HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, CRENNAN, KIEFEL AND BELL JJ

JOHN ANDREWS & ORS — APPLICANTS

AND

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — RESPONDENT

Andrews v Australia and New Zealand Banking Group Limited
[2012] HCA 30
6 September 2012
M48/2012

ORDER

1. *Leave to appeal granted in respect of grounds 1-4 of the amended draft notice of appeal.*

2. *The amended draft notice of appeal treated as filed and the appeal treated as instituted and heard instanter and allowed with costs.*

3. *Save as to sub-paragraphs (f)(i), (g), (h), (i), (k), (o)(i), and (p)(i) of order 1, set aside orders 1 and 2 of the orders made by the Federal Court of Australia on 13 December 2011, and in their place declare that the circumstances:*

   (a) that the honour, dishonour, non-payment and over limit fees were not charged by the respondent upon breach of contract by its customers, and

   (b) that the customers had no responsibility or obligation to avoid the occurrence of events upon which these fees were charged,

   do not render these fees incapable of characterisation as penalties.

4. *Set aside the orders with respect to the costs of the Separate Questions made by the Federal Court of Australia on 7 February 2012, and in their place order that the question of costs be reserved for consideration by a judge of that Court.*

Representation

J T Gleeson SC with J A Watson for the applicants (instructed by Maurice Blackburn)

A C Archibald QC with M H O'Bryan SC for the respondent (instructed by Ashurst Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Andrews v Australia and New Zealand Banking Group Limited

Banker and customer – Penalty doctrine – Consumer and commercial credit card accounts – Honour fee – Dishonour fee – Late payment fee – Non-payment fee – Over limit fee – Whether those fees penalties – Whether penalty doctrine limited to circumstances where there is breach of contract – Significance of law respecting penal bonds – Grounds for equitable intervention – Whether penalty doctrine now wholly a rule of common law.

Equity – Doctrines and remedies – Relief against penalties – Significance of law respecting penal bonds – Whether relief available only in cases of breach of contract – Whether penalty doctrine now wholly a rule of common law.

Words and phrases – "bond", "condition", "dishonour fee", "exception fees", "honour fee", "penalty".

Federal Court of Australia Act 1976 (Cth), Pt IVA, ss 5, 21, 24(1A).
Judiciary Act 1903 (Cth), s 80.
Judicature Act 1873 (UK), s 24(11).

1 FRENCH CJ, GUMMOW, CRENNAN, KIEFEL AND BELL JJ. In this litigation the applicants challenge the legal efficacy of various bank fees charged to customers.

2 These reasons are organised as follows:

Introduction	[3]-[8]
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Introduction

3 There is pending in the Federal Court of Australia a representative action pursuant to Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") against the respondent ("the ANZ"). There are approximately 38,000 group members. In addition there also are pending in the Federal Court six proceedings against other banks which raise the same or similar issues.

4 The prolix pleading filed by the applicants puts their case on various grounds. These include engagement by the ANZ in "unconscionable conduct" in contravention of the *Australian Securities and Investments Commission Act* 2001 (Cth) and the *Fair Trading Act* 1999 (Vic) ("the FTA"), the application of s 32W and s 32Y of the FTA to avoid "unfair terms", and the operation of provisions of

the *Consumer Credit (Victoria) Code* and the *National Credit Code* with respect to "unjust transactions".

5 These aspects of the litigation are not before the Court. But it may be observed that this pattern of remedial legislation suggests the need for caution in dealing with the unwritten law as if *laissez faire* notions of an untrammelled "freedom of contract" provide a universal legal value[1].

6 What is immediately material is the claim for declaratory relief under s 21 of the Federal Court Act that certain provisions in contracts between the ANZ and the applicants are void or unenforceable as penalties, and that the applicants and group members are entitled to repayment of fees charged to them under those provisions, as moneys had and received by the ANZ to their use.

7 In this Court the applicants rely upon the doctrine identified with relief against penalty obligations and, on its part, the ANZ refers to matters of legal history to demonstrate the inapplicability of that doctrine to the present case.

8 It is convenient to begin with some reference to settled aspects of the penalty doctrine.

The penalty doctrine

9 Mason and Deane JJ observed in *Legione v Hateley*[2] that, as the term suggests, a penalty is in the nature of a punishment for non-observance of a contractual stipulation and consists, upon breach, of the imposition of an additional or different liability.

10 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

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1 See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60 [20], 62-63 [24]-[25]; [1999] HCA 67; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [22]; [2010] HCA 42.

2 (1983) 152 CLR 406 at 445; [1983] HCA 11.

additional detriment, the penalty, to the benefit of the second party[3]. 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[4]. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.

11 It has been established at least since the decision of Lord Macclesfield in *Peachy v Duke of Somerset*[5] that the penalty doctrine is not engaged if the prejudice or damage to the interests of the second party by the failure of the primary stipulation is insusceptible of evaluation and assessment in money terms. It is the availability of compensation which generates the "equity" upon which the court intervenes; without it, the parties are left to their legal rights and obligations. The point is illustrated by *Waterside Workers' Federation of Australia v Stewart*[6]. A bond was given by the appellant in the sum of £500 on condition that it pay £50 if and so often as its members in combination should go on strike. Isaacs and Rich JJ[7] emphasised that, whilst refusal to work almost inevitably would cause loss to employers, "no one can ever tell how much loss is sustained by not doing business" and on the principle stated by Lord Macclesfield no relief was to be given against payment of the £50.

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3 *Waterside Workers' Federation of Australia v Stewart* (1919) 27 CLR 119 at 128-129, 131; [1919] HCA 63; *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514 at 520; [1985] HCA 63.

4 *Rolfe v Peterson* (1772) 2 Bro PC 436 at 442 [1 ER 1048 at 1052]; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86; cf, as to irrevocable letters of credit and "performance bonds", the proceeds of which are in substitution for performance by a contractor, *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812; Mason, "'I'll have my bond; speak not against my bond': Constructive trusts and surplus proceeds from performance bonds", (2012) 6 *Journal of Equity* 74 at 81-83.

5 (1720) 1 Strange 447 [93 ER 626].

6 (1919) 27 CLR 119.

7 (1919) 27 CLR 119 at 131-132.

12 It should be noted that the primary stipulation may be the occurrence or non-occurrence of an event which need not be the payment of money[8]. Further, the penalty imposed upon the first party upon failure of the primary stipulation need not be a requirement to pay to the second party a sum of money.

13 In *Jobson v Johnson*[9] Dillon LJ and Nicholls LJ explained that there is no distinction in principle here between a stipulation upon default for the transfer (or the use[10]) of property and a payment of money; such a distinction would elevate form over substance. In that case, cl 6(b) of a share sale contract provided that upon default in payment of an instalment of the purchase price the purchaser was obliged to retransfer the shares to the vendors upon payment of a stipulated sum to the purchaser. The Court of Appeal held that cl 6(b) had the characteristics of a penalty clause. It ordered that either the shares be sold by the purchaser and the amount of the unpaid instalments be paid to the assignee of the vendors; or the current value of the shares, the aggregate of the unpaid instalments and amounts charged on the shares be ascertained and, if this was less than the sum presently due from the vendors under cl 6(b), effect be given to cl 6(b).

14 It will already be apparent that an understanding of the penalty doctrine requires more than a brief backward glance. In his reasons in *Austin v United Dominions Corporation Ltd*[11], after referring to the common law and statutory developments which had occurred by the first half of the 18th century, and noting that the equitable origin of the penalty doctrine was accepted throughout the 18th century, Priestley JA continued:

> "In the latter part of the eighteenth century and through much of the nineteenth century the courts showed restlessness with their longstanding duty to relieve against penalties. This has been attributed to the fact that

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8 Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, 13th ed (1886), vol 2 at [1314].

9 [1989] 1 WLR 1026 at 1034-1035, 1039 respectively; [1989] 1 All ER 621 at 628, 632.

10 See *Forestry Commission (New South Wales) v Stefanetto* (1976) 133 CLR 507 at 519-521 per Mason J; [1976] HCA 3.

11 [1984] 2 NSWLR 612 at 626; affd *sub nom AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170; [1986] HCA 63 (Gibbs CJ, Mason and Wilson JJ; Deane and Dawson JJ dissenting).

during this period the principle of freedom of contract reached its zenith: see Atiyah, *The Rise and Fall of Freedom of Contract*[12]. Whatever the reason, during the nineteenth century the way in which the law concerning penalties originated and the way in which that law became incorporated in the common law were to some extent lost sight of. At the same time the operation of that law was clarified by the recognition of the distinction between a penalty and a genuine pre-estimate of liquidated damages."

15 The formulation of that distinction between a penalty and a pre-estimate of liquidated damages which was made by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[13] has been described as a product of centuries of equity jurisprudence[14]. It was recently applied by this Court in *Ringrow Pty Ltd v BP Australia Pty Ltd*[15]. But the present dispute requires attention at an anterior stage of analysis, namely identification of those criteria by which the penalty doctrine is engaged.

The course of the Federal Court litigation

16 The litigation was instituted and has been conducted in the Victorian District Registry of the Federal Court. Section 5 of the Federal Court Act creates the Federal Court as a court of law and equity. The governing law for the litigation is the common law of Australia as modified by applicable federal and Victorian statute law[16].

17 Before this Court there is that part of a pending application for leave to appeal to the Full Court of the Federal Court removed into this Court by order made 11 May 2012. That order removed grounds 1-4 of the proposed appeal by the applicants from the answers to certain separate questions given by the primary judge (Gordon J)[17] on 13 December 2011. The interlocutory nature of

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12 (1979) at 414-416.

13 [1915] AC 79 at 86-87.

14 Rossiter, *Penalties and Forfeiture*, (1992) at 33.

15 (2005) 224 CLR 656 at 662-663 [11]-[12]; [2005] HCA 71. See also the opinion of Douglas J in *Priebe & Sons Inc v United States* 332 US 407 at 411-412 (1947).

16 *Judiciary Act* 1903 (Cth), s 80.

17 *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 288 ALR 611.

the proceeding before her Honour necessitates the grant of leave for an appeal to the Full Court[18] and delineates the process which has been removed into this Court.

18 Shortly put, grounds 1-4 of the proposed Full Court appeal concern the nature and scope of the jurisdiction to relieve against penalties and the question whether relief is available only after the penalty is imposed upon a breach of contract.

19 The Federal Court litigation concerns fees identified as honour, dishonour, and non-payment fees charged by the ANZ in respect of various retail deposit accounts and business deposit accounts, and fees identified as over limit and late payment fees charged by the ANZ in respect of consumer credit card accounts and commercial credit card accounts; these fees were identified in the reasons of the primary judge as "exception fees".

20 The substance of the relevant, but awkwardly expressed, separate questions before the primary judge was to ask whether the exception fees were payable upon breach by the applicants of contractual obligations to the ANZ, and, in the alternative, to ask whether it had been the responsibility of the applicants to see that the circumstances occasioning the imposition of the exception fees did not arise. If there was an affirmative answer to either of the alternative questions, it then was asked whether the fees were "capable of being characterised as a penalty by reason of that fact".

21 The primary judge found that the late payment fee was payable upon breach of contract and therefore was capable of characterisation as a penalty. The ANZ has not sought to appeal against that finding.

22 However, in respect of the honour, dishonour, non-payment and over limit fees the primary judge held that these were not charged by the ANZ upon breach of contract by the customer, nor was the occurrence of the event upon which the fees were charged (overdrawing the account or credit limit or attempting to do so) an event which the customer had an obligation or responsibility to avoid[19]. Having thus answered in the negative each of the alternative questions, the primary judge held it was unnecessary to answer the question whether these fees were capable of characterisation as a penalty.

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18 Federal Court Act, s 24(1A).

19 (2011) 288 ALR 611 at 667-668 [205]-[208].

23 However, her Honour did find that under the pre-existing terms agreed between them, these fees were charged by the ANZ as a consequence of the decision of the ANZ to afford or to decline the provision of further accommodation to the customer. The ANZ did so respectively by approving or authorising payment on an "instruction" issued to it by the customer, or by refusing to do so, where the honouring of the "instruction" would have the effect of overdrawing the customer's account or exceeding the account credit limit. But the separate questions were not so framed as to ask whether, by reason of these conclusions just mentioned, the fees were incapable of characterisation as penalties. Hence, the proposed grounds of appeal which are presently before this Court (grounds 1-4) do not include an express challenge to those significant findings. Nevertheless, it will be necessary in these reasons to make further reference to them[20]. Ground 6, which is not before this Court, asserts error by her Honour in failing to characterise the fees as payable on breach.

24 The primary judge conducted a detailed analysis by reference to the document identified as "PDS March 2005". This was the "ANZ Saving & Transaction Products – Product Disclosure Statement" issued in compliance with Pt 7.9, Div 2 (ss 1011A-1016F) of the *Corporations Act* 2001 (Cth). What was identified as "Exception Fee No 3" was a Retail Deposit Account (Saving Account, Honour Fee). Clause 2.12 of PDS March 2005 relevantly stated[21]:

> "*ANZ does not agree to provide any credit in respect of your account without prior written agreement*, which (depending on your account type) can be through an ANZ Equity Manager Facility, an Overdraft Facility or an ANZ Assured Facility. *It is a condition of all ANZ accounts that you must not overdraw your account without prior arrangements being made and agreed with ANZ.*
>
> If you request a withdrawal or payment from your account which would overdraw your account, *ANZ may, in its discretion*, allow the withdrawal or payment to be made on the following terms:
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> - interest will be charged on the overdrawn amount at the ANZ Retail Index Rate plus a margin (refer to 'ANZ Personal Banking Account Fees and Charges' booklet for details);

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20 At [79].

21 (2011) 288 ALR 611 at 654 [153].

- an Honour Fee may be charged for ANZ agreeing to honour the transaction which resulted in the overdrawn amount (refer to 'ANZ Personal Banking Account Fees and Charges' booklet for details);

- the overdrawn amount, any interest on that amount and the Honour Fee will be debited to your account; and

- you must repay the overdrawn amount and pay any accrued interest on that amount and the Honour Fee within seven days of the overdrawn amount being debited to your account." (emphasis added)

Clause 2.7 of PDS March 2005 provided that a dishonour fee and a non-payment fee would be charged, respectively, if the customer authorised a third party to direct debit an account and payment was not made, or if the customer authorised a periodical payment and payment was not made, in either case because there were insufficient cleared funds in the customer's account[22].

25 These provisions were modified in December 2009. An "Honour Fee" was charged for considering a deemed (and successful) request for an "Informal Overdraft". An "Outward Dishonour Fee" was charged for considering a deemed (and rejected) request where the customer did not satisfy the ANZ's credit criteria for an Informal Overdraft. The request was deemed to be made where a debit was initiated which, if processed by the ANZ, would result in an account being overdrawn or an approved limit on the account being exceeded.

26 The principal findings of the primary judge made irrelevant the concession by the ANZ that it did not determine the quantum of these fees by reference to a sum which would have constituted a genuine pre-estimate of the damage the ANZ might suffer as a consequence of permitting the overdrawing of an account.

27 The applicants plead that the fees in question were imposed upon or in default of the occurrence of stipulated events but were "out of all proportion" to the loss or damage which might have been sustained by the ANZ by reason of the occurrence of those events.

28 The applicants also submit to this Court that these fees were charged "for a service with no content". Further, the applicants contend that despite the form

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22 (2011) 288 ALR 611 at 655 [156].

of the honour fee, with the provision of further accommodation by the ANZ to the customer, in substance it is a disguised penalty.

The *Interstar* decision

29 In reaching her conclusion respecting the scope of the penalty doctrine, the primary judge, with respect quite properly, followed what had been decided by the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd*[23]. In that case the Court of Appeal held[24] that the primary judge (Brereton J)[25] had erred in denying that the doctrine had ceased to be one of equity and now was wholly legal in nature and in concluding that the doctrine was not limited to the failure of stipulations which were breaches of contract.

30 The appellants in *Interstar* were finance companies and the respondents conducted the business of "mortgage originators". Upon the happening of any one of a range of events, the appellants were empowered to terminate agreements, under which they made to the respondents payments described as commissions. Not all of these events were breaches of those agreements by the respondents and not all were acts or omissions over which the respondents had control[26]. The respondents successfully contended at first instance that the event

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23 (2008) 257 ALR 292.

24 (2008) 257 ALR 292 at 321-330.

25 *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* (2007) Aust Contract Reports ¶90-261 at 90,037; *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd (No 2)* [2007] NSWSC 592.

26 The relevant provisions read:

> "20. Termination
>
> 20.1 Interstar may terminate this Agreement immediately upon the happening of any of the following events:
>
> (a) upon the occurrence of an Insolvency Event in relation to the Originator;
>
> (b) upon the Originator breaching any of the terms and conditions of this Agreement and/or the Manual and

(Footnote continues on next page)

giving rise to the penalty, as the act or event upon which liability was conditioned, could be the termination of the agreements even if the ground for termination was not breach thereof. Brereton J held that the termination clause was a penalty provision and wholly void[27], and that the respondents were entitled to continued receipt of the commissions. The Court of Appeal held that the agreements conferred no accrued rights upon the respondents, so that upon termination there was no forfeiture of accrued property for the collateral purpose of encouraging compliance with the contract and no engagement of the penalty

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the breach not being rectified to the absolute satisfaction of Interstar within fourteen days after the date upon which written notice of such breach is given by Interstar to the Originator;

(c) where the Originator or Originator's Representative has engaged in any proven deceptive or fraudulent activity in relation to an Application or a Settled Loan or Interstar considers, in its reasonable opinion, that the Originator or Originator's Representative has engaged in deceptive or fraudulent activity in relation to an Application or a Settled Loan;

(d) where, in the sole bona fide opinion of Interstar, there is a change in the management or effective control of the Originator which change is not acceptable to Interstar.

...

20.3 In the event that this Agreement is terminated by Interstar:

...

(c) pursuant to clause 20.1(a) or (c), then the Originator shall, with effect from the date of termination, have no further entitlement to receive any Originator's Fee."

27 [2007] NSWSC 592 at [7], [49].

doctrine; further, the character of the provisions was to define entitlement to the commissions[28].

31 These holdings would have been sufficient for the Court of Appeal to dispose of the case. However, the Court went on, with reference to observations of Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin* ("*AMEV-UDC*")[29], to state that "[t]he modern rule against penalties is a rule of law, not equity"[30]. The Court of Appeal also, with particular reference to the speech of Lord Roskill in *Exports Credits Guarantee Dept v Universal Oil Products Co* ("*ECGD*")[31], said that the limits of the doctrine of penalties arise "from the consequences of breach of contract" and so reflect "the public policy of keeping commercial parties to their bargains"[32].

32 The applicants seek in this Court to challenge these statements in *Interstar*. For the reasons which follow that challenge should succeed.

Bonds, contracts and the meanings of "condition"

33 Before proceeding further with the challenge which the applicants seek to make to *Interstar*, something first should be said about the nature of the bond because it was here that equity first intervened. This, in turn, involves consideration of the use of the term "condition" in the relevant legal discourse. Like the term "rescission"[33], the term "condition" has several distinct meanings and applications. This must clearly be kept in mind to avoid engendering confusion of legal principle.

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28 (2008) 257 ALR 292 at 319.

29 (1986) 162 CLR 170 at 191.

30 (2008) 257 ALR 292 at 320.

31 [1983] 1 WLR 399 at 402-404; [1983] 2 All ER 205 at 223-224.

32 (2008) 257 ALR 292 at 324.

33 See *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379-380; [1936] HCA 6; *Johnson v Agnew* [1980] AC 367 at 392-393, 396-397.

34 Unlike a simple contract containing an exchange of promises, which are classified as conditions or warranties, a bond is an instrument under seal, usually a deed poll, whereby the obligor is bound to the obligee. The ordinary form of bond in use in modern times is not merely for a certain money payment, but is accompanied by a condition in the nature of a defeasance, the performance or occurrence of which discharges the bond.

35 One meaning of "condition" is an important, vital, or material promise, the breach of which will repudiate a contract; the term "breach of contract" is used in contrast to "breach of warranty". But as Professor Stoljar pointed out in his article "The Contractual Concept of Condition"[34], while the obligation under a bond may be said to be conditioned upon the occurrence of a particular event, it is important to note that the term "condition" is not used here in the sense just described with respect to breaches of contract.

36 The distinction is drawn as follows in Williston, *A Treatise on the Law of Contracts*[35]:

> "The common early form of contractual obligation was a bond upon condition, so that in the early books the word 'obligation' without more is used to designate such a bond. The purpose of the bond obviously was, and still is, to secure performance of the condition, but instead of attempting to secure this result by exacting a promise from the obligor to perform the condition, there is an acknowledgment of indebtedness – in effect a promise to pay a sum of money if the condition is not performed."

37 In these reasons the term "stipulation" has been used when describing the penalty doctrine[36]. This reflects the origin of the penal obligation or condition, as known today, in the stipulations (*stipulatio*) in Roman law at a period where stipulations for the payment of money were alone valid. The practical method at that period of stipulating for the performance of a collateral act was to make the payment of a money sum conditional on the non-performance of the desired act;

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34 (1953) 69 *Law Quarterly Review* 485 at 486-487.

35 Fourth ed (2000), §42:15; see also Halsbury, *The Laws of England*, 1st ed (1908), vol 3 at 80.

36 At [10]-[11].

that sum might be recovered in full even if it exceeded the value of the stipulated act or forbearance[37].

38 Williston wrote that it came to be recognised in Roman law that the amount stated in a stipulation and named as a penalty might be reduced if found to be excessive[38]. But in the early common law the bond, regarded as a penal sum, secured strict performance of the principal obligation. In modern civil law systems the subject is not dealt with on uniform principles[39]. It is said, for example, that the Louisiana courts have confused the principles of the governing Civil Code and their French derivation[40] with the common law concept of liquidated damages[41]. Section 343 of the German Civil Code, which came into force in 1900, provides that upon the motion of the obligor a "disproportionately high" penalty may be reduced, by a judgment, to an appropriate amount, after taking into account "every legitimate interest" of the obligee, not merely the obligee's economic interest[42].

39 The condition in a bond must not be unlawful, for example, in general or unreasonable restraint of trade[43]. However, the condition may be an occurrence or event which need not be some act or omission of the obligor, analogous to a contractual promise by the obligor. Moreover, the condition is not invalid merely because it provides for the performance of an act or the happening of an event which is improbable, albeit, at the outset[44], not impossible. Thus, in

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37 Loyd, "Penalties and Forfeitures", (1915) 29 *Harvard Law Review* 117.

38 Williston, *A Treatise on the Law of Contracts*, rev ed (1957), vol 3, §792. See also Loyd, "Penalties and Forfeitures", (1915) 29 *Harvard Law Review* 117 at 117-118.

39 Williston, *A Treatise on the Law of Contracts*, rev ed (1957), vol 3, §792.

40 Cox, "Penal Clauses and Liquidated Damages, a Comparative Survey", (1958) 33 *Tulane Law Review* 180 at 186-187.

41 Cox, "Penal Clauses and Liquidated Damages, a Comparative Survey", (1958) 33 *Tulane Law Review* 180 at 192.

42 Zimmermann, *The Law of Obligations*, (1996) at 107-108.

43 *Mitchel v Reynolds* (1711) P Wms 181 [24 ER 347].

44 With respect to supervening impossibility, see Williston, *A Treatise on the Law of Contracts*, 4th ed (2000), §42:17.

Campbell v French[45], Lord Kenyon, in delivering the opinion of the Court of King's Bench, said:

> "The general law respecting conditions is extremely well settled in a vast variety of books and cases; and, without detailing them, it is sufficient to say that they will be found in Rolle's Abridgment, and in Coke upon Littleton; and the uncontrolled result from them all is, that if the condition be an impossible condition, the bond becomes single, but if the condition be only improbable, as in the instance put, if the Pope of Rome should come here to-morrow, yet that condition is a good condition however improbable it may be."

It also should be noted that from the time of Lord Nottingham, the "conditions" which attracted relief in equity extended beyond those described as such in bonds and simple contracts, and to provisions which were secured by a determinable estate in land and to conditions for the vesting of an estate[46].

40 While an action in debt for the sum of the bond was the remedy for enforcement of the bond at law, equity looked to what was involved in satisfaction of the condition for which the bond was security. However, as noted above[47], unless the failure of the condition was compensible there was no "handle" for equity to intervene[48]. A further example of this requirement for equitable intervention is presented by the decision of the United States Supreme Court in *Clark v Barnard*[49]. A bond was given to the government by the holder of a statutory franchise for the completion of an item of public infrastructure by a given date; the prejudice to the body politic by failure to complete did not sound in damages.

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45 (1795) 6 TR 200 at 211 [101 ER 510 at 516].

46 *Pitcarne v Bruce* (1676) *Lord Nottingham's Chancery Cases, Volume II*, Selden Society vol 79 (1961), Case 587; Yale, "Introduction" at 20.

47 At [10].

48 Lord Macclesfield, in *Peachy v Duke of Somerset* (1721) 1 Strange 447 at 453 [93 ER 626 at 630], said that "it is the recompence that gives this Court a handle to grant relief".

49 108 US 436 at 455-459 (1883).

41 Williston describes the position as follows[50]:

> "The court of equity early assumed jurisdiction to limit the recovery in an action on a bond to the damages actually suffered by the obligee, regarding the literal enforcement of the obligation as unconscientious. Although some eminent authorities expressed disapproval of the doctrine of equitable relief against penalties and forfeitures as 'a principle long acknowledged in this court but utterly without foundation,' others of equal note have urged that '[t]here is no more intrinsic sanctity in stipulations by contract than in other solemn acts of the parties which are constantly interfered with by courts of equity upon the broad grounds of public policy on the pure principles of natural justice.'
>
> A distinction was taken at an early day between bonds 'where the party might be put in as good a plight as where the condition itself was literally performed,' and cases 'where the condition was collateral and no recompense or value could be put on the breach of it.' In the former case, equity would give relief; in the latter case, it would not; and this distinction has developed into the modern distinction between penalties and liquidated damages." (footnotes omitted)

42 If the condition of the bond was the conveyance or settlement of an estate or interest in land, or the non-performance of certain acts, for example, by way of competition with a former business partner, a court of equity might treat the condition as evidence of an agreement to convey[51], or of a non-competition covenant[52]. In such cases, specific performance then might be decreed or an injunction granted to enforce the negative covenant; damages would be an inadequate remedy and so it would be no answer by the defendant to offer to pay the sum fixed by the bond. But, contrary to what the ANZ submitted, these cases

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50 Fourth ed (2000), §42:15.

51 *Parks v Wilson* (1724) 10 Mod 515 at 518 [88 ER 832 at 833]; *Prebble v Boghurst* (1818) 1 Swans 309 at 318-319 [36 ER 402 at 407-408]; Evans, Appendix to Pothier, *A Treatise on the Law of Obligations, or Contracts*, (1806), vol 2, Appendix XII at 81-85.

52 *Hardy v Martin* (1783) 1 Cox 26 [29 ER 1046]; *National Provincial Bank of England v Marshall* (1888) 40 Ch D 112.

do not establish any general proposition as to the contractual character of the condition in a bond.

43 Some analogy to the issues which presently arise is presented by those concerning the nature of a deposit which were considered in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd*[53]. The law respecting bonds, like that respecting deposits, was received from Roman law and developed before the rise of what might be called the modern law of contract. The courts of equity did not treat their jurisdiction to relieve against penalties and forfeitures as extending to forfeiture of a deposit, being an amount paid as an earnest of performance[54]. Those courts did, however, relieve against stipulations which were penal conditions in bonds.

44 The courts of equity went on to extend their jurisdiction to deal with stipulations which were penal provisions in simple contracts. But it does not follow that that extension was a change to the nature of the jurisdiction. In particular, the requirement that equity intervene to ensure the recovery of no more than compensation, accommodated the "fundamental principle" of modern contract law to redress breach by adequate compensation[55].

45 Enough has been said to show that (a) the first field for the operation of the equitable doctrine concerned the enforcement of bonds, (b) with respect to bonds, the expressions "obligation" and "condition" are not employed in the same or corresponding sense as appears in dealing with the breach of contractual promises, and (c) it does not follow, as the ANZ would have it, that in a simple contract the only stipulations which engage the penalty doctrine must be those which are contractual promises broken by the promisor.

Limited scope of the penalty doctrine?

46 Thus, while the ANZ maintains that the penalty doctrine has the limited scope, respecting breaches of contract, which in *Interstar* the Court of Appeal identified with *ECGD*, this limitation should not be accepted.

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53 (2008) 236 CLR 342 at 349-352 [22]-[27]; [2008] HCA 22.

54 *NLS Pty Ltd v Hughes* (1966) 120 CLR 583 at 589; [1966] HCA 63.

55 Farnsworth, *Contracts*, 4th ed (2004), §12.18; cf *Attorney General v Blake* [2001] 1 AC 268 at 284-285.

47 What was in issue in *ECGD* was a defence to an action upon an indemnity given to a guarantor which was a government body to hold the guarantor harmless by reimbursement of moneys it paid to answer calls on the guarantee. The circumstance, as was the case in *ECGD*, that this might turn out to have been a commercially improvident arrangement for the indemnifier would not attract the intervention of equity when the indemnity was called upon by the guarantor. The liability of the indemnifier would mirror the loss incurred by the guarantor. It was in that particular situation that Lord Roskill said in *ECGD*[56]:

> "[P]erhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant."

48 In *AMEV-UDC* Gibbs CJ[57] emphasised that this Court was not required to consider the proposition, said to be derived from *ECGD*, that no clause which provided for the payment of money on the happening of a specified event other than a breach of a contractual duty owed by the contemplated payor to the contemplated payee could ever be a penalty.

49 Brereton J in *Interstar*[58] rejected the submission that liability to pay, forfeit or suffer the retention of money or property which engages the penalty doctrine may never be triggered by the failure in occurrence of an event which is stipulated in a prior agreement between the parties but is not itself the subject of a contractual promise between them. Brereton J pointed to the regard paid by equity to substance rather than merely to form and referred to the grant of relief in the case of penal bonds for non-performance of a condition which was not the subject of any contractual promise[59]. These are significant considerations. They are not displaced by fixing solely upon a breach of contract by the party seeking relief from an alleged penalty.

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56 [1983] 1 WLR 399 at 403; [1983] 2 All ER 205 at 224.

57 (1986) 162 CLR 170 at 174.

58 (2007) Aust Contract Reports ¶90-261 at 90,044.

59 (2007) Aust Contract Reports ¶90-261 at 90,044.

50 In *Interstar* the Court of Appeal misunderstood the scope of the penalty doctrine. The question whether in a given case the operation of a stipulation which is not a contractual promise may attract the penalty doctrine is not foreclosed by the rejection in the Court of Appeal of what had been said by Brereton J at first instance.

The common law action of assumpsit

51 There remains for consideration the further proposition in *Interstar* which, rather than acknowledging the concurrent administration in New South Wales (as elsewhere) of law and equity, appears to treat the penalty doctrine as having disappeared from equity by absorption into the common law action of assumpsit. This proposition should be rejected.

52 It will be recalled that the common law courts developed assumpsit as a general remedy for breach of agreements not under seal, simple contracts, for which an action for breach of covenant would not lie. Moreover, assumpsit was extended to certain cases where there was no more than an implied undertaking to pay, thus giving the occasion for the unhappy expression "quasi-contract"[60].

53 With respect to money bonds, by the time of Lord Nottingham, who was Lord Chancellor 1673-1682, and thus well before the statutes dealing with the procedure in actions upon bonds[61], the common law courts significantly revised their procedures with respect to trials of actions pleaded in assumpsit. They did so in the fashion described by Lord Nottingham in his handbook (first published only in 1965) "Prolegomena of Chancery and Equity" and repeated by Priestley JA in *Austin*[62]:

> "The settling of the chancery practice of relieving penalties brought a prompt response from the common law courts. Lord Nottingham

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60 Anson wrote that where "for purposes of pleading" obligations acquired "the form of agreement", the term "quasi-contract" was used "for want of a better name": Anson, *Principles of the English Law of Contract*, 10th ed (1903) at 382.

61 8 & 9 Will III, c 11 (1696); 4 & 5 Anne, c 16 (1705). The relevant statutory texts are set out in Newland, "Equitable Relief Against Penalties", (2011) 85 *Australian Law Journal* 434 at 442.

62 [1984] 2 NSWLR 612 at 625-626. See also Simpson, "The Penal Bond with Conditional Defeasance", (1966) 82 *Law Quarterly Review* 392 at 419.

recorded it in his *Prolegomena*, in Ch V headed 'Equitas Sequitur Legem', as follows:

> '10. In the midst of those cases which refer to this head, it may be worth the while a little to invert the rule, and to consider how far *lex sequitur equitatem*, that is, to observe how courts of law have changed their rules and, when they saw that equity would relieve, have chosen rather to relieve the parties themselves than send them hither.
>
> 11. Thus in all suits on bonds it's now become the course of the Court, that, if the defendant will pay the principal and interest and charges, the plaintiff shall be obliged to accept it till plea pleaded, else the defendant shall have a perpetual imparlance[63], and all this to prevent a suit in Chancery, which otherwise would give the same relief' (at 203).

The position thus reached was regulated at common law by statute in 1696 in regard to plaintiffs suing for penalties for non-performance of covenants or agreements[64] and in 1705 in regard to money bonds[65]. Practice in England based on the Statutes of William and Anne had the effect of making the law concerning penalties as familiar to the common law courts as in chancery."

54 The effect of the statute of 1705 upon the enforcement of a money bond was that the debtor was discharged on paying principal, interest and costs; with respect to other bonds and covenants with a penalty the statute of 1696 enabled damages to be assessed for such breaches as were proved, execution being stayed

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63 An imparlance denoted the time given to the defendant to plead either of course or in the discretion of the court (*Mellor v Walker* (1671) 2 Wms Saund 1 at 1 note (2) [85 ER 524 at 530]), and a perpetual imparlance would have had the effect of a permanent stay.

64 8 & 9 Will III, c 11, s 8.

65 4 & 5 Anne, c 3, s 12.

on payment of the amount assessed and costs, but with the judgment remaining to answer any further breach[66].

55 Writing in 1769, Blackstone had identified as one of the advances made since the revolution of 1688, "the liberality of sentiment, which (though late) has now taken possession of our courts of common law, and induced them to adopt (where facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity, from the time Lord Nottingham presided there"[67]. This adoption of equitable doctrine by the common law courts, in the period before the introduction of the Judicature system, was not limited to the principles concerning penalties. The trend was the subject of comment in 1845 by the standard text *Law Studies* written by Samuel Warren[68]. For example, Parke B spoke in *Smith v Winter*[69] of the equitable doctrine with respect to the discharge of sureties having "crept into the law"; the result was that a parol agreement by the creditor to give time to the principal debtor might be pleaded to an action at law on a guarantee not given under seal[70].

56 The position established in the common law courts with respect to penalties was exemplified by the remarks of Lord Mansfield in *Lowe v Peers*[71], Lord Ellenborough in *Wilbeam v Ashton*[72], Tindal CJ in *Kemble v Farren*[73], and

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66 *White and Tudor's Leading Cases in Equity*, 9th ed (1928), vol 2 at 224. See also *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 202 per Deane J; *Instruments Act* 1958 (Vic), s 30.

67 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 435.

68 Second ed (1845) at 300-302. A recent observation of this "fusion by convergence" is made by Professor Polden in *The Oxford History of the Laws of England*, vol XI (2010) at 757.

69 (1838) 4 M & W 454 at 464 [150 ER 1507 at 1512].

70 Rowlatt, *The Law of Principal and Surety*, 3rd ed (1936) at 252-254. However, as de Colyar noted (*A Treatise on the Law of Guarantees*, 3rd ed (1897) at 424-425), "of course the surety was still at liberty to resort to a court of equity for relief".

71 (1768) 4 Burr 2225 at 2228-2229 [98 ER 160 at 162].

72 (1807) 1 Camp 78 [170 ER 883].

73 (1829) 6 Bing 141 at 148 [130 ER 1234 at 1237].

Parke B in *Horner v Flintoff*[74], *Galsworthy v Strutt*[75] and *Atkyns v Kinnier*[76]. In *Kemble v Farren*[77], an action in assumpsit by the manager of the Covent Garden Theatre against an actor who had failed to meet an engagement at that theatre, Tindal CJ said:

> "But that a very large sum should become immediately payable, in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

57 In *Reynolds v Bridge*[78], a decision of the Court of Queen's Bench, Coleridge J referred to *Astley v Weldon*, *Kemble v Farren* and *Atkyns v Kinnier* and concluded that:

> "the principle seems to be, that, if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid which is much less than the sum named as payable upon the breach, there it is held that the last named sum is specified by way of penalty, because a Court of equity would limit the amount to be actually paid".

58 To the above English authorities it may be added that by the mid-19th century, common law courts in the United States "almost universally" adopted a practice whereby, although judgment for the full amount of the bond was entered, the courts then proceeded to "chancery the bond"; execution issued only for the just amount found to be due on a reference to a master, assessor, or jury[79].

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74 (1842) 9 M & W 678 at 680-681 [152 ER 287 at 287-288].

75 (1848) 1 Ex 659 at 662-666 [154 ER 280 at 282-283].

76 (1850) 4 Ex 776 at 783-784 [154 ER 1429 at 1432-1433].

77 (1829) 6 Bing 141 at 148 [130 ER 1234 at 1237].

78 (1856) 6 El & Bl 528 at 541 [119 ER 961 at 966].

79 Merwin, *The Principles of Equity and Equity Pleading*, (1895) at 220.

It also should be noted that where in Chancery it appeared that the sum in question was a penalty, the court would direct an issue of *quantum damnificatus* for jury determination[80].

59 However, the common law courts were constrained by the limitations of their remedies and procedures. Thus, they lacked the procedures to take complex accounts and the remedy of injunction to restrain, for example, attempts by the defendant to recover the amount of a bond by an action at law[81]. The *Common Law Procedure Act* 1854 (UK)[82] was directed to enlarging the jurisdiction of the common law courts, having regard to the inconvenience of concurrent proceedings necessary in certain cases to establish a right in a common law court and to obtain a remedy in Chancery. However, the power of the common law courts to grant injunctions under that Act was limited to restraining the repetition or continuation of breaches of contract in respect of which the plaintiff was entitled to bring an action for damages[83].

60 Where the collateral stipulation relieved against was one not for the payment of money but for the transfer or use of property, there was no scope in an assumpsit action for what Nicholls LJ called "the scaling down exercise" by which a court of equity would tailor specific relief to ensure adequate compensation, but no more[84]. This had to await the arrival of the united court administration under the Judicature system. Further, as Lord Eldon pointed out in *Seton v Slade*[85], where the condition of the bond was a temporal stipulation, it remained the position that in equity time was not of the essence.

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80 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 187; *Astley v Weldon* (1801) 2 Bos & Pul 346 at 350-351 [126 ER 1318 at 1321] per Lord Eldon; *Hardy v Martin* (1783) 1 Cox 26 [29 ER 1046]; Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 1 at 1008-1010.

81 *Edwards-Wood v Baldwin* (1863) 4 Giff 613 [66 ER 851].

82 17 & 18 Vict, c 125.

83 Sections 79 and 82.

84 *Jobson v Johnson* [1989] 1 WLR 1026 at 1042, 1045-1046; [1989] 1 All ER 621 at 634, 636-637.

85 (1802) 7 Ves Jun 265 at 273-274 [32 ER 108 at 111].

61 The developments in the practice of the common law courts in assumpsit actions before the introduction of the Judicature system did not somehow supplant the equity jurisdiction[86].

62 Moreover, the applicants correctly submit that the ANZ can point to no reason in principle why the scope of the equitable doctrine should be restricted to those cases today where, hypothetically, an assumpsit action would have lain at common law in the 19th century. Indeed, considerations of principle point in the other direction. It is undoubtedly the case that in fields of private and public law the principles of equity continue to develop by principled advances of traditional doctrine[87]. Sir Anthony Mason has noted that while the common law comprised rules which traditionally existed as a body of customary law, equity "made no secret of its evolutionary development"[88]. Why, with respect to the penalty doctrine, that evolutionary process should be restricted by hypothetical assumpsit actions is not apparent.

63 A further point is that, to the extent that the common law courts had so developed their procedures and the action in assumpsit by the second half of the 19th century as in some situations to speak with courts of equity with the same voice, there was at that time, and within the terms of the Judicature legislation, no "conflict or variance ... with reference to the same matter"; and so there was no occasion under the statute for the doctrine of equity to "prevail"[89]. It should be emphasised that, in any event, under the Judicature legislation it is equity not the law that is to prevail. In *Interstar* the Court of Appeal thus had no basis for the proposition that the penalty doctrine is a rule of law not of equity.

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86 cf *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 201; *Metro-Goldwyn-Mayer Pty Ltd v Greenham* [1966] 2 NSWR 717 at 727.

87 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241 [90]; [2001] HCA 63.

88 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 3. See also *PGA v The Queen* (2012) 86 ALJR 641 at 649-650 [20]-[21]; 287 ALR 599 at 605; [2012] HCA 21; Watt, *Equity Stirring*, (2009) at 231-232.

89 *Judicature Act* 1873 (UK), s 24(11). See *Supreme Court Act* 1986 (Vic), s 29.

AMEV-UDC in the High Court

64 That counsel for the successful respondent in *AMEV-UDC* was well aware of the pre-Judicature developments in the common law courts is apparent from the citation[90] of Lord Eldon's judgment in *Astley v Weldon*[91], which was delivered when he was Chief Justice of the Court of Common Pleas.

65 There is, with respect, no ground upon which to cavil with four of the five propositions distilled from the history of the penalty doctrine and stated in *AMEV-UDC* by Mason and Wilson JJ as follows[92]:

> "(1) equity would only relieve where compensation could be made for the actual damage suffered by the party seeking to recover the penalty; (2) the actual damage suffered by the party was assessed in an action at common law, such as an action of covenant, or upon a special issue quantum damnificatus which could be joined in an action on the case ... (3) the expression 'actual damage' seems to have been used in contradistinction to 'agreed sum' or 'liquidated' or 'stipulated' damages, not by way of opposition to damage which was recoverable at law; (4) there seems to have been no instance of equity awarding compensation over and above the amount awarded as common law damages, other than cases in which equity would not relieve against the penalty; and (5) relief was granted, in the case of penal bonds, where there was no express contractual promise to perform the condition (see *Hardy v Martin*[93]), though it seems such a promise could in many cases readily be implied."

66 However, as noted earlier in these reasons under the heading "Bonds, contracts and the meanings of 'condition'", a reference such as that in proposition (5) to the implication into a bond of an "express contractual promise to perform the condition" tends to obscure the path taken by the common law courts in developing the action in assumpsit.

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90 (1986) 162 CLR 170 at 172-173.

91 (1801) 2 Bos & Pul 346 [126 ER 1318].

92 (1986) 162 CLR 170 at 190.

93 (1783) 1 Cox 26 [29 ER 1046].

67 The upshot is that at first instance in *Interstar*[94], Brereton J properly understood the significance of what had been said by Mason and Wilson JJ, when he concluded:

> "[T]heir Honours' judgment does not decide that relief against a penalty is available only when it is conditioned upon a breach of contract; to the contrary, it suggests that relief may be granted in cases of penalties for non-performance of a condition, although there is no express contractual promise to perform the condition – apparently on the basis that despite the absence of such an express promise, a penalty conditioned on failure of a condition is for these purposes in substance equivalent to a promise that the condition will be satisfied."

68 A further statement by Mason and Wilson JJ in *AMEV-UDC*[95], that it was the effect of the Judicature system which led:

> "to the conclusion that the equitable jurisdiction to relieve against penalties withered on the vine for the simple reason that, except perhaps in very unusual circumstances, it offered no prospect of relief which was not ordinarily available in proceedings to recover a stipulated sum or, alternatively, damages",

overlooks the proposition that the only relevant effect of the Judicature system, as explained above, was upon the procedures in the unified court system not upon substantive doctrine. Thereafter, in whatever court the action was brought in respect of a penalty, a money remedy, declaratory and injunctive relief and the taking of an account were available in that one action.

The *Dunlop Case*

69 Extensive reference was made by the primary judge to the decision of the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[96]. The conduct of that litigation illustrates the operation just mentioned of the Judicature system. Something more should be said on that matter.

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94 (2007) Aust Contract Reports ¶90-261 at 90,037.

95 (1986) 162 CLR 170 at 191.

96 [1915] AC 79.

70 The appellant in *Dunlop* was a manufacturer of motor tyres and related products which it sold under the registered trade mark "Dunlop". It allowed trade purchasers discounts from the list prices, but in order to prevent under-selling insisted that the trade purchasers agree not to sell to private buyers at less than list prices or to trade buyers at less than list prices after deducting certain discounts. The trade purchasers also agreed, as agents for the appellant, to obtain from their trade customers similar undertakings to observe list prices of the appellant.

71 It appeared to follow from the then recent decision of Kekewich J in *Elliman, Sons & Co Ltd v Carrington & Son Ltd*[97] that resale price maintenance stipulations of this nature were not contracts in restraint of trade[98]. No challenge to that decision was made in *Dunlop*.

72 A company curiously styled A. Pellant Limited had a contract with the appellant under which it received considerable quantities of the appellant's products. Before supplying these goods to the respondent as sub-purchaser, A. Pellant Limited, as required by its contract with the appellant, required the respondent to enter into a contract with it, as agent for the appellant[99]. The contract obliged the respondent on its part to observe the restrictions described above. This contract contained the clause:

> "We agree to pay to [the appellant] the sum of £5 for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty, but without prejudice to any other rights or remedies [A. Pellant Limited] or [the appellant] may have hereunder."

The contract appears to have been in a standard form, and was headed "Price Maintenance Agreement to be entered into by trade purchasers of Dunlop Motor Tyres"[100].

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97 [1901] 2 Ch 275.

98 See Heydon, *The Restraint of Trade Doctrine*, 3rd ed (2008) at 248-249.

99 cf *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

100 See [1915] AC 79 at 80-81, where the full text is set out.

73 The appellant commenced an action in the King's Bench Division, seeking an equitable remedy, namely an injunction to restrain further breaches of this contract by the respondent, in particular, by making further sales of a tyre cover for £3.12.11 per item instead of the list price of £4.1.0. The appellant also sought damages. One of the defences pleaded was that the sum of £5 stipulated in the contract was a penalty.

74 The primary judge (Phillimore J) granted the injunction and also directed an inquiry as to damages. The Court of Appeal (Vaughan Williams and Swinfen Eady LJJ; Kennedy LJ dissenting) held that the stipulation as to £5 was a penalty and, moreover, the appellant was entitled only to nominal damages in the sum of £2. On the other hand, at the earlier inquiry before the Master, evidence had been accepted that price cutting by a particular firm soon became generally known and the local agents of the appellant suffered a loss of business and resorted for supplies to other firms, thereby upsetting the selling organisation of the appellant. The Master had assessed the damages at £250.

75 In the House of Lords, Lord Atkinson summarised the evidence directed to showing that even if the sum agreed appeared imprecise as a pre-estimate of damage, it protected the appellant's interest in preventing undercutting, which would disorganise its trading system[101]. Thus the critical issue, determined in favour of the appellant, was whether the sum agreed was commensurate with the interest protected by the bargain.

76 The effect of the decision of the House of Lords was to restore the outcome at first instance and the award made by the Master upon the inquiry.

77 The litigation in *Dunlop*, where in the one court, and in the same proceeding, legal and equitable remedies were sought by the plaintiff and the defendant raised the penalty doctrine in its defence, illustrates the place of the penalty doctrine in a court where there is a unified administration of law and equity but equitable doctrines retain their identity.

Conclusion

78 The upshot is that the restrictions upon the penalty doctrine urged by the Court of Appeal in *Interstar* should not be accepted. The primary judge erred in concluding, in effect, that in the absence of contractual breach or an obligation or

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101 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 91-93.

responsibility on the customer to avoid the occurrence of an event upon which the relevant fees were charged, no question arose as to whether the fees were capable of characterisation as penalties.

79 Indeed, a further issue appears to have been presented by her Honour's findings set out above[102]. This may be stated as being whether the requirement to pay the fees in question was not enjoyed by the ANZ as security for performance by the customer of its other obligations to the ANZ, or whether the fees were charged by the ANZ, as specified in pre-existing arrangements with the customer, and ANZ, respectively, for the further accommodation provided to the customer by its authorising payments upon instructions by the customer upon which the ANZ otherwise was not obliged to act, or upon refusal of that accommodation.

80 The operative distinction would be that upon which the majority of the New South Wales Court of Appeal (Jacobs JA and Holmes JA) decided *Metro-Goldwyn-Mayer Pty Ltd v Greenham*[103]. Their Honours contrasted a stipulation attracting the penalty doctrine and one giving rise consensually to an additional obligation. This distinction had been identified long before, by Lord St Leonards in *French v Macale*[104], as follows:

> "[I]t appears, that the question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it a payment is reserved; or *whether according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent*. If a man let meadow land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking up the land is not inconsistent with the contract,

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102 At [23].

103 [1966] 2 NSWR 717 at 723-724, 727.

104 (1842) 2 Drury and Warren 269 at 275-276. The case was decided when, as Sir Edward Sugden, Lord St Leonards was Lord Chancellor of Ireland.

> which provides, that in case the act is done the landlord is to receive an increased rent."[105] (emphasis added)

81 The English and United States authorities in which the distinction thereafter was applied are collected and discussed in the treatise by Pomeroy[106], under the heading "Stipulations not Penalties – Alternative Stipulations".

82 In *Metro-Goldwyn-Mayer*, the contract for the hiring of films to exhibitors for public showing conferred the right to one screening only. The exhibitor was obliged to pay for each additional screening a sum equivalent to four times the original fee. The questions of construction of the contract were resolved by Jacobs JA and Holmes JA in such a fashion that the penalty doctrine had no application. Jacobs JA concluded[107]:

> "There is no right in the exhibitor to use the film otherwise than on an authorized occasion. If he does so then he must be taken to have exercised an option so to do under the agreement, if the agreement so provides. The agreement provides that he may exercise such an option in one event only, namely, that he pay a hiring fee of four times the usual hiring fee."

83 But it should be emphasised that the determination, with respect to the relevant exception fees, of live issues of this nature is entirely a matter upon further trial, along with the grounds upon which the applicants submit the penalty doctrine does apply to those fees.

Order

84 The applicants should have leave to appeal upon grounds 1-4 of the amended draft notice of appeal, and, to that extent, the appeal should be allowed with costs. The answers to so much of paragraphs 1 and 2 of the orders of the primary judge against which the applicant appeals should be set aside. In place of those answers, the answer should be substituted that the circumstances that the honour, dishonour, non-payment and over limit fees were not charged by the

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105 To the same effect were remarks of Lord Loughborough in *Hardy v Martin* (1783) 1 Cox 26 at 27 [29 ER 1046 at 1046-1047].

106 Pomeroy, *A Treatise on Equity Jurisprudence*, 5th ed (1941), vol 2, §437.

107 [1966] 2 NSWR 717 at 723.

respondent upon breach of contract by its customers and that the customers had no responsibility or obligation to avoid the occurrence of events upon which these fees were charged, do not render the fees incapable of characterisation as penalties.

85 That will leave for determination by the Full Court the grant of leave with respect to ground 6, by which the applicants challenge the finding of the absence of breach. Ground 5, which also remains, may add nothing to the other grounds. It will be for the applicants to decide whether to press those grounds.

86 If those grounds remain in play and the Full Court has disposed of them and of any consequent appeal and remaining costs issues in that Court, it will be for the applicants to seek the hearing at trial of the live issues respecting penalties and of the statutory claims.

87 The primary judge made a costs order and gave comprehensive reasons for doing so. So much of those orders as require the applicants to pay fifty percent of the costs of the ANZ of and incidental to the hearing of the separate questions should be set aside. The making of a substituted costs order should be for the primary judge upon the further conduct of the trial.