."

The First Schedule and Second Schedule respectively specified the amount of each debt, the date at which it was owing, the creditor and the debtor. The creditors covenanted not to enforce the debtors' respective liabilities during "the Moratorium". By cl.7(1) each of the creditors agreed "in relation to the whole or any portion of any debt set forth in the First Schedule or Second Schedule or any claim arising or alleged to have arisen against the Debtors or any of them with respect to any such debt" that it would not wind up a debtor, take proceedings against a debtor, apply for the appointment of a receiver or manager of a debtor's assets or take further steps in any proceedings pending against a debtor. By cl.10.2, Offshore and Aureole agreed as follows:

" With respect to each debt details of which are

set forth in the First Schedule, the Creditor

with respect to each debt covenants with the

respective Debtor that during the Moratorium such

Creditor shall not demand repayment of such

debt."

The definition of the term "the Moratorium" is to be found in cl.1:

" From the date of this Deed and until and

including November 30, 1983 or until terminated

in accordance with the provisions hereof,

whichever shall first occur (hereinafter called

the 'Moratorium') ... "

3. The Moratorium was to terminate on the happening of any of the events mentioned in cl.29. One of the events mentioned - in par.(b) - is the giving of a notice of termination of the Moratorium pursuant to cl.22.

4. Clause 22 provides:

" If during the Moratorium the Examining Accountant

in his absolute opinion considers that:

(a) the interests of the Creditors could be

prejudiced by compliance by any Debtor with this Deed;

(b) any Debtor is not observing or fulfilling any of the covenants or agreements herein contained on its part to be observed and fulfilled;

(c) without affecting the generality of sub-clause 22(b) above any Debtor is not ... making sufficient progress in the discharge of its indebtedness to the Creditors as referred to herein including the realisation of its assets during the Moratorium so as to discharge such indebtedness,

the Examining Accountant will deliver that opinion and the reasons therefor and any proposals consequent upon such opinion to the Creditors. Any Creditor may within seven (7) days after receipt of an opinion pursuant to this clause give notice of termination of the Moratorium to the Debtors. No party to this Deed shall challenge or contest on any account an

opinion formed by the Examining Accountant."

The Examining Accountant was Mr MacIntosh, the sixth respondent. On 10 February 1983 he delivered an opinion to the creditors pursuant to cl.22. His opinion related to all three of the matters specified in that clause. On 16 February 1983, the creditors gave notice of termination of the Moratorium to the debtors.

5. The appellants submit that the operation of cl.22 is penal and the clause is therefore void. The argument is that the termination of the Moratorium by a cl.22 notice leaves the debtors exposed to an immediately enforceable liability to pay the acknowledged debts while the Moratorium deed continues to bind the debtors and other parties associated with the debtors to performance of the burdensome obligations which they had undertaken under the deed. The debtors might suffer the termination of the Moratorium irrespective of the gravity of the matter to which the Examining Accountant's opinion relates or the extent of any loss which a creditor might suffer by reason of that matter. The matters to which the Examining Accountant's opinion might relate were various - some matters being important, some trifling. Yet, whatever the gravity of the matter to which the opinion might relate, the delivery of an opinion gave each creditor the power to terminate the Moratorium.

6. Of course, there is no penalty if the provisions of the Moratorium deed simply grant an indulgence for the payment of a debt that is due and payable: Wallingford v. Mutual Society (1880) 5 App.Cas.685, at p 702; O'Dea v. Allstates Leasing System (WA) Pty.Ltd. [1983] HCA 3; (1983) 152 CLR 359, at pp 366-367,382,386. The appellants submit that the Moratorium deed does not simply grant such an indulgence. It is submitted that the Court must look beyond the provisions of the Moratorium deed to the circumstances in which the debtors and their associates undertook all the burdens expressed in the deed. If the validity of the deed as a whole is considered, it is right to compare the position of the parties with respect to the debts before the deed was executed with their position thereafter. That comparison does not reveal a penalty. The deed compromises a dispute as to the terms of the antecedent debts. The creditors gained the benefit of the acknowledgments, a mechanism to secure payment and a liability for interest at commercial rates until payment of the debts in the First Schedule; the debtors gained the benefit of the creditors' covenants during the Moratorium. The cessation of the debtors' liability for interest on payment consequent on termination of the Moratorium in accordance with cl.22 is a significant indicator that the deed as a whole is not penal. In truth, the appellants seek to retain the benefit of the creditors' covenants in the deed and they must accept the operation of cl.22 unless that clause, in its operation on the debts as acknowledged, provides for a penalty. It does not.

7. As Clause 22 alone is singled out as a supposed penal provision, the operation of that clause must be determined not in the light of the circumstances existing before the deed was executed but in the light of the legal rights and obligations which the deed itself creates or confirms. The clause does not operate on the antecedent debts but on the debts as acknowledged in the deed.

8. The debts which were the subject of cl.10 and the First Schedule were acknowledged to be owing on the dates specified in the schedule and "unconditionally repayable by such Creditor on demand". The debts which were the subject of cl.10 and the Second Schedule were acknowledged to be owing on the dates specified in the schedule and to be "now repayable in full". Whatever the terms of the debts may have been before the Moratorium deed took effect, thereafter the debts were owed on the terms therein set out. The parties thus agreed upon the character of the debts to which the creditors' covenants should apply. The creditors' covenants in cll.7(1) and 10.2 not to enforce the debtors' liabilities during the Moratorium related to debts that were unconditionally payable on demand. The loss of the benefit of the creditors' covenants was therefore no more than the loss of the qualified indulgence which the creditors had agreed to give - that is, an indulgence qualified by the terms of cl.22. The loss of the benefit of the creditors' covenants was not a penalty.

9. It follows that the appeal must be dismissed.

10. The dismissal of the appeal against some of the appellants may have been required by reason of an issue estoppel arising from the determination of the same issue by Tadgell J. in the Supreme Court of Victoria when his Honour made a winding up order against Brinds Limited. Issue estoppel was raised in the pleadings in the present action, but two circumstances have led us to refrain from considering that plea. First, the estoppel if any does not bind all the parties in the present action. Secondly, the reasons for judgment of the Courts below do not canvass the evidence on which the plea was based. It is preferable therefore to dismiss the appeal solely on the ground stated.

DEANE J: Under the Deed of 25 November 1982, the Creditors accepted a qualified Moratorium of approximately one year on any demand for or action to secure repayment of any of the debts which the Debtors acknowledged were then due and payable. The primary qualification of that Moratorium was contained in cl.22 of the Deed. It was that, in the event that the Examining Accountant should consider, in his absolute opinion, that any of the circumstances mentioned in pars. (a), (b) or (c) of that clause existed in relation to any Debtor company and should deliver to the Creditors an "opinion (to that effect) and the reasons therefor and any proposals consequent upon such opinion", any Creditor might within seven days after receipt of the opinion terminate the Moratorium. That qualification of the Moratorium did not, as a matter of form, constitute a penalty. It simply represented an inbuilt limitation of the indulgence which the Creditors covenanted to grant in respect of payment or enforcement (cf. Wallingford v. Mutual Society (1880) 5 App Cas 685, at p 702).

2. The question whether the provisions of an agreement impose a penalty must, however, be determined as a matter of substance rather than of mere form (see, e.g., Clydebank Engineering and Shipbuilding Co. Ltd. v. Castaneda [1904] UKHL 3; (1905) AC 6, at p 9; Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Company Ltd. [1914] UKHL 1; (1915) AC 79, at pp 86-87, 92; Campbell Discount Co. Ltd. v. Bridge (1962) AC 600, at p 624). If, as a matter of substance, the provisions of an agreement operate, in the case of breach or non- performance, to impose some additional or different financial obligation in the nature of a punishment (as distinct from a genuine pre-estimate of damage or withdrawal of

a mere incentive), they will prima facie impose a penalty (cf., e.g., Clydebank Engineering, at pp.15,19; Dunlop, at pp 86ff., 97, 100-101; Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406, at p 445).

3. The overall settlement of previous disputes between Creditors and Debtors which was embodied in the Deed involved a number of concessions by each side. Among the concessions made by the Debtors was the express acknowledgment that the designated debts were due and owing. Among the concessions made by the Creditors was their agreement to the qualified Moratorium. The acknowledgment by the Debtors that their respective debts were due and owing could not, of itself, possibly be seen as constituting a penalty. The question which arises is whether, in the context of that acknowledgment and as a matter of substance, the provisions of cl.22 can properly be seen as imposing such a penalty to the extent that they provided a machinery pursuant to which the whole Moratorium could be terminated in the event that the Examining Accountant considered that "any Debtor" was not observing or fulfilling "any of the covenants or agreements" of the Deed (cl.22(b); underlining added). If the overall settlement of previous disputes which is embodied in the Deed had been to the effect that no interest or only nominal interest was payable in respect of any of the debts during the period of the Moratorium, that question would, for me, be one of some difficulty (cf. O'Dea v. Allstates Leasing System (WA) Pty. Ltd. [1983] HCA 3; (1983) 152 CLR 359, at pp 403-404; Wanner v. Caruana (1974) 2 NSWLR 301, at pp 303ff.). The reason is that, if no interest had been payable, cl.22 could so operate that the consequences of trifling breaches by one Debtor would, in the real world of the distinction between the nominal and present actual value of an interest-free debt payable in twelve months' time, be measured in hundreds of thousands of dollars.

4. In fact, however, the Debtors were required by cl.10 of the Deed to pay interest to the relevant Creditor in respect of the acknowledged debts to which the interest provisions of that clause applied. It has not been suggested that the rates of interest for which cl.10 provided were less than appropriate commercial rates or that the two amounts of indebtedness to which the interest provisions in cl.10 did not apply were in a different situation under the securities which related to them. The obligation to pay interest extended only for so long as the particular debt was outstanding. The general applicability of the termination of the Moratorium as a consequence of breach or failure by only one Debtor reflected the fact that the Debtors were associated entities as members of the Brinds Group. In these circumstances, the provisions of cl.22 providing for termination of the Moratorium in the event that the Examining Accountant considered that there had been a breach of the Deed by a Debtor no more involved the imposition of a penalty in substance than they constituted a penalty in form. They did not impose a punishment or even a liability to pay pre-estimated damages for breach. They represented the agreed machinery for the termination of an agreed forbearance in the commercial context that payment of a debt would pro tanto extinguish the obligation to pay and the right to receive future interest.

5. The appeal should be dismissed.

ORDER

Appeal dismissed with costs.