Australasian Legal Information Institute

O'Dea v Allstates Leasing System (WA) Pty Ltd [1983] HCA 3; (1983) 152 CLR 359 (17 February 1983)

HIGH COURT OF AUSTRALIA

O'DEA v. ALLSTATES LEASING SYSTEM (W.A.) PTY. LTD. [1983] HCA 3; (1983) 152 CLR 359

Contract

High Court of Australia

Gibbs C.J.(1), Murphy(2), Wilson(3), Brennan(4) and Deane(5) JJ.

CATCHWORDS

Contract - Breach - Penalty - Hire of vehicle for term - Liability of lessee on repossession before end of term - Provision that entire rent for term due at commencement of term - Entire rent not payable if instalments duly paid - Provision entitling lessor to retain possession and sue for total rent - No credit for accelerated payment - No credit for proceeds of sale of vehicle - Whether penalty - Equitable relief against forfeiture.

HEARING

1982, August 23, 24; 1983, February 17. 17:2:1983

APPEAL from the Supreme Court of Western Australia.

DECISION

1983, February. 17.

The following written judgments were delivered: -

GIBBS C.J. By an agreement in writing made on 13 April 1977 the first "the Lessor") leased to Mr. and Mrs. O'Dea and Mr. and Mrs. Granich, who, together, traded as cartage contractors under the name of Granich Geraldton (in the agreement called "the Lessee"), a Mercedes Benz prime mover for a period of thiry-six months. No right was given to the lessee to buy the vehicle and the agreement stated that it was not intended to be a hire

purchase agreement (cl. 17). Clause 1(a) of the agreement stated that the lessor leased to the lessee and the lessee took on lease the vehicle:

". . . upon the terms and conditions hereinafter contained for a period of 36 months at an entire rental of $39,550.32 which shall be due by the LESSEE to the LESSOR upon the signing of this Agreement PROVIDED THAT if the LESSEE shall duly observe and perform all and singular the covenants and conditions on the part of the LESSEE herein contained or implied and if the LESSEE shall duly and punctually pay on account of such entire rent the following instalments on the days following namely: The sum of $1098.62 per month commencing on the 13TH day of APRIL 1977 up to and including the 13TH day of MARCH 1980 . . . THEN the LESSOR shall not demand or seek to enforce payment of the entire rent or any balance thereof outstanding otherwise than by the said instalments."

By cl. 6(a) the lessee agreed duly and punctually to pay to the lessor the instalments of rent on the days set forth in cl. 1(a). Clause 12 provided as follows:

"In the event that the LESSEE defaults in the punctual payment of any of the instalments of rent as herein provided or in the payment of the insurance premiums as herein provided or defaults in the performance of any of the terms and conditions of this agreement, the LESSOR may immediately retake possession of the vehicle in respect of which such default has occurred, without notice to the LESSEE, with or without legal process, and the LESSEE hereby authorises and empowers the LESSOR to enter the premises or other places where the said vehicle may be found and take and carry away the said vehicle, and, in such eventuality, the LESSEE'S right to the retention and use of the said vehicle shall terminate. All moneys due for unexpired terms shall become immediately due and payable, plus reasonable costs of repossesion. Provided that the LESSOR at its option may lease the leased vehicle for the account of the LESSEE for the remainder of the term and should the rental therefrom be less than that provided herein the LESSEE shall pay the deficiency. Nothing herein shall release the LESSEE from the obligation to pay the rent as herein provided for the unexpired balance of the term of this agreement plus reasonable costs of repossession."

The agreement contained a number of terms and conditions, varying in importance, which the lessee was bound to observe. Clause 31 provided:

"On the goods being received into the LESSOR'S possession consequent upon the expiration of the period of the Lease or any extension thereof or consequent on the LESSOR'S having retaken possession pursuant to Clause 12, the LESSOR shall as soon as practicable, sell the goods by Public Auction or to or through traders dealing in goods of a similar description (hereinafter called 'the trade') at the best price the LESSOR can reasonably obtain and the LESSEE agrees to pay the LESSOR on demand additionally to any rentals and other monies payable to the LESSOR and by way of indemnity for the capital loss so suffered the amount (if any) by which the appraisal value stated in the

schedule below exceeds the disposal price after allowing for any costs and expenses incidental to such disposal. In the event of any dispute the average of three valuations by 'the trade' shall be accepted by the parties as the value of the said goods."

The appraisal value was stated in the schedule to be $13,300. On the same day M. G. O'Dea Pty. Ltd. guaranteed the due and punctual observance and performance of all the obligations imposed upon the lessee by the agreement. Nothing turns on the form of the guarantee. (at p365)

2. The lessee took possession of the vehicle and made payments of rent which totalled $8,114.28 and which represented the instalments due for the months of April to October 1977 and part of the instalment due for November. After November 1977 no further rent was paid. The first respondent later retook possession of the vehicle and resold it, realizing $20,000 on the sale. To obtain the vehicle it was necessary for the first respondent to pay $7,003.32 to a company which had a lien on the vehicle for repairs. (at p366)

3. The first respondent commenced proceedings in the Supreme Court of Western Australia against Mr. and Mrs. O'Dea, Mr. and Mrs. Granich and M. G. O'Dea Pty. Ltd., claiming $31,436.04 (the difference between the total rent, $39,550.32, payable under the agreement and the amount of the instalments paid) together with interest, and $7,003.32, the amount paid to discharge the lien. In the alternative, damages of $33,650.39 were claimed. Mr. and Mrs. Granich did not enter a defence and judgment was given against them by default; they have together been made the second respondent to this appeal, although it is not clear why their joinder was necessary. At the trial of the issues between the first respondent and the remaining defendants, Mr. and Mrs. O'Dea and M. G. O'Dea Pty. Ltd. (who are the present appellants), it was conceded that the amount of $7,003.32 was recoverable and the sole issue fought was whether the amount of $31,436.04 was a penalty. Counsel for the first respondent suggested that if it became necessary to assess damages that could be done in separate proceedings. The learned trial judge (Wallace J.) held that the sum was not a penalty and gave judgment for the first respondent against the appellants in the sum of $45,294.95 which included interest. An appeal to the Full Court was dismissed. A further appeal has now been brought to this Court. (at p366)

4. The argument on behalf of the first respondent was that the rules which distinguish between a penalty and liquidated damages are simply not relevant to the present case. It was said that the first respondent was suing for the consideration payable under the contract, and was not seeking to recover a sum payable in the event of a breach by the appellants of their contractual obligations, so that the question whether the amount payable was a genuine pre-estimate of damage did not arise. (at p366)

5. The cases to which counsel for the first respondent referred in support of his argument that there can be no question of penalty in the present case seem to me to fall into two classes. In the first class of case, if a sum of money is payable by instalments, and it is provided that in the event of one instalment not being punctually paid the whole sum shall immediately become payable, the acceleration of payment is not a penalty: The Protector Loan Co. v. Grice (1880) 5 QBD 592 ; Wallingford v. Mutual Society (1880) 5 App Cas 685, at

pp 696, 702, 705-706, 710 . Similarly there is no penalty where it is agreed to charge a certain rate of interest on condition that if payment is made punctually the rate will be reduced (Astley v. Weldon (1801) 2 Bos & Pul 346, at p 353 (126 ER 1318, at p 1322)) or where a creditor agrees to accept payment of part of his debt in full discharge if certain conditions are met but stipulates that if the conditions are not met he will be entitled to recover the original debt: Thompson v. Hudson (1869) LR 4 HL 1, at pp 15-16, 27-28, 30 ; Ex parte Burden; In re Neil (1881) 16 ChD 675 . In all the cases of this kind there is a present debt, which, by reason of an indulgence given by the creditor, is payable either in the future, or in a lesser amount, provided that certain conditions are met. The failure of the conditions does not mean that the creditor becomes entitled to damages; the consequence is that the sum which was always owed, but which the debtor was allowed to pay by instalments or in a smaller amount, becomes recoverable at once or in full. (at p367)

6. The second class of case arises where the parties have stipulated that a sum shall become payable on a certain event which, although brought about by the party required to make the payment, does not involve a breach of contract. It has been held that where there is a contract for the payment of a certain sum in a certain event, and that event has happened, the sum is payable and no question of penalty versus liquidated damages arises: In re Apex Supply Co. (1942) Ch 108, at p 119 ; Alder v. Moore (1961) 2 QB 57, at p 65 . Difficulties have arisen in the application of this principle to contracts of hire purchase which provide that in the event of termination a sum representing all or part of unpaid instalments will be paid by the hirer to the owner. There was some controversy as to the position when the owner's right to terminate the contract and receive payment arose on the happening of any of a number of events, some of which were breaches and some of which were not, but it has now been settled in England that in such a case where the agreement is terminated by reason of a breach committed by the hirer, the sum payable will be a penalty unless it is a genuine pre-estimate of the loss suffered by the owner by reason of the breach: Cooden Engineering Co. Ltd. v. Stanford (1953) 1 QB 86 ; Campbell Discount Co. Ltd. v. Bridge (1962) AC 600 ; Financings Ltd. v. Baldock (1963) 2 QB 104 . I respectfully agree with that conclusion. If, however, the agreement is terminated by the hirer himself, e.g. because he is unable to keep up his payments, it has been held that the question whether the sum payable is liquidated damages or a penalty does not arise, since what has occurred is that the hirer has exercised his option to put an end to the contract on paying a certain sum, and the sum for which he has made himself liable must be paid: Associated Distributors Ltd. v. Hall (1938) 2 KB 83 . Conflicting opinions have been expressed as to the correctness of that decision (see Campbell Discount Co. Ltd. v. Bridge (1962) AC, at pp 614, 631, 633 ; and United Dominions Trust (Commercial) Ltd. v. Ennis (1968) 1 QB 54, at pp 64, 67) but the question whether it was correct does not fall for consideration in the present case. (at p368)

7. In Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1914] UKHL 1; (1915) AC 79, at pp 86-87 , Lord Dunedin said:

"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 of the contract, not as at the time of the breach."

Similarly, in my opinion, the question whether the rules which relate to the distinction between penalties and liquidated damages are applicable must be judged as at the time of the making of the contract in question. The question is "not of words or of forms of speech, but of substance and of things", to use the words cited by Lord Radcliffe in Campbell Discount Co. Ltd. v. Bridge (1962) AC, at p 624 . (at p368)

8. In the present case, the event upon which the outstanding balance of the instalments became payable was a breach by the lessee of its obligations, under cl. 6(a), duly and punctually to pay the instalments of rent on the days set forth in cl. 1(a). The present case therefore does not fall within the second class of cases on which the first respondent relied - it is not a case in which under the contract money became payable on a certain event which was not a breach of the contract. On the contrary, the reasoning in such cases as Cooden Engineering Co. Ltd. v. Stanford and Campbell Discount Co. Ltd. v. Bridge supports the conclusion that the provision requiring payment of the balance of the rent is a penalty, unless of course it can be said to be a genuine pre-estimate of damage. (at p368)

9. Nor, in my opinion, is the present case within the first class of cases cited by counsel for the first respondent. The contract did not, in my opinion, merely provide for the acceleration of a presently existing debt. In the argument for the first respondent much reliance was naturally placed on the provisions of cl. 1(a) of the contract, and it was said that the first respondent's claim was based entirely on that clause, and could succeed even if no breach of the contract were proved. If cl. 1(a) was read in isolation, it might create a present debt for the entire rental, although it would allow the lessee the indulgence of paying the sum due by instalments, provided the payments were duly and punctually made. In other words, there might then be debitum in praesenti, although selvendum in futuro, and, if so, such authorities as The Protector Loan Co. v. Grice (1880) 5 QBD 592 would apply. But the contract must be viewed as a whole, and not in fragments. When cll. 1(a), 6(a) and 12 are read together, it becomes apparent that at the date of the contract there was no presently existing obligation to pay the entire rental. The obligation was to pay the instalments, and if there were a default in payment of the instalments the whole became payable. The clauses, read together, had the effect that the entire rent only became payable in the events specified in cl. 12 - including default in punctual payment of the instalments. In the circumstances of the present case the obligation to pay the entire rent arose only by reason of a breach, and the amount which the contract makes payable in that event is either a penalty or liquidated damages. (at p369)

10. Counsel for the first respondent did not dispute that if the question whether the sum was a penalty or liquidated damages falls for decision the sum must be held to be a penalty. Of course, a lessor is entitled to be compensated for the loss which he is likely to suffer on the premature termination of a hiring. However, the outstanding balance of the entire rental could not in the circumstances possibly represent a genuine pre-estimate of the loss which would be caused to the first respondent by a breach of the contract. In the event of a breach

the first respondent was entitled to repossess and resell the vehicle, but it was not bound to account to the lessee for any amount received on a resale, even if it exceeded (as it did) the appraisal value. The first respondent became entitled under the contract to receive the accelerated payments of the rental without any rebate and to receive back the vehicle sooner than would otherwise have been the case without giving credit for its value and in these circumstances the amount receivable by the first respondent was manifestly excessive in comparison with the greatest loss that it could possibly suffer as a result of the default in payment of the instalments. Moreover, the entitlement of the first respondent arose on a number of events, including any default in performance of the terms and conditions of the contract, some of which, by their nature, could lead only to trifling damage. (at p369)

11. I have no doubt in principle that the provisions requiring the payment of the entire rent amounted to a penalty. It remains however to consider some Australian decisions, and in particular Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; (1906) 4 CLR 672 which the Supreme Court felt bound to follow. In that case, the lessors leased to the lessees for a term of ten years a patented apparatus, and the lessees agreed that they would not discontimue the use of the apparatus or use it elsewhere than on specified premises. The agreement by cll. 2 and 6 provided for payment of an annual rental in advance and by cl. 8 provided that in case of a breach by the lessees of any of the conditions of the lease, or in case the apparatus should be taken from the lessees or attached by process of law by proceedings in bankruptcy or insolvency or otherwise, the whole of the rent for the remainder of the term should immediately become due and the lessors might forthwith take possession of and remove the apparatus. The lessees (a company) were wound up and it was held by a majority of this Court, reversing the Supreme Court, that the lessors were entitled to prove for the whole of the amount of the ten years' rent. The judgment of the majority was delivered by Griffith C.J. The learned Chief Justice first dealt with the effect of cl. 8 in so far as it provided that the whole of the rent should be payable on breach of a condition of the lease, other than a default in payment of an instalment of rent, and held that the sum stipulated for was a genuine pre-estimate of damage (1906) 4 CLR, at pp 681-683). In reaching this conclusion he was influenced by the fact that:

". . . it might reasonably have been desired by the lessors, and have been in the contemplation of both parties when fixing the amount of the rent and the conditions of the lease, that a fair opportunity should be given for the public use of the invention in its entirety, for a considerable time, on suitable premises, and by persons carrying on a business in which its advantages would commend it to the public, and so be likely to induce future purchases from the patentees" (1906) 4 CLR, at pp 681-682 .

He then turned to the stipulation for acceleration of the payment of rent in the event of default of payment in any instalment, and said (1906) 4 CLR, at p 683 :

". . . Is it a mere agreement of demise for a term of years at a yearly rent, not creating any absolute obligation to pay rent for more than one year, so that the obligation may be

terminated by abandoning the demised premises, with a collateral stipulation that an amount equal to ten years' rent shall be payable on default in payment of that one year's rent? Or is it an agreement creating an absolute obligation to pay ten years' rent in any event, with a provision that it may be paid in annual instalments? If the first contention is the right one, there is no doubt that the decision appealed from is correct. If the latter is the true construction, there was a debitum in presenti solvendum in futuro."

He concluded (38) that the agreement expressed a clear intention that a sum equal to the rent for ten years should be paid by the lesses in any event, and that the case was indistinguishable from The Protector Loan Co. v. Grice. He added (1906) 4 CLR, at p 684 :

". . . It is true that in that case the consideration was a debt already existing. Here, on the other hand, the only debt is created by agreement of the parties, and is payable in futuro. But for the reasons already given I do not think that this difference is material."

The reasons to which he referred appear to have been that there would be nothing unreasonable, in the circumstances, in stipulating for a receipt of the rent for the whole term, and that it would be competent to the parties further to stipulate that in the event of a breach there should be no deduction for acceleration of payment. O'Connor J., who dissented, distinguished The Protector Loan Co. v. Grice. He said (1906) 4 CLR, at p 692 :

". . . If in this case the whole amount of rent was actually due on the signing of the contract the provisions of clause 8 might well be regarded as providing merely for acceleration of payment within the principle expounded by Lord Hatherley (in Thompson v. Hudson (1869) 4 LRHL 1), but, as I have already pointed out, the whole amount of rent was not then due under the agreement. No more than the annual instalment could become due in the first year. Under these circumstances the facts necessary to make the principle of the Protector Loan Co. v. Grice applicable do not exist."

He added that the stipulation for payment of the rent was in reality one for compensation for breaches of the covenant and, that, not being a genuine estimate of possible damage, it was a penalty. (at p371)

12. This decision was followed in Western Electric Coy. (Australia) Ltd. v. Ward (1933) 51 WN(NSW) 19 and Re Mutual (Q'ld) Knitting Mills Pty. Ltd. (In liq.) (1959) Qd R 357 . It was distinguished in Lessors (Aust.) Pty. Ltd. v. Westley (1964-65) NSWR 2091 on the ground, amongst others, that in that case there was no agreement to pay a lump sum and indeed the agreement there appears to have been deliberately framed to avoid a primary obligation to pay a lump sum. In Wanner v. Caruana (1974) 2 NSWLR 301 the case was again distinguished. The mortgage in that case contained a clause relating to payment of principal and interest with a proviso that, in the event of any monthly instalment being in default for fourteen days, the whole of the balance of the principal sum and other moneys due thereunder with interest thereon at the rate of ten per cent per annum should immediately become due and payable for the balance of the term. It was held that the proviso was void

as a penalty. Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; (1906) 4 CLR 672 was distinguished on two grounds. One ground of the distinction was that the proviso, which purported to make the mortgagors liable to pay unaccrued and unearned interest, was not a provision for the acceleration of future instalments of an agreed present debt. A further ground of distinction was that in Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. "the equipment which was the subject of the hiring agreement was of such a nature that it was reasonable to attribute to the lessor a commercial desire to have the advantage of his equipment actually being in use during the agreed term" and that this led the majority in that case to hold that the provision for the advancement of the future rent in substance "amounted to a single quantification of the damage which would be suffered by the lessor, in the event of a default on the part of the lessee so that the term did not run its full contractual period", and that there was no similar commercial advantage to the mortgagees in the instant case (1974) 2 NSWLR, at p 305 . Finally in I.A.C. (Leasing) Ltd. v. Humphrey [1972] HCA 1; (1972) 126 CLR 131 this Court was concerned with an agreement for a lease whereby it was agreed that the lessee would pay an entire rent equal to the total of eighteen monthly instalments provided in the agreement, subject however to adjustment of rent as provided in cl. 4. That clause provided that if during the lease the lessee should (inter alia) default in payment of any instalment, and the default should continue for fourteen days, there should forthwith become due and payable any rent instalment then accrued due but not paid, and the total of the rent instalments not then accrued due, "rebated to reflect their then value, ascertained by applying an interest rate of ten per cent per annum to each such instalment over the period by which the date for payment thereof is by virtue of this clause brought forward". The clause further empowered the lessor to retake possession of the equipment leased, and another clause provided that in certain circumstances credit should be given to the lessee for the amount by which the actual value of the equipment at the time of the termination of the agreement exceeded its appraisal value. The main judgment of the Court was delivered by Walsh J., who considered that in the particular circumstances of the case, to which he referred at p. 140, no question really arose as to whether the provisions in cl. 4 for the payment of the future instalments constituted a penalty. However, he said that if the question did arise for decision, in his opinion the provision did not constitute a penalty. He said (1972) 126 CLR, at p 141 :

". . . That conclusion would be required if the agreement ought to be construed in the way in which the majority of this Court construed the agreement under consideration in Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. that is, as an agreement to pay a total rent, being the sum of the monthly instalments, subject only to such adjustments as were specified in the agreement. It could be urged, in support of that construction, that the agreement was expressed to be an agreement to lease the equipment for a term of eighteen months 'at an entire rent equal to the total of the instalments provided in the schedule subject however to adjustment of such rent as provided in Clause 4'." (at p373)

13. He went on to say that even if the agreement ought to be read as one in which the

liability under cl. 4 to pay instalments, rebated as provided therein, at a time earlier than the time when they would have become payable in the ordinary course of time was a liability which would fall upon the lessee in consequence of a breach of the agreement the provisions should not be held to be a penalty. This was because the agreement provided "its own limitation upon the ability of the lessor to gain a large profit by reason of the equipment being repossessed after a relatively short period". On the first aspect of the case Walsh J., speaking obiter, assumed, but did not consider for himself, the correctness of Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. The second issue, whether the clause was a genuine pre-estimate of damage, depended on the particular provisions of the lease there under consideration, which are quite distinguishable from those of the present case. (at p373)

14. The question whether a contractual provision amounts to a penalty depends on all the surrounding circumstances existing at the time of the making of the contract as well as on the terms of the contract itself, and it is therefore not always possible to apply a decision given upon one contract to another case even though that case concerns a contract in identical terms (see Lombank Ltd. v. Excell (1964) 1 QB 415). In Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. there was a particular circumstance on which the majority of the Court relied, namely the commercial importance to the lessor of the continued use of the patented apparatus. That circumstance was regarded as important in relation to the agreement in so far as it provided the consequence of a breach of conditions other than default in payment of an instalment, but I find it difficult to understand how, as a matter of logic, it could be relevant to the question whether there was a present debt for the entire rent. In my opinion the principle of cases such as The Protector Loan Co. v. Grice (1880) 5 QBD 592 applies only where there is a present debt, a debt actually due before the breach which accelerated the payment, and with all respect I would prefer the reasoning of O'Connor J. to that of Griffith C.J. and would hold that in that case there was no present debt for the entire amount. It makes commercial sense that parties may validly agree that payment of a present debt at a reduced rate, or at a future time, or by instalments, will be accepted if, but only if, certain conditions are observed. There is, however, a crucial difference between such an agreement and one under which a sum, originally payable only by instalments, is made payable in full immediately if the instalments are not duly paid. If Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. cannot be confined to its own special facts I would decline to follow it. (at p374)

15. For these reasons I consider that the provisions of the contract which required payment of the entire rent amounted to a penalty and that the first respondent's claim to recover $31,436.04 could not succeed. The first respondent is, however, entitled to recover such unpaid instalments as were due before it retook possession of the vehicle and such damages as may be proved to have been occasioned by the breach of the conditions of the lease. Notwithstanding the suggestion of counsel that the damages might be assessed in fresh proceedings, it seems to me that the proper course is to refer the matter back to the Supreme Court to enable an assessment of damages to be made. (at p374)

16. I would allow the appeal. For the order made by the Full Court I would substitute an order setting aside the judgment of Wallace J. and ordering: (a) that judgment be given in favour of the plaintiff against the third and fourth-named first defendants and the second defendant in an amount to be assessed, with no order as to costs; and (b) that the matter be remitted to a single judge of the Supreme Court to enable him to decide such questions as are raised by the parties in relation to the recovery of instalments of rent due before the retaking of possession, the assessment of any damages and the payment of interest and to fix the amount to be assessed (which will include the sum of $7,003.32 and any interest thereon). (at p374)

MURPHY J. The respondent lessor relies on certain terms of the contract (or lease agreement) which purport to apply on the occurrence of breach by the lessee. For trivial as well as serious breaches, at any time during the lease period, the combined operation of cll. 1(a) and 12 is to accelerate instalment payments, making the outstanding balance of the entire rental due. Further, the vehicle may then be repossessed without notice, with no provision for rebate of future instalments; and if it is then sold the lessee is not entitled to any surplus received in excess of the appraisal value. These provisions permit the lessor to recover grossly in excess of any genuine pre-estimate of its loss. They are a trap for an unwary or unfortunate lessee. They are unenforceable because, by modern standards, they are unconscionably harsh. (at p375)

2. Where a contract provides that failure to comply strictly with conditions on an obligation to pay a certain sum, results in an obligation to pay a higher sum, that obligation is treated as an unenforceable penalty unless the increase can be shown to be a genuine pre-estimate of the damage sustained by the non-performance of the conditions. Suppose a second contract states that the obligation is to pay the higher sum, but that it will be satisfied if the lower sum is paid strictly in accordance with the conditions. To describe the contractual right to pay the lower sum as an indulgence is a misdescription; to treat the first contract as penal and the second as non-penal is to elevate form above substance. Similar considerations apply to accelerated payment of a whole sum on occurrence of breach in payment of instalments. In such a case, Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; (1906) 4 CLR 672 , a majority of this Court (Griffith C.J. and Barton J., O'Connor J. dissenting) preferred form to substance. In this case, the Supreme Court of Western Australia felt constrained to follow the Lamson Case. The Lamson Case should be overruled. (at p375)

3. The appeal should be allowed. I agree with the proposed order. (at p375)

WILSON J. On 13 April 1977, Mr. and Mrs. O'Dea and Mr. and Mrs. Granich (the lessee) agreed, pursuant to a written agreement, to lease from Allstates Leasing System (W.A.) Pty. Ltd. (Allstates) a 1975 Mercedes Benz prime mover. The due and punctual observance and performance of the lease agreement was guaranteed by M.G. O'Dea Pty. Ltd. No separate question concerning the guarantee arises in the case. The appeal to this Court was instituted by Mr. and Mrs. O'Dea and M. G. O'Dea Pty. Ltd. (the appellants) against Allstates as the first respondent. Mr. and Mrs. Granich are together joined as the second respondent

but have taken no part in any stage of the proceedings before this Court or in the courts below. (at p376)

2. Clause 1(a) of the lease agreement provided as follows:

"The LESSOR hereby leases to the LESSEE and the LESSEE hereby takes on lease the vehicles more particularly described in the Schedule hereto upon the terms and conditions hereinafter contained for a period of 36 months at an entire rental of $39,550.32 which shall be due by the LESSEE to the LESSOR upon the signing of this Agreement PROVIDED THAT if the LESSEE shall duly observe and perform all and singular the covenants and conditions on the part of the LESSEE herein contained or implied and if the LESSEE shall duly and punctually pay on account of such entire rent the following instalments on the days following namely:

The sum of $1098.62 per month commencing on the 13TH day of APRIL 1977 up to and including the 13TH day of MARCH 1980 and thereafter the sum of $ - on the day of each and every month commencing on the day of 197 - THEN the LESSOR shall not demand or seek to enforce payment of the entire rent or any balance therof outstanding otherwise than by the said instalments."

The lessee made payments in accordance with cl. 1 until 30 November 1977 but subsequently failed to pay any further instalments. The vehicle was repossessed in May 1978. In the course of repossession the vehicle was found to be subject to a repairer's lien to the amount of $7,003.32, which Allstates verified and paid. (at p376)

3. Allstates commenced an action in the Supreme Court of Western Australia claiming first, the sum of $31,436.04 representing the balance of the rent due and payable pursuant to the lease agreement, plus interest and, secondly, the further sum of $7,003.32 being the amount of the lien. At the hearing of the action the appellants' sole defence was that the amount claimed for the balance of the rent was a penalty and so irrecoverable. They do not deny their liability with respect to the cost of removing the repairer's lien. Both the learned trial judge (Wallace J.) and the Full Court (Wickham, Brinsden and Jones JJ.) found, in favour of Allstates, that the sum claimed was not a penalty. In the Full Court, Brinsden J. with whom Jones J. agreed, found the circumstances of this case to be covered by the decision of this Court in Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; (1906) 4 CLR 672 and the subsequent discussion of that case in I.A.C. (Leasing) Ltd. v. Humphrey [1972] HCA 1; (1972) 126 CLR 131 . Wickham J. would have found that the amount claimed was a penalty if not for the binding authority of Lamson Store. (at p376)

4. Apart from cl. (a) regard must also be had to the following clauses: "6.(a) The LESSEE will during the term hereof duly and punctually pay the instalments of rent on the days set forth in Clause 1(a) hereof to ALLSTATES LEASING SYSTEM (W.A.) PTY. LTD. at 505 Newcastle Street, Perth, or such other place as directed, the first instalments to be paid upon execution of this lease and the remaining instalments to be paid upon the same day or such other day as arranged with the LESSOR of each succeeding month thereafter until the

whole rental hereunder shall have been paid in full.

. . .

12. In the event that the LESSEE defaults in the punctual payment of any

of the instalments of rent as herein provided or in the payment of the insurance premiums as herin provided or defaults in the performance of any of the terms and conditions of this agreement, the LESSOR may immediately retake possession of the vehicle in respect of which such default has occurred, without notice to the LESSEE, with or without legal process, and the LESSEE hereby authorises and empowers the LESSOR to enter the premises of other places where the said vehicle may be found and take and carry away the said vehicle, and, in such eventuality, the LESSEE'S right to the retention and use of the said vehicle shall terminate. All monies due for unexpired terms shall become immediately due and payable, plus reasonable costs of repossession.

Provided that the LESSOR at its option may lease the leased vehicle for the account of the LESSEE for the remainder of the term and should the rental therefrom be less than that provided herein the LESSEE shall pay the deficiency. Nothing herein shall release the LESSEE from the obligation to pay the rent as herein provided for the unexpired balance of the term of this agreement plus reasonable costs of repossession.

. . .

31. On the goods being received into the LESSOR'S possession consequent

upon the expiration of the period of the Lease or any extension thereof or consequent on the LESSOR'S having retaken possession pursuant to Clause 12, the LESSOR shall as soon as practicable, sell the goods by Public Auction or to or through traders dealing in goods of a similar description (hereinafter called 'the trade') at the best price the LESSOR can reasonably obtain and the LESSEE agrees to pay the LESSOR on demand additionally to any rentals and other monies payable to the LESSOR and by way of indemnity for the capital loss so suffered the amount (if any) by which the appraisal value stated in the schedule below exceeds the disposal price after allowing for any costs and expenses incidental to such disposal. In the event of any dispute the average of three valuations by 'the trade' shall be accepted by the parties as the value of the said goods." (at p377)

5. The appellants' precise defence to the claim is that cl. 12, which in terms entitles Allstates to bring this action for the balance of the moneys due under the agreement, amounts to a penalty and is therefore unenforceable. If that question is shown to be a relevant one, it will fall to be determined by the proper construction of the contract in its entirety in the light of all the circumstances. In essence the task of a court in such a case is to discern the true

intention of the parties: is the clause under challenge a genuine pre-estimate of damage, or is it a penal sanction imposed on the observance of the agreement by the lessee? The relevant principles for distinguishing between a genuine pre-estimate of damage and a penalty are well established; they are conveniently summarized in the form of propositions by Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1914] UKHL 1; (1915) AC 79, at pp 86-87 . It is unnecessary to detail them here because, as will appear, that distinction is not the real problem in this case. Here Allstates raises the more fundamental issue of whether that question really arises at all. (at p378)

6. I turn first to a brief description of the case advanced in support of the appeal. In support of their contention, the appellants rely on the effect of cll. 12 and 31 as evidenced by their operation in the present circumstances. The contract binds the lessee to the observance of a wide range of terms and conditions which vary greatly in importance. They range from the obligation to pay the instalments of rent punctually to the duty to keep and maintain the vehicle in good order and condition by washing and cleaning as the same may be required. Clause 12 provides for the consequences of any default, no distinction being drawn by reference to the degree of seriousness which the default may exhibit. Upon a default the lessor may immediately retake possession of the vehicle without notice to the lessee, with or without legal process; in that event, the lessee's right to the retention and use of the vehicle shall terminate. All moneys due for unexpired terms shall become immediately due and payable, plus reasonable costs of repossession. The clause also provides the lessor with the option of leasing the vehicle for the account of the lessee for the remainder of the term, whereupon the lessee shall pay the amount of any deficiency that may result. The clause does not advert to the possibility of a surplus by reason of the vehicle being leased at a higher rental; in that event, presumably, the lessor is intended to benefit. (at p378)

7. Three points of significance to the construction of the agreement arise from cl. 12. The first is that the lessor, if it is going to exercise its rights under that clause, must repossess the vehicle. This is an essential condition precedent to the accelerated liability of the lessee to pay the moneys due for unexpired terms. The second is that no discount is allowed for the acceleration in payment of those moneys. The third is that the lessor is not obliged to attempt a leasing for the unexpired term of the original lease in order to mitigate the loss otherwise accruing to the lessee by reason of the default. (at p379)

8. Clause 31, as may be seen, provides that the lessor, having retaken possession pursuant to cl. 12, shall sell the vehicle as soon as practicable at the best price it can reasonably obtain. Should that price, less any costs and expenses incidental to the sale, fail to reach the appraisal value of the vehicle stated in the schedule, the lessee will pay to the lessor on demand the amount of the deficiency "by way of indemnity for the capital loss so suffered". In the present case, the appraisal value is stated in the schedule as $13,300.00. The clause makes no provision for the consequences of a capital gain arising on the sale of the vehicle by reason of the net sale price exceeding the appraisal value; the lessee can derive no benefit from such an eventuality. It is common ground that, following its repossession of the vehicle in May 1978, Allstates sold the vehicle at a price of $20,000.00. (at p379)

9. It requires little argument to demonstrate that this agreement could operate to the extreme disadvantage of the lessee. One can suppose circumstances in which the default occurs very early in the term of the lease. The vehicle can then be repossessed at a time when little depreciation would have occurred. The lessor would receive both the entire rental and possession of the vehicle. In direct contrast to the agreement which was under consideration in I.A.C. (Leasing) Ltd. [1972] HCA 1; (1972) 126 CLR 131 , the amount of the rental is not subject to any adjustment to allow for the accelerated payment, nor is the lessee entitled to any credit for the amount by which the value of the vehicle when repossessed exceeds its appraisal value. Subject, therefore, to any merit which the argument advanced on behalf of Allstates may be found to possess, these features of the agreement afford strong support to the appellants' defence to the claim. It is to Allstates' argument that I now turn. (at p379)

10. Mr. Pullin, counsel for Allstates, submits that the question whether the sum claimed is or is not a penalty does not arise. That question would arise, in his submission, only if the claim was one for liquidated damages. Here, however, the lessor has sued to enforce the principal obligation imposed on the lessee under the lease. It relies on cl. 1 (a), which provides that the entire rental of $39,550.32 "shall be due by the LESSEE to the LESSOR upon the signing of this Agreement". The provision permitting the lessee to discharge that obligation by the payment of instalments spread over the term of the lease is an indulgence which is liable to be withdrawn upon any default. The obligation to pay the entire rental lies at the heart of the agreement between the parties. Mr. Pullin argues that, unless the Court is to assume a general responsibility to review bargains which might be thought to be oppressive, there is no basis on which it should intervene. (at p380)

11. The principle underlying Allstates' argument that the agreement provided merely for the acceleration of payment of an existing debt in the event of the lessee's default was expounded by Lord Hatherley L.C. in Thompson v. Hudson (1869) LR 4 HL 1, at pp 15-16 in the following terms:

" . . . where there is a debt due, and an agreement is entered into at the time of that debt having become due and not being paid, in regard to farther indulgence to be conceded to the debtor, or farther time to be accorded to him for the payment of the debt, or in regard to his paying it immediately, if that be a portion of the stipulations of the agreement, or at some future time which may be named, and the creditor is willing to allow him certain advantages and deductions from that debt, as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions, then it is perfectly competent to the creditor to say: 'If the payment be not made modo et forma as I have stipulated, then forthwith the right to the original debt reverts, and it is to be open to me to proceed with reference to the original debt, and to exercise all those powers which I possess for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement, which has been now broken, was entered into.'"

A clear application of this principle is to be found in the decision of the Court of Appeal in The Protector Loan Co. v. Grice (1880) 5 QBD 592 and of the House of Lords in Wallingford v. Mutual Society (1880) 5 App Cas 685 . (at p380)

12. The same principle also appears to have played a large part in the decision in this Court of Griffith C.J., with whose judgment Barton J. agreed, in Lamson Store [1906] HCA 87; (1906) 4 CLR 672 . As I have noted, it was the authority of this decision which constrained the Full Court to find in favour of Allstates. It was a case in which the lessor furnished the lessee's store with a patented cash cable tramway system for the conveyance of money and dockets, under a hiring agreement. The lessor was to instal the system and to bear the cost of repairs and risk of damage or loss by fire; the lessee was to lease the system for ten years at an annual rental payable in advance and to maintain the system in operation continuously on the named premises. Upon any breach of any of the conditions of the agreement by the lessee, or in the event of the bankruptcy of the lessee, the agreement provided that the lessor might forthwith repossess the system and the whole of the rent for the remainder of the term should immediately become payable. Two months after the installation of the system, the lessee was made subject to a winding up order. The lessor sought to prove in the winding-up for the whole ten years' rent remaining unpaid. At first instance, the claim was rejected, without prejudice to the lessor's right to prove for rent actually due and for damages. The lessor appealed successfully to the High Court, although O'Connor J. dissented. The learned Chief Justice emphasized the substantial interest of the lessor, as the holder of patent rights in the system, in its full and fair exhibition in the particular premises for the term of the lease. He construed the agreement as one which provided for the payment by the lessee of a total rent, amounting to ten years' rent, in any event. He considered the decision in The Protector Loan Co. to be indistinguishable; the fact that the Court of Appeal was concerned with an already existing debt as contrasted, in Lamson Store, with a debt which was created only by agreement of the parties and was payable in futuro was thought to be immaterial. (at p381)

13. The decision in Lamson Store was the subject of a passing reference, apparently with approval, by Walsh J., with whom the other members of the Court agreed, in I.A.C. (Leasing) Ltd. (1972) 126 CLR, at p 141 . I need not examine the latter case in any detail because the agreement the subject of that case provided for the rebate of any accelerated payments and for the lessee to receive the benefit of any sum by which the value of the equipment on repossession exceeded the appraisal value. It was in the light of those considerations that Walsh J. concluded that the provisions of cl. 4 of the agreement should not be held to constitute a penalty, for the reason that "the agreement provides its own limitation upon the ability of the lessor to gain a large profit by reason of the equipment being repossessed after a relatively short period" [1906] HCA 87; (1906) 4 CLR 672 . (at p381)

14. He said also that a similar conclusion would be required if the agreement "ought to be construed in the way in which the majority of this Court construed the agreement under consideration in Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; (1906) 4 CLR 672 , that is, as an agreement to pay a total rent, being the sum of the

monthly instalments, subject only to such adjustments as were specified in the agreement". (at p382)

15. O'Connor J., in Lamson Store, found the principle expressed in The Protector Loan Co. (1880) 5 QBD 592 to be inapplicable because on the view he took of the agreement there was no existing debt for the whole amount of ten years' rent due prior to the breach. This conclusion made it necessary for him to consider whether the provision requiring the immediate payment of the whole of the rent for the remainder of the term notwithstanding the repossession of the system could be regarded as a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation", applying the test enunciated by Lord Dunedin in Public Works Commissioner v. Hills (1906) AC 368, at pp 375-376 . Recognizing that the agreement entitled the lessor to demand the whole rent for ten years and at the same time to deprive the lessee of the consideration for which it was payable, he answered the question in the negative. (at p382)

16. The appellants seek to distinguish the decision in Lamson Store on the basis that the right of the lessor to repossess the system was not material to the decision. There was no evidence to show whether that right had been exercised and the point is not mentioned in the judgment of the Chief Justice. All that appears is that the lessor sought to prove in the winding up the debt which in the view of the majority was established by the agreement. In order to evaluate the submission, it is necessary to examine the basis of the claim in the present case. (at p382)

17. It seems to me that Lamson Store is an authority applicable to this case only if Allstates' claim proceeds on the basis that cl. 1(a) established a present liability in the lessee for the entire rent subject to an indulgence in the form of a proviso permitting payment by instalments and that default in the payment of those instalments entitled the lessor to withdraw that indulgence and sue immediately for the entire rental. Such a cause of action might well be established by reference solely to cl. 1(a) of the agreement. The question of penalty or liquidated damages would not then arise. But it is quite clear that Allstates' claim did not proceed on this basis. If it had done so, there would have been no question of repossession of the vehicle. The obligation to pay an entire rent supplies the consideration for a lease of the vehicle for a period of three years. The only clause which entitles Allstates to repossess the vehicle at an earlier time is cl. 12. Given a repossession pursuant to cl. 12, the respective rights of the parties are wholly governed by that clause and cl. 31. The lease is terminated, the lessee no longer having any right to the retention and use of the vehicle. The clause does not purport to operate to withdraw the indulgence of deferred payment of rent which is the subject of the proviso to cl. 1(a). Significantly, it makes no reference to rent. On the contrary, it says, "All moneys due for unexpired terms shall become immediately due and payable." In my opinion, it is this provision which supplies the basis to Allstates' claim. (at p383)

18. It follows from this conclusion that the decision in Lamson Store does not govern the present case. It is therefore unnecessary to consider the alternative submission advanced

by Mr. Malcolm on behalf of the appellants that its correctness should be re-examined. (at p383)

19. It remains, then, to consider whether the acceleration provision in cl. 12 can be considered to be a "genuine pre-estimate of the creditor's (Allstates') probable or possible interest in the due performance of the principal obligation": Public Works Commissioner v. Hills (1906) AC, at pp 375-376 or whether it is a penalty inserted "merely to secure the enjoyment of a collateral object": Sloman v. Walter [1783] EngR 158; (1783) 1 Bro CC 418, at p 419 (28 ER 1213, at p 1214) , per Lord Thurlow L.C. Bearing in mind that the possible defaults that may activate the powers of the lessor under cl. 12 encompass both trivial and serious breaches without distinction in the remedy and that the clause may operate at any time during the currency of the lease with no provision for rebate of future instalments or for crediting the lessee with any capital gain represented by the amount by which the value of the vehicle on repossession exceeds its appraisal value, it is in my opinion quite impossible to conclude that the clause reflects on the part of the parties a genuine pre-estimate of damage. It is a penalty against which the lessee is entitled to relief. Such a conclusion finds support in the reasoning of O'Connor J. in Lamson Store [1906] HCA 87; (1906) 4 CLR 672 , and by reference to the contrasting provisions which led Walsh J. to a different conclusion in I.A.C. (Leasing) Ltd. [1972] HCA 1; (1972) 126 CLR 131 . Indeed, I understood Mr. Pullin to acknowledge, very frankly and fairly, that such a conclusion was inevitable if his consideration argument were to fail. (at p383)

20. Of course, this conclusion does not mean that the lessee cannot be liable to Allstates, in addition to the amount of $7,003.32 which the latter paid to release the repairer's lien on the vehicle, for the arrears of rent payable in respect of the period prior to repossession and perhaps for damages. At no stage in the proceedings has Allstates made a specific claim for arrears of rent. A claim for damages was made but was abandoned at the hearing for reasons which it is unnecessary to mention. Mr. Pullin has indicated his readiness should the claim for accelerated rental fail, to institute fresh proceedings and it is acknowledged by Mr. Malcolm that there is no estoppel operative in that regard. However, in my opinion the preferable course is for the Court to remit the matter to the Supreme Court, leaving Allstates to take such action as it wishes by way of amendment of the claim or otherwise. There should of course be judgment in any event for Allstates in the sum of $7,003.32. (at p384)

21. For these reasons, I would allow the appeal in part, set aside the decision of the Full Court and remit the matter to the Supreme Court. The appellants should have their costs in the two appeals. (at p384)

BRENNAN J. The first two appellants are two of the lessees, or hirers, of a Mercedes Benz prime mover under a lease agreement with the first respondent, the lessor. The third appellant is the guarantor of the lessees' performance of their obligations under the lease agreement. In an action brought in the Supreme Court of Western Australia by the lessor against the lessees and their guarantor, the lessor recovered a judgment for $45,294.95, the principal component of which was $31,436.04, being the unpaid balance of the "entire rental", or hiring charge, specified in cl. 1(a) of the lease agreement. Clause 1(a) of the lease

agreement reads:

"The LESSOR hereby leases to the LESSEE and the LESSEE hereby takes on lease the vehicles more particularly described in the Schedule hereto upon the terms and conditions hereinafter contained for a period of 36 months at an entire rental of $39,550.32 which shall be due by the LESSEE to the LESSOR upon the signing of this Agreement PROVIDED THAT if the LESSEE shall duly observe and perform all and singular the covenants and conditions on the part of the LESSEE herein contained or implied and if the LESSEE shall duly and punctually pay on account of such entire rent the following instalments on the days following namely:

The sum of $1088.62 per month commencing on the 13TH day of APRIL 1977 up to and including the 13TH day of MARCH 1980 . . . THEN the LESSOR shall not demand or seek to enforce payment of the entire rent or any balance thereof outstanding otherwise than by the said instalments." (at p384)

2. Clause 6(a) contains a covenant for the due and punctual payment by the lessees of the instalments of rent. In breach of cl. 6(a) default was made. Only $8,114.28 was paid. The last payment was made on 30 November 1977. The default enlivened the provisions of cl. 12:

"In the event that the LESSEE defaults in the punctual payment of any of the instalments of rent as herein provided or in the payment of the insurance premiums as herein provided or defaults in the performance of any of the terms and conditions of this agreement, the LESSOR may immediately retake possession of the vehicle in respect of which such default has occurred, without notice to the LESSEE, with or without legal process, and the LESSEE hereby authorises and empowers the LESSOR to enter the premises or other places where the said vehicle may be found and take and carry away the said vehicle, and, in such eventuality, the LESSEE'S right to the retention and use of the said vehicle shall terminate. All moneys due for unexpired terms shall become immediately due and payable, plus reasonable costs of repossession. Provided that the LESSOR at its option may lease the leased vehicle for the account of the LESSEE for the remainder of the term and should the rental therefrom be less than that provided herein the LESSEE shall pay the deficiency. Nothing herein shall release the LESSEE from the obligation to pay the rent as herein provided for the unexpired balance of the term of this agreement plus reasonable costs of repossession." (at p385)

3. In mid-January 1978 the lessor took the first step to repossess the vehicle. A letter was sent to the lessees. The letter was not produced at the trial, but I assume that the letter demanded possession. Then the lessor was informed by Diesel Motors Ltd. that that company had carried out repairs on the vehicle and that it claimed a lien in the amount of

$7,003.32 for the cost of repairs and parts. The lessor paid out the repairer and repossessed the vehicle on or shortly after 3 May 1978. On 5 September 1978 it wrote to the lessees and the guarantor demanding immediate payment of the balance of the entire rental outstanding. As that sum was not forthcoming, on 15 September 1978 the lessor sued to recover the sum and interest. It also sued for the $7,003.32 paid to Diesel Motors Ltd. Wallace J. at first instance and the Full Court on appeal upheld the lessor's claims for the entire rental outstanding, interest thereon and $7,003.32 paid to Diesel Motors Ltd. Wallace J. rejected the defence of the lessees and their guarantor that the claim for the balance of the entire rental was a claim for a penalty. The question whether it was a claim for a penalty was the sole issue at the trial; the lessor declined to claim damages in the event of failure of its claim for the balance of the entire rental. The same question was the sole issue in the present appellants' appeal to the Full Court, and in their further appeal to this Court. In the Supreme Court it was thought that Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; [1906] HCA 87; (1906) 4 CLR 672 was an authority indistinguishable in principle from the case in hand and that that case required the defence of penalty to be rejected. (at p385)

4. There are two arguments for the proposition that the claim for the unpaid balance of the entire rental is a claim for a penalty. First, it may be argued that default by the lessees exposes them to a greater pecuniary liability than that originally imposed, for the lessees become liable to pay immediately an amount which they would otherwise be entitled to pay by monthly instalments. Secondly, it may be argued that the lessor's right to recover the unpaid balance of the entire rental (cl. 1(a)) or "All moneys due for unexpired terms" (cl. 12) on default by the lessees is in the nature of a penalty when, under cl. 12, the lessor may retake possession of the vehicle. They are distinct arguments and may be considered separately.

Acceleration of Payment. (at p386)

5. The entire rental is the price of the hiring, which the lessees bound themselves to pay. If cl. 1(a) or cl. 12 simply requires the lessees on default to pay what they were already bound to pay in performance of the agreement, the acceleration provisions in cll. 1(a) and 12 could not be held to impose a penalty. In Thompson v. Hudson (1869) LR 4 HL 1, at p 28 , Lord Westbury said:

"It is impossible to hold that money due by contract can be converted into a penalty. A penalty is a punishment, an infliction, for not doing, or for doing something; but if a man submits to receive, at a future time and on the default of his debtor, that which he is now entitled to receive, it is impossible to understand how that can be regarded as a penalty."

In The Protector Loan Co. v. Grice (1880) 5 QBD 592, at p 596 , Brett L.J. stated the true rule to be that "if a larger sum is to be paid upon default, it is a penalty; a stipulation to pay upon default a sum not larger than the total amount is not a penalty". Griffith C.J. followed The Protector Loan Co. v. Grice in Lamson Store Service, holding that the rule was applicable to the contract in the latter case. His Honour thought that that contract entitled the lessor to receive a sum being ten years' rent but subject to a stipulation that the sum might be paid in annual instalments. To accelerate on default payment of the sum already due by the hirer was said to impose no fresh or increased liability (1906) 4 CLR, at pp 683-684 . (at p386)

6. If the contract in the present case were construed as imposing an absolute obligation to pay three years' rent on the signing of the contract with a provision that that debt might be paid in monthly instalments, the rule stated by Brett L.J. would govern the present case, as it was held to govern Lamson Store Service. But the debt created by cl. 1(a) is not a debt to be paid on the signing of the contract; it is a debt payable by instalments over thirty-six months; it does not otherwise become payable in full unless there be a default. In Lamson Store Service, Griffith C.J. did not think it material that the debt created by the agreement of the parties was payable in futuro. If the result in the present case depended upon the acceptance of that opinion, I should wish to consider whether it should now be followed. (at p387)

7. There seems to be an air of commercial unreality in a time of high interest rates to hold that a debt which a creditor is not entitled to recover except by instalments over a period is to be equated with a debt which the creditor is entitled to recover immediately but which he agrees to receive by instalments over such a period. In the latter case, the value of the debt is greater than the value of the instalments payable over the period (cf. McGain v. Federal Commissioner of Taxation [1965] HCA 41; (1965) 112 CLR 523; (1966) 116 CLR 172); in the former case the value of the debt is the value of the instalments by which it is payable. I do not think that the question is concluded by anything that Walsh J. said in I.A.C. (Leasing) Ltd v. Humphrey [1972] HCA 1; (1972) 126 CLR 131 , where the leasing contract contained a clause providing for acceleration upon the occurrence of any one of a number of specified events. In that case, partly because the conduct of the proceedings did not raise the question and partly because the terms of the contract provided for a rebate for early payment and an adjustment which precluded the lessor from making a profit out of the lessee's default (1972) 126 CLR, at pp 140-142 , the question was not discussed. (at p387)

8. Although the opinion expressed by Griffith C.J. in Lamson Store Service on this question may require re-examination, it should not be re-examined finally in this case. The result in this case does not depend upon the acceleration of the payment of all thirty-six instalments; rather, the result depends upon the qustion whether all of those instalments are payable if the lessor repossesses the vehicle.

9. For the purposes of this argument, it may be assumed that the acceleration of the payment of the entire rental is not a penalty, but is merely a mode of payment of the sum ($39,550.32) which is the true hiring charge specified in cl. 1(a). As that sum is agreed to be "due by the LESSEE to the LESSOR upon the signing of (the) Agreement", it is payable in performance of the agreement, not as damages for breach of that agreement. (at p387)

10. Much of the argument in the Supreme Court and in this Court has focussed upon the question (derived from the question proposed by Griffith C.J. in Lamson Store Service (1906) 4 CLR, at p 681) whether the moneys to be paid in accordance with cl. 12 "can or can not be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation'". That question assumes that the moneys to be paid in accordance with cl. 12 are payable as liquidated damages. That is the same assumption as Griffith C.J. made in Lamson Store Service (1906) 4 CLR, at pp 681-682 :

"I proceed to apply this rule to the present case, assuming, though not deciding, for present purposes, that the amount of future rent payable under clause 8 of the agreement is to be regarded in the same way as if it had been called 'liquidated damages'."

That assumption will presently be considered. It served well enough to dispose of the case in Lamson Store Service, for his Honour held that the amount of future rent which became immediately payable upon breach fairly represented a pre-estimate of the damages which the lessor was likely to suffer by the breach. It was immaterial to the result in that case whether the ground on which the challenged provisions were held not to provide for a penalty was that those provisions did not provide for the payment of damages or that the sum payable was no greater than could be supported as a genuine pre-estimate of damage. The latter ground, which determined Lamson Store Service has no application on the facts of the present case. (at p388)

11. In finding that the amount of future rent represented a pre-estimate of damage, Griffith C.J. had regard chiefly to the novelty of the apparatus the subject of the hiring agreement, and the advertising benefits which the owner was likely to derive from its use by the hirer. The apparatus was a patented cash cable tramway system for the conveyance of money and dockets. His Honour said (1906) 4 CLR, at pp 681-682 :

"The subject-matter of the agreement was a newly invented appliance, the subject of a patent which the lessors were desirous of introducing to public notice. By the agreement it was stipulated that the apparatus should remain their property during the term of ten years unless the option to purchase were exercised within thirty days. Regarding the matter from the point of view of the parties at the date of the agreement, it might reasonably have been desired by the lessors, and have been in the contemplation of both parties when fixing the

amount of the rent and the conditions of the lease, that a fair opportunity should be given for the public use of the invention in its entirety, for a considerable time, on suitable premises, and by persons carrying on a business in which its advantages would commend it to the public, and so be likely to induce future purchases from the patentees. The agreement contains stipulations apt for all these purposes, to which I will directly refer in detail."

After referring to the several stipulations which were calculated to ensure that the owners' novel apparatus would be fully and fairly exhibited to the public during the ten year period, his Honour concluded (1906) 4 CLR, at pp 682-683 :

"The damages for a breach of any of these conditions would be problematical, to this extent at least, that a jury could not be directed to assess them upon any fixed arithmetical basis. I think they might fairly be the subject of a pre-estimate of damages made by the parties." (at p389)

12. In the present case, however, the leasing of the vehicle is attended by none of the factors which led Griffith C.J. to hold that the hirer was entitled to sue for and retain the whole of the ten years' rental as liquidated damages. The subject-matter of the leasing agreement in the present case is a vehicle the use of which by the lessees confers no advantage upon the lessor. The distinction between the present case and Lamson Store Service does not lie in the lessor's right to repossess on default: a similar right was conferred on the hirer in Lamson Store Service, though Griffith C.J. did not find it necessary to refer to it. Having regard to what the Chief Justice though to be the principal advantage which the contract conferred on the hirer in that case, namely, the right to a fair and full exhibition of the novel apparatus, the lessor's right to dismantle and take away the apparatus was hardly a material benefit which the lessor could turn to account. Not so in the present case. The factual distinction between the present case and Lamson Store Service lies in the fact that the lessor here has an advantage in retaking possession of the vehicle from the hirer; in Lamson Store Service the lessor had an advantage in the continued use of the apparatus by the hirer. (at p389)

13. It is necessary to retrace our steps and examine whether we should adopt in this case the assumption made by Griffith C.J. that "the amount of future rent . . . is to be regarded in the same way as if it had been called 'liquidated damages'". The unpaid balance which becomes payable on default under cl. 1(a) or the "moneys due for unexpired terms" which becomes immediately due and payable under cl. 12 are part of the entire rental which the lessees undertook to pay as the price of the hiring. Neither cl. 1(a) nor cl. 12 is drawn as a provision for liquidated damages; or, for that matter, as a provision relating to damages at all. Neither clause purports to create or impose a new pecuniary liability, but only to accelerate the time for payment of moneys already "due". (at p390)

14. Although the time for payment of the entire rental is accelerated on and by reason of a default in punctual payment of an instalment (cll. 1(a), 6 and 12) or on and by reason of a

default in performance of another term or condition (cl. 12), the entire rental is and remains simply the price of the hiring. Leaving aside for the moment the difference between an obligation to pay the entire rental by instalments and an obligation to pay immediately the balance of the entire rental (cl. 1(a)) or the "moneys due for unexpired terms" (cl. 12), the obligation to pay the entire rental is not imposed on and by reason of the lessees' default. If, after a default which enlivened cl. 12, the lessor sued to recover the unpaid balance of the entire rental, leaving the lessees in possession of the vehicle, the lessees could not point to the right to repossess to transform their debt payable under the contract into damages for its breach. The balance of opinion in this Court has favoured the view that no question of penalty arises unless the obligation to pay arises upon breach of contract. In I.A.C. (Leasing), Walsh J. said (1972) 126 CLR, at p 143 :

". . . there has been a preponderance of opinion in favour of the view that it is only when a provision operates so that the event upon which an obligation is placed upon a party to pay a sum of money to another party to a contract is the breach by the former party of a term of the contract, that the question arises whether an obligation arising upon that event is a penal provision." (at p390)

15. The mere obligation to pay the entire rental cannot be characterized as penal. What gives to that obligation the flavour of a penalty is the lessor's right, in the event of a default by the lessees, to repossess the vehicle. If the lessor was to repossess the vehicle and recover the entire rental, he would have both the price of the hiring and possession of the vehicle which was to be hired. That would be inconsistent with the respective rights of the parties under the agreement if the agreement should be duly performed. The contract was to be performed by the lessees paying the entire rental to the lessor and by the lessor allowing the lessees possesson and use of the vehicle for thirty-six months. Clause 12 confers upon the lessor in the event of and by reason of a default by the lessees a right to recover both the moneys due for unexpired terms and possession of the vehicle, so that the lessor becomes entitled to more than it would be entitled to if no default occurs. However, cl. 12 leaves the lessees with the right to retain and use the vehicle until the lessor actually takes the vehicle and carries it away. The lessor is not bound upon a default by the lessees to repossess the vehicle before the expiry of the hiring period; it may choose not to do so. Unless the lessor repossesses the vehicle, there is no ground for denying it the right to payment of the entire rental to which it is entitled under the agreement. (at p391)

16. By conferring on the lessor the right in the event of the lessees' default to recover both possession of the vehicle hired and the entire price of the hiring before the hiring period expires, cl. 12 provides an incentive for the due and punctual performance of the lessees' obligations - pecuniary and other - by imposing a liability to forfeiture. The lessees may lose both possession and use of the vehicle for the remaining period of thirty-six months and that proportion of the entire rental which is attributable to the hiring period remaining after repossession. Although a stipulation as to the price payable for the sale of hiring of goods is

not itself in the nature of a penalty, a stipulation which provides for the forfeiture on breach by the buyer or hirer of both the price and the consideration for which it is payable is in the nature of a penalty and equity will relieve against it. The foundation of the jurisdiction to relieve against forfeiture is that the stipulation for the forfeiture is really in the nature of a penalty (Pitt v. Curotta (1931) 31 SR (NSW) 477, at pp 480-481). In The Protector Loan Co. v. Grice (1880) 5 QBD, at p 595 Baggallay L.J. said:

"The doctrine in equity is stated by Lord Macclesfield, L.C., in Peachy v. Duke of Somerset 2 W. & T.L.C. (5d) 1100, at p. 1108. : (1) 'The true ground of relief against penalties, is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired;' but it has been long established, that relief in equity is also given where the penalty is intended to secure the performance of a collateral object: Sloman v. Walter 2 W. & T.L.C. (5d) 1112. . Familiar instances of the relief afforded in equity, may be found in those cases where a default has occurred in repayment of a loan secured by a mortgage . . ." (at p391)

17. Clause 12 is in the nature of a penalty, for the lessor who exacts the full measure of his entitlement under that clause receives more than the damages he would suffer by reason of many of the defaults which enliven that clause. The agreement in the present case differs from the agreement considered in I.A.C. (Leasing), which contained provisions preventing the lessor from gaining a large profit if he should repossess the leased equipment. Walsh J. contrasted the agreement in I.A.C. (Leasing) with an agreement exhibiting the features of the present agreement, saying (1972) 126 CLR, at p 141 :

"The fact that those provisions could operate upon breaches varying greatly in their seriousness and in their likely consequences might suggest a conclusion that the imposition of such a liability as a consequence of a breach, followed by a termination of the contract, could not be a genuine pre-estimate of damage. Such a conclusion might be warranted if the lessor might regain the possession and the right of disposal of the equipment when only a small part of the term of the lease had gone by and might do this in consequence of a minor breach, which would really have little damaging effect upon the value of the equipment, and if the lessor might thus receive in those events a large profit not related to any damage which had actually been suffered." (at p392)

18. In this branch of its jurisdiction equity relieves against forfeiture of the purchase money (other than the deposit) paid by a defaulting purchaser under a contract of sale of land when the vendor rescinds for breach (McDonald v. Dennys Lascelles Ltd. [1933] HCA 25; (1933) 48 CLR 457 ; Mayson v. Clouet (1924) AC 980) and relief has been granted in like circumstances in the case of a contract for the sale of chattels (Stockloser v. Johnson (1954) 1 QB 476). In those cases, however, the consideration for which the price was payable - title

to the land or chattels - failed totally; in the present case, part of the consideration - the possession and use of the vehicle for part of the hiring period - has been enjoyed. That circumstance does not preclude the grant of equitable relief, whatever be its significance for a common law action to recover money or property which has been forfeited under a stipulation in the nature of a penalty (cf. Palmer v. Temple (1839) 9 Ad & E 508(112 ER 1304) ; McDonald v. Dennys Lascelles Ltd. (1933) 48 CLR, at p 470). Equity may mould a decree relieving against the exaction of a forfeiture under such a stipulation according to the exigencies of the case, as Jacobs J. said in Forestry Commission of N.S.W. v. Stefanetto [1976] HCA 3; (1976) 133 CLR 507, at p 524 :

"A court of equity can mould its relief so that the substantial purpose of its doctrine of relief against forfeiture and penalties is achieved. It can leave the contractual right to use the plant and materials unaffected and can avoid that part and that part only of the agreement between the parties which is, or may be, open to challenge under the equitable doctrine."

The conditions upon which a party is granted relief will vary according to whether the stipulation conferring the right to forfeit is to secure the payment of money or some other stated result (see per Lord Wilberforce in Shiloh Spinners v. Harding (1973) AC 691, at pp 722-723). (at p393)

19. In the present case, the relief sought by the appellants is against the exaction of the unpaid balance of the entire rental, the lessor having repossessed the vehicle. However, the lessees had the right to use the vehicle until it was repossessed on or shortly after 3 May 1978. Had the lessees performed their part of the agreement until that time, the lessor would have received the monthly instalments appropriate to that period of the hiring. Those instalments, being thirty-six aliquot parts of the entire rental and becoming payable each month during the thirty-six months of the hiring, cannot be thought to contain any element of penalty. The lessor is entitled to no less than the instalments which it would have received if the lessees had not defaulted during the period when the vehicle was in their possession (cf. Hyundai Heavy Industries Co. v. Papadopoulos (1980) 1 WLR 1129; (1980) 2 All ER 29). (at p393)

20. But the "moneys due for unexpired terms", i.e. for the hiring period after repossession of the vehicle, stand in a different position. Possession of the vehicle for those unexpired terms having been retaken by the lessor, the lessees are entitled to relief against the exaction of so much of the entire rental as is attributable to that period so that the lessor shall not recover or be entitled to retain both the whole of the entire rental and possession of the vehicle. If it be possible to identify an amount as attributable to that period, relief against the exaction of that amount falls within the principle expressed by Dixon J. in McDonald v. Dennys Lascelles Ltd. (1933) 48 CLR, at p 478 :

"Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is

considered to involve a forfeiture from which the purchaser is entitled to be relieved (see the judgment of Long Innes J. in Pitt v. Curotta (1931) 31 SR (NSW), at pp 480-482)." (at p393)

21. Even if cl. 1(a) had not itself attributed each monthly instalment, being instalments of the same amount, to a month of the hiring period, it would have been appropriate nevertheless to divide the entire rental by thirty-six and to attribute each of thirty-six aliquot parts of the entire rental to a month of the hiring period. The lessees are entitled to relief against the recovery of the equivalent of the monthly instalments payable in respect of the hiring period after the vehicle was repossessed in May 1978. They are entitled to this relief on a ground analogous to but not precisely the same as the ground on which they relied at the trial. The lessor sued for the entire rental in reliance upon the terms of the contract. The lessees and their guarantor pleaded that the amount claimed by the lessor was claimed pursuant to cl. 12 and was an irrecoverable penalty. At the trial, the issue was simply whether the rule which refuses to sanction legal proceedings to enforce a stipulation for a penalty for breach of contract applied. Effect has been given to that rule by courts of common law as well as by the courts of equity since the statute 8 & 9 Will. 3, c. 11, s. 8 (see In re Newman; Ex parte Capper (1876) 4 ChD 724 ; cf. Campbell Discount Co. Ltd. v. Bridge (1962) AC 600, at p 622). In my opinion, that rule has no application to the liability to pay each of the thirty-six monthly instalments. Those instalments are payable not by reason of a breach of the agreement but in performance of the lessees' obligations thereunder. However, an analogous equitable rule, relieving against forfeiture of amounts so payable, entitles the lessees to relief from the liability to pay an amount equal to the instalments payable in respect of the hiring period after the date of repossession. (at p394)

22. The liability of the guarantor in respect of the instalments payable up to the date of repossession is established by reason of the lesses having defaulted in paying in full the instalments for which they became liable before the date of repossession: see Hyundai and Lep Air Services Ltd. v. Rolloswin Ltd. (1973) AC 331 . But in respect of the "moneys due for the unexpired terms" after the date of repossession, the guarantor is relieved from liability according to the relief granted to the lessees. The principle stated by Rich J. in McDonald v. Dennys Lascelles Ltd. as to a guarantor's liability for instalments of the purchase price under a contract of sale of land is no less applicable to the guarantor's liability for that part of the entire rental which is attributable to the hiring period after repossession. Rich J. said (1933) 48 CLR, at pp 467-468 :

"Once it is decided, as upon the authority of Mayson v. Clouet (1924) AC 980 I think it must be decided, that as between purchaser and vendor the vendor cannot retain, let alone recover, an overdue instalment of purchase money after the contract has come to a premature end even by his own fault, I think it follows that no guarantee of such an instalment could be enforced by the vendor." (at p394)

23. It follows that the appeal by both the lessees and the guarantor should be allowed. The judgment of the Full Court should be set aside and in lieu thereof it should be ordered that the appeal to the Full Court be allowed. The judgment of Wallace J. should be set aside. The lessor is entitled to judgment for the $7,003.32 paid to Diesel Motors Ltd., for the unpaid instalments which became due prior to the date of repossession, for any damages for the lessees' breach of contract which the lessor may be able to establish and for interest. These issues should be remitted for decision by a single judge who should assess the whole amount due by the lessees and the guarantor. There should be no order for the costs of the trial, but the appellants should have the costs of both appeals. (at p395)

DEANE J. The issues between the parties to this appeal and the context in which those issues arise appear from the judgment of Wilson J. Except to the extent necessary for discussion, I shall refrain from restating them. (at p395)

2. The agreement between Allstates Leasing System (W.A.) Pty. Ltd. (Allstates) and Mr and Mrs Granich and Mr and Mrs O'Dea, trading as Granich Geraldton, (the lessees) provided (cl. 1(a)) for the "lease" by Allstates to the lessees of a prime mover for a period of thirty-six months "at an entire rental of $39,550.32" which was stated to be due upon the signing of the agreement subject to a proviso that, if the lessees duly observed and performed "all and singular the covenants and conditions" and duly and punctually paid thirty-six monthly instalments of $1098.62 commencing on 13 April 1977, Allstates would not "demand or seek to enforce payment of the entire rent or any balance thereof outstanding otherwise than by the said instalments". As a matter of substance, the rent which the lessees promised to pay under the agreement was the consideration for the possession and use of the prime mover during the agreed term of the hiring. The equation between the thirty-six months of that agreed term and the thirty-six equal monthly instalments of rent indicated a relationship between monthly instalment and monthly period which would, in my view, have sufficed to relieve the lessees of any obligation to pay further rent if Allstates, which remained the owner of the prime mover, had wrongfully deprived them of possession and use of it. If those primary terms of the agreement had stood alone with no provision as to "default" or if Allstates had not resorted to the default provisions contained in a subsequent clause of the agreement, a failure by the lessees to pay an instalment of rent would have resulted in the "entire rental" becoming payable. In that event, the lessees would, if they had honoured the obligaton to pay the "entire rental", have remained entitled to the possession and use of the prime mover and, to the extent that it is appropriate to use the word "rent" to describe a hiring charge for an item of personality, the payment could properly have been seen as conforming to that description. (at p396)

3. Clause 12 of the agreement operated only in the event of default by the lessees followed by an election by Allstates to take advantage of the terms of the clause by retaking possession of the prime mover. In such circumstances, which are the circumstances which have occurred, the lessees lost all right to the possession and use of the prime mover and all "moneys due for unexpired terms" became "immediately due and payable, plus reasonable costs of repossession". In addition, Allstates became entitled (cl. 31) to sell the prime mover at the best price it could reasonably obtain and to recover from the lessees any

amount by which the agreed "appraisal" value of $13,300 exceeded the sale price. If any regard at all is had to substance, it would be a misuse of language to describe the obligation under cl. 12 immediately to pay the "moneys due for unexpired terms" as an obligation to pay rent. The obligation to pay those moneys without any entitlement to the possession or use of the machine was an obligation immediately to pay an amount of money upon default which was calculated and described by reference to, but was distinct and quite different in substance from, the amounts which would have been payable as rent if no default had occurred. (at p396)

4. The last payment of an instalment of rent made by the lessees in the present case was on 30 November 1977 when an amount of $5,000 was paid. After that payment, all instalments up to and including the October instalment had been paid and $423.94 had been paid towards the November instalment which was overdue. By the end of 1977, default had also been made in the payment of the whole of the December instalment. Allstates refrained, at that time, from electing to exercise the right of repossession which it enjoyed under cl. 12 of the agreement. While the provisions of cl. 12 remained dormant, the result of the lessees' default in payment of instalments was that the balance of the total rent was payable under cl. 1(a). (at p396)

5. The evidence indicates that Allstates activated the provisions of cl. 12 in "the middle of January" 1978 when it wrote to the lessees demanding possession of the prime mover. The effect of that letter was to bring to an end any right of the lessees to possession and use of the machine. The lessees were liable to pay to Allstates all "moneys due for unexpired terms . . . plus reasonable costs of repossession". The "moneys due for unexpired terms" which became payable under cl. 12 included, at most, the equivalent of the instalments which would, if there had been no breach, have been payable in respect of the monthly period commencing 13 January 1978 and of subsequent monthly periods. There is room for arguing that those instalments, which had already become due and payable under cl. 1(a) upon the lessees' breach, were thereafter payable under both cl. 1(a) and cl. 12. As I have indicated however, I consider an amount payable under cl. 12 upon termination of the hiring to be different in its character from rent payable under cl. 1(a) as consideration for the hiring. To the extent to which the provisions of cl. 1(a) and cl. 12 might otherwise have overlapped, the provisions of cl. 12 were paramount. Upon Allstates exercising its rights under cl. 12, the amount equivalent to the instalments attributable to the unexpired period of the original term ceased to be due and payable under cl. 1(a) as rent and became due and payable under cl. 12 as a consequence of the lessees' breach. (at p397)

6. It follows from the above that the balance of the November instalment and the December instalment remained due and payable under cl. 1(a) and did not become due and payable under cl. 12. Those instalments of rent were attributable to periods during which the lessees had retained, as against Allstates, the possession and use of the prime mover. No question of relief against a penalty arises in relation to them (see I.A.C. (Leasing) Ltd. v. Humphrey [1972] HCA 1; (1972) 126 CLR 131, at p 140). An amount equal to the balance of the agreed "entire rental" became payable under cl. 12 upon the breach by the lessees and the election by Allstates to invoke the provisions of that clause and to retake possession of the prime

mover. The ultimate issue between Allstates and the appellants is whether the lessees were relieved of the liability to pay that amount by reason that it was an unenforceable penalty. In the Supreme Court of Western Australia, the learned trial judge and the Full Court held that they were not. The members of the Full Court stated that they were of the view that they were "compelled" so to hold by the decision of this Court (Griffith C.J. and Barton J., O'Connor J. dissenting) in Lamson Store Service Co. Ltd. v. Russell Wilkins & Sons Ltd. [1906] HCA 87; (1906) 4 CLR 672 which, as they pointed out, had been referred to with apparent approval by Walsh J. (with whom Barwick C.J. and McTiernan J. agreed) in I.A.C. (Leasing) Ltd. v. Humphrey (1972) 126 CLR, at p 141). It will subsequently be necessary to refer, in some detail, to the Lamson Store Case. Before so doing, it is convenient to approach the question from the viewpoint of what I see as being the relevant general principles. (at p397)

7. The ordinary rule is that an obligation which is imposed upon one party to a contract to pay a sum of money to another on breach of contract will only be enforceable if the sum to be paid is properly to be characterized as damages as distinct from a penalty. Counsel for Allstates submitted that the question of damages or penalty did not arise in the present case because the sum to be paid was the balance of the agreed figure for thirty-six months' hire and represented the agreed consideration for the hiring and not an amount payable as the consequence of breach. It seems to me that what has been said above answers this argument. Once Allstates elected to terminate the hiring and retake possession of the machine pursuant to the provisions of cl. 12, its rights against the lessees in respect of moneys attributable to the unexpired term of the hiring which it had terminated were the rights conferred by cl. 12. The amount payable under that clause was not the balance of the agreed payment for thirty-six months' hiring. It was not a payment for hire at all: it became payable as a consequence of the lessees' breach when Allstates elected under cl. 12 to terminate the hiring by depriving the lessees of possession and use of the machine which was the subject of the hiring. (at p398)

8. A similar argument to that advanced by counsel for Allstates in the present matter was advanced and rejected in Cooden Engineering Co. Ltd. v. Stanford (1953) 1 QB 86 in respect of an obligation to pay, upon repossession, the balance of instalments under a motor vehicle hire purchase agreement pursuant to a clause whose effect was not dissimilar to that of cl. 12. Somervell L.J. disposed of the argument in the following terms with which I agree (1953) 1 QB, at p 97 :

"It was further argued that the question of penalty or a reasonable pre-estimate of damage did not arise because the sum to be paid was the balance of the agreed figure for 30 months' hire, notwithstanding that the right to determine could on the clause be exercised if there was one day's delay in the first instalment. This cannot be right. One may take as an example a sale of 1,200 tons of coal for 6,000 pounds, the coal to be delivered by monthly instalments of 100 tons, 500 pounds to be paid within seven days of each delivery. It is further provided that if payment is not made within that period the seller shall be free of all obligations as to further deliveries. If the contract went on to provide that the buyer should

be liable to pay the cost of the outstanding instalments for subsequent deliveries which he would ex hypothesi not receive, I cannot see how this way of arriving at the sum to be paid could affect the question whether it was a reasonable pre-estimate of damage or a penalty."

(See, also, as to the need to identify the substance of the transaction, Campbell Discount Co. Ltd. v. Bridge (1962) AC 600, at p 624 ; and, generally, as to the underlying principles, per Dixon J., McDonald v. Dennys Lascelles Ltd. [1933] HCA 25; (1933) 48 CLR 457, at pp 474-479 .) (at p399)

9. Subject to what is said hereunder, the principles applicable in deciding whether a sum stipulated to be payable by one party to a contract to another party upon breach is recoverable as liquidated damages or irrecoverable as representing a penalty are, in my view, set out in convenient form in the speech of Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1914] UKHL 1; (1915) AC 79, at pp 86-88 . They need not be repeated in detail. As Lord Radcliffe commented in Campbell Discount Co. Ltd. v. Bridge (1962) AC, at pp 621-622 , "the line of demarcation is drawn in its simplest form . . . if one says that a sum cannot be legally exacted as liquidated damages unless it is found to amount to 'a genuine pre-estimate of loss'" . . . "(i)f it does not amount to such a pre-estimate, then it is to be regarded as a penalty, and I do not myself think that it helps to indentify a penalty, to describe it as in the nature of a threat 'to be enforced in terrorem'" (see, also, Public Works Commissioner v. Hills (1906) AC 368, at pp 375-376). The question is one "not of words or of forms of speech, but of substance and of things" (per Lord Davey, Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda [1904] UKHL 3; (1905) AC 6, at p 15). "The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages" by reference to "the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach" (per Lord Dunedin, Dunlop Pneumatic Tyre Case (1915) AC, at pp 86-87). There is a presumption (but nothing more) that it is a 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" (per Lord Dunedin (1915) AC, at p 87 , quoting Lord Watson in Lord Elphinstone v. Monkland Iron and Coal Co. (1886) 11 App Cas 332, at p 342). It will be a 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" (per Lord Dunedin (1915) AC, at p 87). In that regard, a pre-estimate of damages will not, for the purposes of determining whether a stipulated sum is a penalty, be regarded as "genuine" if it be unreasonable (see the Dunlop Pneumatic Tyre Case (1915) AC, at pp 91, 97, 99, 102 ; the Cooden Engineering Case (1953) 1 QB, at pp 97, 103, 104, 108, 113-114). (at p400)

10. In what is written above, I have omitted the statement to be found in many cases, including Lord Dunedin's judgment in the Dunlop Pneumatic Tyre Case (1915) AC, at p 86 , to the effect that "the question whether a sum stipulated is penalty or liquidated damages is a question of construction". Properly understood, that statement is unobjectionable: whether

or not a provision of a contract imposes a penalty must be determined by reference to the true operation of that provision. That question must however be determined as a question of substance which cannot be foreclosed by statements of the parties in their agreement, no matter how genuine they may be, as to their intention in stipulating the sum. The parties to an agreement may have subjectively intended to make a pre-estimate of damages in the event of breach. If, however, that pre-estimate is either extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach or, judged as at the time of making the contract, is unreasonable in the burden which it imposes in the circumstances which have arisen, it is a penalty regardless of the intention of the parties in making it. (at p400)

11. The application of the above principles to the present case leads to the conclusion that the provisions of cl. 12 impose a penalty. There is nothing at all in the contract to suggest that those provisions represent a genuine or a reasonable pre-estimate of damages which Allstates would sustain in the event of breach by the lessees. They are applicable on the occurrence of any default in the punctual payment of an instalment of rent or of an insurance premium or in the performance of any one of a large number of terms and conditions ranging from the trivial to the serious. They could result in an unreasonable windfall to Allstates and an unconscionable burden upon the lessees in the event of breach of the most trivial condition. Thus, if breach occurred immediately after the commencement of the agreement, Allstates would be entitled to retake possession of the prime mover and to recover, pursuant to cl. 12, the amount necessary to bring its total receipts from the lessees to $39,550.32 for a hiring period that might be measured in hours or days. It follows that, if the matter be approached in accordance with what I consider to be established principle, it is apparent that the provisions of cl. 12 requiring that the lessees pay to Allstates all "moneys due for unexpired terms" are unenforceable for the reason that they impose a penalty. As I have said, I consider that, upon the proper construction of the agreement as a whole, the obligation under cl. 1(a) to pay rent attributable to future periods did not survive the election by Allstates to invoke the provisions of cl. 12 and terminate the hiring. If I be mistaken in that regard however and the provisions of cl. 1(a), upon their proper construction, required the payment of "rent" attributable to future periods notwithstanding that Allstates had terminated the hiring pursuant to cl. 12, I am of the view that cl. 1(a), in those circumstances, required payment of a sum on breach which as a matter of substance was neither rent nor liquidated damages but a penalty. (at p401)

12. I turn to a consideration of the Lamson Store Case [1906] HCA 87; (1906) 4 CLR 672 . The agreement in that case was for the lease or hire, for the term of ten years, of a patented cash cable tramway system, having fourteen "stations", for the conveyance of money and dockets in a store. The lessor was the Lamson Company. The lessee was the Wilkins Company. Clause 2 of the agreement provided that the Wilkins Company would pay to the Lamson Company an annual rental determined on the basis of 6 pounds 10s. sterling "per annum per station". Clause 6 provided that "the said annual rental" was to be paid in advance. Clause 8 provided that the system and every part of it remained the property of the Lamson Company and that "in case of a breach of any of the conditions or agreements to be

observed or performed on the part of the lessees, or in case the said system shall be taken from the lessees or attached by process of law by proceedings in bankruptcy or insolvency or otherwise, the whole of the rent for the remainder of the term shall immediately become due, and the lessors may forthwith without notice or demand enter upon the said premises where the said system may be, and take possession of the said system and remove the same forcibly, if necessary, . . . " . During the first year of the term of the agreement, the Wilkins Company was ordered to be wound up. It was common ground that that brought into operation the provisions of c. 8. Griffith C.J. (with whom Barton J. agreed) held that the liability under cl. 8 to pay forthwith the whole of the rent was not a penalty against which equity would grant relief and that the Lamson Company was entitled to prove in the winding up of the Wilkins Company for the full amount of rent which it would have been entitled to receive if the hiring agreement had run its full term. O'Connor J., who dissented, held that the obligation imposed by cl. 8 was a penalty in respect of which the Wilkins Company was entitled to relief. (at p402)

13. The starting point in the chain of reasoning that led Griffith C.J. to conclude that no penalty was involved was his view that, on its true construction, the agreement created an absolute obligation to pay ten years' rent in any event with a provision that it might be paid in annual instalments. The Chief Justice stated that he assumed, without deciding, that "the amount of future rent payable under cl. 8 of the agreement is to be regarded in the same way as if it had been called 'liquidated damages'" and that the question whether that amount was truly liquidated damages, and as such not to be interfered with by the Court, or was truly a penalty which covered the damage if proved but did not assess it, was to be determined by reference to whether the sum stipulated for could or could not properly be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation (see per Lord Dunedin, Public Works Commissioner v. Hills (1906) AC, at pp 375-376). In concluding that the amount was not a penalty, the Chief Justice was plainly influenced by his view that, since the appliance the subject of the hiring agreement was "newly invented", "it might reasonably have been desired by the lessors, and have been in the contemplation of both parties when fixing the amount of the rent and the conditions of the lease, that a fair opportunity should be given for the public use of the invention in its entirety, for a considerable time, on suitable premises, and by persons carrying on a business in which its advantages would commend it to the public, and so be likely to induce future purchases from the patentees (1906) 4 CLR, at pp 681-682 . If his Honour's view in that regard did, in truth, form a basis of the conclusion that the amount of the required payment represented a genuine pre-estimate of damages, it would offer grounds for distinguishing the Lamson Store Case from the present. Upon close analysis of his judgment, however, it appears to me that the possible importance, to the Lamson Company, of the exhibition of the invention was not critical to the Chief Justice's decision. In particular, his Honour's statement that he was unable to distinguish the case before him from that of The Protector Loan Co. v. Grice (1880) 5 QBD 592 leads me to think that the learned trial judge and the members of the Full Court of the Supreme Court in the present case were correct in concluding that the reasoning in the Lamson Store Case supported the conclusion that no penalty was involved in the circumstances of the present case. (at p403)

14. In The Protector Loan Co. v. Grice, the plaintiffs had lent a sum of 50 pounds to the debtor. The debtor covenanted to pay the principal together with interest, negotiation expenses and a premium for the insurance of the debtor's life by quarterly instalments over a term of five years. The debtor's bond, of which the defendant was a guarantor, provided that all instalments became payable on the failure to pay any single instalment. Default having been made in payment of an instalment, the plaintiffs brought an action claiming the entire balance of unpaid instalments. It was held by the Court of Appeal, reversing Bowen J. at first instance, that no penalty was involved. The principle underlying the decision would seem to have been accurately stated by Bramwell L.J. (1880) 5 QBD, at p 595 who confessed that he had "some difficulty in seeing that Bowen J. was wrong", when he said (1880) 5 QBD, at p 596 :

"Apart from the authorities which bind us, I do not quite assent to the principle upon which this doctrine is founded. A definition of the principle may possibly be that where a sum is payable as a punishment for a default, or by way of security, and the realization of that sum is not within the original intention of the parties, the sum is a penalty; but when it forms part of the original intention, that upon default a sum otherwise payable at a future period, shall become forthwith payable, it is no longer a penalty." (at p403)

15. It is unnecessary, for the purposes of the present appeal, to consider whether the mere acceleration of a payment upon breach can constitute a penalty if the nature of the payment remains unchanged (cf. 22 Am. Jur. 2d, Damages, s. 228). As a matter of principle, there is plainly much to be said for the view that it can. In both the present case and the Lamson Store Case the nature of the relevant payment upon breach with consequential loss of any right to possession or use was as different in character to the payment which would have been made if the hirer had retained the right to possession and use of the equipment or machine as was the payment described in the above-quoted comments of Somervell L.J. calculated by reference to the price of coal which was not delivered to a payment for coal actually supplied. To the extent to which either the Protector Loan Co. Case or the Lamson Store Case is authority for any general principle precluding a finding that a payment under cl. 12 in the present case was a penalty, they accord neither with the principle that the question whether a sum is a penalty is a question of substance and not of mere form nor with the approach adopted in subsequent cases (see, e.g., Campbell Discount Co. Ltd. v. Bridge (1962) AC 600 ; Anglo Auto Finance Co. Ltd. v. James (1963) 1 WLR 1042; (1963) 3 All ER 566 ; United Dominions Trust (Commercial) Ltd. v. Ennis (1968) 1 QB 54 ; Charterhouse Leasing Corp. Ltd. v. Sanmac Holdings Ltd. (1966) 58 DLR (2d) 656) and should not be followed. I am conscious of the fact that my conclusion in that regard does not lie well with the comments of Walsh J. in I.A.C. (Leasing) Ltd. v. Humphrey (1972) 126 CLR, at p 141 . Those comments were not, however, essential to the actual decision in that case and there is nothing in his Honour's judgment to indicate that any submission had been made challenging the correctness of anything that was said in the judgment of Griffith C.J. in the Lamson Store Case. Apart from them, the decision in the Lamson Store Case, which was a

decision of a court of three justices including one dissentient, has not been subsequently relied upon in judgments in this Court. While it has been applied in at least two cases in State Supreme Courts other than the present (Western Electric Coy. (Australia) Ltd. v. Ward (1933) 51 WN (NSW) 19 ; Re Mutual (Q'ld) Knitting Mills Pty. Ltd. (In liq.) (1959) Qd R 357), most of the references to it in cases in such courts have been for the purpose of distinguishing it (see, e.g., Lessors (Aust.) Pty. Ltd. v. Westley (1964-65) NSWR 2091 ; Wanner v. Caruana (1974) 2 NSWLR 301). (at p404)

16. In the result, I would uphold the appeal and set aside the judgment in the amount of $45,294.95 in Allstates' favour against the appellants. It is common ground that Allstates is entitled to retain judgment in the amount of $7,003.32 against the appellants on account of the amount it had to pay a third party in order to effect a discharge of a lien held by that third party over the prime mover. Prima facie, Allstates is also entitled to claim the sum of $1,773.30 representing the balance of the November 1977 instalment and the whole of the December 1977 instalment, any further instalments due before the retaking of possession and any additional amount of damage which it has actually sustained (see Public Works Commissioner v. Hills (1906) AC, at pp 376-377). While the approach was taken by the parties that the question of actual damage should be left to be determined in separate proceedings, I consider that, in all the circumstances, the preferable course is that suggested by Wilson J and I agree with the orders which he proposes. (at p405)

ORDER

Appeal allowed with costs.
Order of the Full Court of the Supreme Court of Western Australia set aside and in lieu thereof order as follows:

"(1) That the appeal to that court be allowed with costs;

(2) That the judgment of Wallace J. be set aside and in lieu thereof order that judgment be given in favour of the plaintiff against the third and fourth-named first defendants and the second defendant in an amount to be assessed, with no order as to costs of the hearing already heard before Wallace J.

(3) That the matter be remitted to a single judge of the Supreme Court of Western Australia to enable him to decide such questions as may be raised by the parties in relation to the recovery of instalments of rent due before the retaking of possession, the assessment of any damages and payment of interest and to fix the amount to be assessed (which will include the sum of $7,033.32 and any interest thereon)."