LIQUIDATED DAMAGES

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ABSTRACT

The recent High Court judgment in Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71 (17 November 2005) (Ringrow) and the judgment of the Full Court of the Supreme Court of Tasmania in State of Tasmania v Leighton Contractors Pty Ltd [2005] TASSC 133 (21 December 2005) (Tasmania v Leighton) and the Court of Appeal in State of Tasmania v Leighton Contractors Pty Ltd address the application of some well settled principles of contract law governing the enforcement of liquidated damages provisions.

Recently established principles relating to unconscionable conduct in contracts may impact upon the principles applied to determine the character and validity of liquidated damages clauses.

The judgments in Ringrow and Tasmania v Leighton raise questions about the applicability of the principles that define liquidated damages. Liquidated damages ought to be a pre–estimate of damages (the 'primary principle'). A further principle is that damages should not be beyond all proportion to the damage suffered (the 'assistance principle'—Lord Dunedin—Dunlop Pneumatic Tyre Co Ltd v New Garage).

This paper considers how the courts have applied the primary and the assistance principles, the potential conflict between the application of these two principles and the confusion and uncertainty that can arise if the principles are not considered in their proper context, as was the case in the matter of Tasmania v Leighton before Cox CJ.

1. INTRODUCTION

In Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd (1915) A.C. 79 (Dunlop) Lord Dunedin held at p86:

> The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre–estimate of damage ...
> 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.

In November 2005, the High Court in Ringrow Pty Ltd v BP Australia Pty Ltd[1] (Ringrow) confirmed that in relation to the recovery of liquidated damages, the principles established in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd[2] still applied.

Lord Dunedin also referred to an 'assistance principle', being as a matter of construction an aid to applying the first principle in the following terms:

> 1. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach...
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid...
>
> (c) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.'[3]

The primary and assistance principles are based on different considerations. The law as stated by Lord Dunedin (in Dunlop) requires firstly a determination of whether the liquidated damages clause under consideration is a 'genuine pre–estimate of damages'.

This paper argues that:

(a) The assistance principle ought to have limited application and only in the event that it has been found that there was a pre–estimate of damages and that the pre–estimate was a genuine attempt by the party at the time of the conclusion of the contract to establish damages flowing from breach, but that notwithstanding the above it would be unconscionable to enforce the remedy.

(b) If the court could not establish these requirements then the damages clause is unenforceable and the court is at large and no heed is paid to the assistance principle.

(c) It is an incorrect application of these principles for a court to determine whether or not a liquidated damages clause is a penalty solely by considering whether or not the amount stipulated is beyond all proportion to damages that might have been recovered. Such an approach undermines the sanctity of contracts and defeats the object and purpose of the laws relating to liquidated damages.

2. THE CHARACTER OF THE TWO PRINCIPLES

The Primary Principle

The primary principle is a contractual exercise of a curial self–help remedy afforded to parties to resolve the question of damages upon breach. It is made up of the following elements: a 'genuine' 'pre–estimate' of damages not in the character of a 'penalty'.

The Assistance Principle

The assistance principle on the other hand is a test tortuous in character based on the principles of unconscionable conduct. The increase in prominence of the law relating to unconscionable conduct in contracts has resulted in an emphasis being placed on the elements that make up the assistance principle.

In Tasmania v Leighton, Cox CJ appeared to focus on the assistance principle (and appeared to not consider adequately the primary principle) which led to a judgment that was in our view correctly overturned on appeal for the reasons set out hereunder.

3. THE CASES

CASE 1: State of Tasmania v Leighton Contractors Pty Ltd[4] (A Quo)

This case concerned a complex contract for the design, construction and maintenance for 10 years of 13.65 kilometres of new highway in Tasmania. Cox CJ at first instance determined that Leighton Contractors had delayed completion of the works by some 229 days. In reliance upon the liquidated damages clause, $1,832,000 was deducted from the contract payments otherwise due to Leighton Contractors. The evidence before the court included a cost break–down calculation for a sum of $7,985 per day (for a 6–day week) obtained in pre–trial discovery. Evidence was provided to the court that this calculation was made before the contract was entered into and 'was intended to provide an estimate of the actual loss to the principal on a daily basis for … delay. … It did not include loss by way of interest on the principal's capital outlay.'[5] No evidence was provided to explain the application of the rounded $8,000 amount on a 7–day basis.[6]

No evidence was led by Leighton to provide an alternative cost break–down of a genuine estimate (based upon the matters known to the parties when the contract was made) of the additional costs likely to be incurred by the principal as the project was delayed, or to enable the court to determine whether or not it was appropriate in this case to measure liquidated damages for this project by reference to the principal's capital tied up for this project,[7] or whether or not the principal (or the parties) anticipated that the principal may need to incur additional maintenance or other expense maintaining the existing road during the period of any delay in constructing the new replacement route and the likely amount of such additional costs. There is no evidence as to whether or not many, if not all, of these costs would have been incurred by the principal in the normal course of managing its public works program.

Cox CJ held that the amount calculated for liquidated damages was a penalty because it included costs for components of the liquidated damages amount that were 'extravagant and speculative'.[8] The rates used for three senior project managers who would be required to supervise the contract during periods of delay were charged at a rate applicable for persons engaged on annual salaries of $360,000, $430,000 and $330,000. There is no evidence as to whether or not these managers would be required full time or whether they would have other duties and other projects under their supervision. Cox CJ also held that other charge rates used were also extremely high.[9] Furthermore, even using these 'extravagant and speculative' cost estimates, the deductions for liquidated damages made

in accordance with the contract included a surcharge of $8,000 per week over and above the costs estimated to be incurred.

Cox CJ at paragraphs 232–236 recognises the purpose of the principles regulating liquidated damages cited in Dunlop Pneumatic and other cases.[10] Cox CJ cites with approval Dunlop at 193:

Instead of pursuing a policy of restricting parties to the amount of damages which would be awarded under the general law or developing a new law of compensation for plaintiffs who seek to enforce a penalty clause, the courts should give the parties greater latitude to determine the terms of their contract.

In the case of provisions for agreed compensation and, perhaps, provisions limiting liability, that latitude is mutually beneficial to the parties. It makes for greater certainty by allowing the parties to determine more precisely their rights and liabilities consequent upon breach or termination, and thus enables them to provide for compensation in situations where loss may be difficult or impossible to quantify or, if quantifiable, may not be recoverable at common law. And they may do so in a way that avoids costly and time–consuming litigation.

This is precisely the purpose of such clauses. In Ringrow the sanctity of contracts between partes is emphasised.

… [e]xceptions from … freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged 'extravagant and unconscionable in amount'. It is not enough that it should be lacking in proportion. It must be 'out of all proportion'. It would therefore be a reversal of longstanding authority to substitute a test expressed in terms of mere disproportionality.

Notwithstanding the above, Cox CJ without an adequate analysis of the existence, role and function of the evidence relating to the primary principle, embarked upon an inquiry into the reasonableness of the damages and applied the assistance principle to determine the validity of the liquidated damages clause largely defeating the purpose of the primary principle (i.e. to avoid an in–depth investigation into a complex matrix of facts regarding damages) on the following basis:

But equity and the common law have long maintained a supervisory jurisdiction, not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing that distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term.[11]

On this basis Cox CJ concludes:

In the present case, it does not appear that any estimation was made in respect of the principal's loss other than direct costs of supervising an over–run contract and it is my view that these costs are extravagant and exorbitant as they are totally disproportionate to the likely actual costs anticipated to be incurred.

The evidential basis for these comments by Cox CJ is unclear. The estimate of $7,985 had been prepared by Evans & Peck, a consulting engineering group engaged by the State of Tasmania. Cox CJ may have thought the charge rates were closer to Melbourne or Sydney solicitor or barrister rates but his comment appears to reflect a criticism (or submissions) by Leighton rather than a discussion of evidence to support his judgment that the rates were extravagant. Certainly, we may comment that the road could not have been designed and built using those rates.

It is not sufficient with respect on the most cursory basis to discount the primary principle and in fact elevate the assistance principle to the test for liquidated damages.

CASE 2: Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71 (17 November 2005)

A similar approach was adopted in Ringrow.

In Ringrow[12] the court was asked to review the exercise of an option to sell a petrol station site back to BP and to declare that it was unenforceable as a penalty because the exercise of the option was conditioned upon a breach of a separate fuel supply agreement that prohibited the retailer from on–selling fuel at the site from any supplier other than BP. The option was granted when Ringrow purchased the site and the option deed provided that the price payable under the option was to be determined by an independent valuer, valuing the site as an 'operational service station' but without 'allowance for any goodwill attaching to any business conducted' by Ringrow. The proceedings were conducted on the basis that the case for

consideration turned upon the law concerning penalties. The High Court expressly states that case did not involve any consideration of the wider 'application of equitable principles respecting relief against forfeiture to the exercise of the option.'[13]

The option–back was granted at the same time as the purchase of the site. The consideration payable under the option–back formed part of the commercial bargain between the parties and would properly be a factor considered by the parties in determining the initial sale price for the land. Furthermore, the exercise of the option was conditioned upon factors within the control of the purchaser (i.e. a breach of the terms of a separate fuel supply agreement). There appears to be no basis outside the 'commercial bargain of commercial parties' to attract the penalty doctrine.

The Court of Appeal again at length considered its right to supervise the parties' contract in relation to liquidated damages. An early inquiry into whether the clause complained of could in any manner be construed as a genuine pre–estimate of damages may have brought the matter to an early end, instead an inquiry into the proportionality of the damages may leave practitioners with a view that the real inquiry in the determination of liquidated damages concerns the relationship between the real damages that were suffered and the damages agreed upon.

In Ringrow two further questions were raised regarding this debate:

(a) Can a clause which is properly part of the commercial agreement (simply part of a bad bargain) be set aside on the basis that it constitutes a penalty?

(b) Given (despite the assertions to the contrary in Ringrow) that there is to be some consideration of whether or not the damages are not to be out of all proportion to the likely damage suffered, what is the position if no damage was suffered at all?

Had the court in Ringrow considered the primary principle it might have reached a clear and unequivocal conclusion rather than follow a tortured path of investigating notions of 'proportionality' which may have raised more questions than provide clear guidance.

CASE 3: The Court of Appeal State of Tasmania v Leighton Contractors Pty Ltd[14]

This court applied the primary principle by considering firstly the evidence concerned with establishing whether or not the parties had established a genuine pre–estimate of damages.

The following facts were considered persuasive and form a guide to practitioners as to what must be established to prove that there had been a genuine pre–estimate of damages:

(a) the parties considered the consequences of delay and breach of the contract;

(b) it was reasonable to provide for a remedy;

(c) the contract was such that to agree on compensation was justified;

(d) the supervision of delayed works would result in expense being incurred;

(e) quantification of damages would be difficult;

(f) both parties were experienced construction entities;

(g) a calculation was made by a person having expertise to do so;

(h) there was no imbalance between the negotiating parties;

(i) that calculation was not questioned and the breaching

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party had taken advice as to quantum;

(j) the integrity of the expert at trial who computed the calculations was not impugned at trial;

(k) no evidence was led at trial by the contractor to refute the reasonableness or otherwise of the damages;

(l) the parties agreed that the Liquidated Damages were a genuine pre–estimate; and

(m) in broad terms the amount of damages ($8k per day) did not appear unreasonable in relation to the contract price ($30 million).

4. UNDERSTANDING THE DEBATE

Sanctity of Contract and Liquidated Damages

The fundamental purpose of damages for breach of civil obligations:

... is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed.[15]

When this fundamental purpose is applied for the assessment of damages for breach of contract it becomes:

The plaintiff is entitled to be placed, so far as money can do it, in the same position as he would have been had the contract been performed.[16]

This statement of principle has been accepted and applied in Australia.[17]

The law relating to contractual damages provides that the parties themselves may agree in the contract how much will be payable if a party breaches the contract.

A contract may therefore include a provision that if the contractor fails to complete the contract works by the date for completion specified by the contract, or within any extended time determined under procedures set out in the contract for extension of the date for completion, the contractor must pay or allow the principal to deduct or set–off a specified sum, by way of liquidated damages.[18]

The general policy of the law is:

… people should honour their contracts. That policy forms part of our idea of what is just.[19]

In accordance with this general principle, the contract to be honoured includes both the terms imposing obligations to be performed and any terms requiring payment of 'agreed or liquidated damages' in certain circumstances.

When the parties settle terms for payment of liquidated damages they are not simply making a commercial bargain. The parties are assuming a self–help curial process to determine damages; they are setting out, on the basis of a genuine pre–estimate, the damages (liquidated) payable in the event of a breach in place of the parties' rights to have damages determined by action at law. In relation to 'agreed damages', the parties are not simply making a good or bad bargain; they are, in substance and effect (if the provision is not declared a penalty) pre–estimating and agreeing the value of the 'secondary obligation' that arises between contracting parties when there is a breach. The 'secondary obligation' forms part of the 'commercial rule of law'; the right to sue for loss of bargain damages arising upon breach of a contract.[20] That secondary obligation is to be valued in accordance with the fundamental rule of the common law that where a party sustains a loss by reason of a breach of contract, the innocent party is, so far as money can do it, to be placed in the same position (by payment of damages) as if the contact had been performed.[21] Contracting parties cannot oust judicial supervision (review to ensure that the term does not impose a penalty) in relation to this secondary obligation.

The benefit of entering into such an agreement is that the parties are assisted in the proof of damages in that subject to complying with the test applicable to liquidated damages they need not prove damages but only that the damages have been agreed.

An inquiry into whether or not the clause was a genuine pre–estimate of damages might have ended the inquiry. The court might further have considered that the clause was part of the commercial bargain and not intended to be in any manner a liquidated damages clause. Given the fact that a court will be loathe to protect a party from a bad bargain the inquiry might reasonably have ended upon that inquiry as it was clear that the clause was not constructed so as to genuinely pre–estimate damages.

Penalties and Liquidated Damages

A liquidated damages clause is unenforceable if it is a penalty.[22] Whether or not a clause, formula or amount making provision for or setting the amount of liquidated damages is a penalty could be considered in the light of the following questions:

(a) The question of construction of the provision:

i. reading the liquidated damages provision at the time the contract was made[23] to ascertain if the liquidated amount payable on breach is a genuine pre–estimate of the loss or damage likely to be incurred in the event of the breach or, in all the circumstances, is not exorbitant and unreasonable; and[24]

ii. considering the inherent circumstances of the contract or the matrix of circumstances surrounding the making of the contract at that time, particularly if there is evidence of oppression or other unconscionable use of bargaining power; and[25]

iii. the presumption against enforceability should arise because the liquidated damages are payable upon the occurrence of one or more or all of several events, some of which may impose liability for liquidated damages in circumstances where the liquidated damages are 'out of all proportion' to the damage likely to be suffered by the party entitled to deduct the liquidated damages;[26] and

iv. there are other grounds upon which the court should grant relief against the enforcement of the liquidated damages provision.

The judgment of the High Court in Ringrow Pty Ltd v BP Australia Pty Ltd[27] certainly appears to raise the bar against claims for relief against the imposition of liquidated damages unless they are 'out of all proportion'.

Care must be taken to give full effect to the High Court in Ringrow that the court's first cornerstone is to respect the bargain of the parties rather than impose a notion of fairness based on the proportionality of the bargain. The purpose of the agreement is to avoid the need to prove quantum of the damages suffered.

One of the objectives of a liquidated damages clause has been held to be:

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

The Role of the 'Assistance Principle' and 'Proportionality' in Determining Liquidated Damages

The High Court expressly disavowed any use of a 'proportionality–test'; the sum fixed need not be proportionate to the likely amount of damages; rather, the liquidated sum must not be 'extravagant and unconscionable in amount'. The High Court considered[28] that the use of the phrase 'degree of proportion' by Mason and Wilson JJ in AMEV–UDC Finance Ltd v Austin[29] did not require a judicial inquiry and judgment as to whether or not the liquidated damages were 'proportionate' to the legitimate commercial interests of the party seeking to deduct the liquidated damages. Rather, a liquidated sum should be characterised as an unenforceable penalty only if it is 'out of all proportion to the damage likely to be suffered as a result of breach'. In one respect it is difficult to escape the conclusion that the High Court itself applied a 'proportional test' by holding the damages that 'were out of all proportion' constituted a penalty.

The High Court in Ringrow Pty Ltd v BP Australia Pty Ltd[30] has given a wide range for estimating error; the genuine pre–estimate must not be extravagantly or unconscionably inaccurate. Most estimators would be pleased to work within that guideline. The test therefore is not simply mathematical. It is not sufficient to show that the estimated damages are much greater than the loss suffered (or at the time the contract was entered into, could reasonably have been predicted or estimated as likely to be incurred in the event of the particular delay or breach).

It will, however, still be difficult to assess whether or not a liquidated damages amount is 'extravagant or unconscionable' for many subcontracts, long term contracts, instalment contracts and hire contracts where the damage caused by a breach (like delay by a trade affecting following trades, or a failure to pay an instalment) is likely to be much less than the financial losses flowing from any termination[31] triggered by the delay (or failure to pay the instalment).

The High Court's rejection in Ringrow Pty Ltd v BP Australia Pty Ltd[32] of a 'proportionality–test'; that the sum fixed for liquidated damages should be proportionate to the likely amount of damages, is to make it vital that contractors seek and obtain protection from exposure to financial and economic damages claims for loss of profit, loss of contracts, loss of use of assets, business interruption losses, loss of opportunity and loss of revenue claims.[33]

When and How is the Assistance Principle to be Applied?

The Court of Appeal in Tasmania held that Cox CJ did not apply the principles relating to the determination of liquidated damages correctly for the following reasons:

- There was clear evidence that the liquidated damages were pre–estimated.
- There was clear evidence that the liquidated damages were calculated to criteria relevant to the contract and with regard to market rates.
- The court permits considerable latitude in determination of damages because pre–estimates deal with projections which are

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by there nature inaccurate and complex.

• If the primary principle is established a court will merely consider broadly the parameters of the bargain (i.e. damages stipulated and the contract price) to ensure that the stipulated damages are not out of all proportion to the damages recoverable and will therefore form some idea of the recoverable damages to test the proposition.

• It is not permissible for a court to delve into the actual machinery regarding the calculations and to identify matters of miscalculation to justify a conclusion that the damages are excessive.

• Once the primary principle is established a court ought not to interfere with the bargain because it considers that the liquidated damages being sought to be recovered are excessive.

A court ought not to consider the question of whether the damages are out of all proportion without first considering whether or not the parties have satisfied the test that the liquidated damages are a genuine pre–estimate of damages.

Unanswered Questions Raised

What if No Damage has been Suffered?
An interesting question is raised as to what the position would be if a breach is committed triggering the liquidated damages clause yet no damage was suffered. On one view if no damage was suffered any damages claim would be out of all proportion to the damage suffered and the only purpose of the clause would be to afford a windfall to the principal. In contract that might not be objectionable, simply a consequence of breach.

In tort and under the laws of unconscionable conduct in contracts it might be argued that the purpose of the clause was intended to restore damage suffered and that to give to a principal a windfall might be unconscionable particularly where the damages are significant.

Where delay damages are claimed it might also be considered to be unconscionable to recover damages if the delay has not adversely affected performance of the contract allowing a principal to gain a windfall recovery from a contractor (in breach) rather than recover damages for delays incurred.

In a US decision Massman Constr. Co v City Council 147 F.2d 925 (5th Cir. 1945) a US federal court refused to enforce a liquidated damages provision in a case where completion of bridge piers was delayed by the contractor but the completed bridge could not be put to use because connecting bridge approaches and roadwork (work done by another entity) was concurrently delayed. The court stated (at 926):

All dressed up and nowhere to go', the bridge sat unutilised for 30 days or more after its full completion, so that the delay by the Appellant did not cause a delay in beginning the operation of the toll bridge with the attendant losses for non–operation which the contract sought to provide against.

Proportionality or No Proportionality—That is the Question
Despite the fact that Ringrow disavowed proportionality as being part of Australian law the court confirmed that the assistance test was that if liquidated damages were beyond all proportion to the damages that could be recovered then in those circumstances the

liquidated damages could not be enforced. It is difficult to envisage that it is possible to conclude that damages are beyond all proportion without considering the very question of proportion or proportionality.

It is perhaps understandable that the High Court dealt briefly with the assistance principle to reject the appellant's argument, the facts did not lend themselves to the extensive debate on the test for the assistance principle in the same manner that the facts in Tasmania v Leighton did. Perhaps a more definitive approach would have been to reject the argument on the basis that there clearly was no genuine pre–estimate of damages.

5. SOME CONCLUDING THOUGHTS

The High Court has confirmed that the test enunciated in Dunlop Pneumatic by Lord Dunedin remains the primary test. There is a limited application of the assistance principle as proposed by Lord Dunedin which is applied only once the primary test has been applied.

It is an incorrect application of the principles defining liquidated damages to determine whether or not the damages agreed are out of all proportion in the absence of first establishing that the damages were a genuine pre–estimate of damages.

The application of the principles of unconscionable conduct in contract raises a serious question as to whether a liquidated damages clause, which has as its purpose the curial self–help remedy of agreeing the amount to be recovered in the event of breach, could be used by a principal to gain a windfall where no damage has been suffered.

The judges in Ringrow, with respect, correctly characterised the clause under discussion as not meeting the primary test. It is not clear in those circumstances what status should be afforded to the debate on proportionality which followed considering that the facts did not lend themselves to that debate. Those comments, as in the case of Cox CJ, may inadvertently lead a practitioner to consider that the assistance principle is an equal test or independent test for the determination of liquidated damages. The message which emerges from that debate is that courts will not readily interfere with the 'big end of town' if they have profiteered from smaller contractors who have committed a breach, rather than simply recovering the loss. This is perhaps a message which is not consistent with the general trend in construction projects intended to prevent the imbalance between principals and contractors, such as for instance under the Security of Payments legislation.

It is questionable whether it is conscionable for a principal to recover damages under a liquidated damages clause if it has suffered no damage at all.

The statement in Ringrow that 'proportionality' is not part of Australian law might receive closer scrutiny particularly in circumstances where the High Court applied the very principle which it has eschewed.

6. AUTHORITIES

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2. State of Tasmania v Leighton Contractors Pty Ltd [2005] TASSC 133 (21 December 2005)

3. Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd (1915) AC 79

4. Lord Elphinstone v Monkland Iron and Coal Co (1886) 11 App Cas 332

5. Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504

6. Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41

7. State of Tasmania v Leighton Contractors Pty Ltd [2005] TASSC 133

8. AMEV–UDC Finance Ltd v Austin (1986) 162 CLR 170

9. Clyde Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo Castanera [1905] AC 6

10. Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71

11. Esso Petroleum Co Ltd v Alstonbridge Properties [1975] 3 All ER 358

12. Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71 at para [9]

13. Tolhurst, GJ & Carter, JW Relief against forfeiture in the High Court of Australia (2004) JCL 74

14. Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, 539 per Asquith

15. Robinson v Harman (1848) 1 Ex 850

16. British Westinghouse Electric and Manufacturing Co v Underground Electric Railway of London [1912] AC 673

17. Hadley v Baxendale (1854) 9 Ex Ch 341

18. The Heron II: Koufos v Czarnikow Ltd [1969] 1 AC 350

19. Wenham v Ella (1972) 127 CLR 454

20. Clydebank Engineering Co v Don Jose Yzquierdo y Castaneda [1905] AC 6

21. Baltic Shipping Co v Dillon (1991) 22 NSWLR 1; [1993] HCA 4; (1993) 176 CLR 344

22. Progressive Mailing and Sunbird Plaza Phot Production Ltd v Securicor Ltd [1980] AC 827

23. Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245

24. Robinson v Harman (1848) 1 Ex. 850 (Parke B)

25. Dingwall v Burnett 1912 SC 1097

26. Public Works Commissioner v Hills [1906] AC 368

27. Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 (HL)

28. Esanda Finance Corpn Ltd v Plessnig (1989) 166 CLR 131 at 142

29. CRA Ltd v NZ Goldfields Investments [1989] VR 873

30. O'Dea v Allstates Leasing Systems (WA) Pty Ltd (1983) 152 CLR 359 at 400

31. Lax v Glenmore Pty Ltd (1969) 90 WN(pt 1)(NSW) 703

32. Findlay v Cameron (1878) 4 VLR (L) 191

33. Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309

34. Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 281 (TCC) (Jackson J)

35. AMEV–UDC Finance Ltd v Austin (1986) 162 CLR 170

36. Esanda Finance Corpn Ltd v Plessnig (1989) 166 CLR 131, (1988) 63 ALJR 238

37. Bridge v Campbell Discount Co Ltd [1962] AC 600

38. Financings Ltd v Baldock [1963] 2 QB 104

39. Aquatec–Maxcon v Barwon Region Water Authority (No 2) [2006] VSC 117

40. Hotel Services Ltd v Hilton International Hotels (UK) Ltd [2000] 1 All ER (Comm) 750

41. Addax Ltd v Arcadia Petroleum Ltd [2000] 1 Lloyd's Rep 493

42. Deepak Fertilisers & Petrochemicals Corpn v ICI Chemicals & Polymers Ltd [1998] 2 Lloyd's Rep 139

43. GEC Alstom Australia v City of Sunshine (1996) Federal Court (20 February 1996, Ryan J) BC9600288

44. Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd's Rep 55

45. Massman Constr. Co v City Council 147 F.2d 925 (5th Cir. 1945)

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1. [2005] HCA 71 at para [32] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ

2. [1915] AC 79 at 86–87

3. Lord Watson in Lord Elphinstone v Monkland Iron and Coal Co (1886) 11 App Cas 332 at 342

4. [2004] TASSC 132 at para [36]

5. [2005] TASSC 133 at para [9]; sub nom [2004] TASSC 132 at para [236].

6. This calculation adjustment (or sleigh–of–hand) was effectively an 'unexplained' 15% uplift. It may of course be explained as a 'desire to put forward a large enough number to provide an incentive for due performance'; the court did not draw this inference.

7. Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504 (Cole J); Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41; cited in State of Tasmania v Leighton Contractors Pty Ltd [2005] TASSC 133 at para [31] sub–para 2 in relation to the particular issues facing a government agency when preparing a pre–estimate to calculate liquidated damages for inclusion in a contract.

8. [2004] TASSC 132 at para [36]

9. The evidential basis for these comments by Cox CJ is unclear. The estimate of $7,985 had been prepared by Evans & Peck, a consulting engineering group engaged by the State of Tasmania. Cox CJ may have thought the charge rates were closer to Melbourne or Sydney solicitor or barrister rates but his comment appears to reflect a criticism (or submissions) by Leighton rather than a discussion of evidence to support his judgment that the rates were extravagant. Certainly, we may comment that the road could not have been designed and built using those rates.

10. AMEV–UDC Finance Ltd v Austin (1986) 162 CLR 170 at 190 and Clyde Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo Castanera [1905] AC 6

11. Paragraph [234]

12. Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71. We are living in a global economy; the facts bear a striking resemblance to the English case Esso Petroleum Co Ltd v Alstonbridge Properties [1975] 3 All ER 358

13. Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71 at para [9]. See Tolhurst, GJ & Carter, JW Relief against forfeiture in the High Court of Australia (2004) JCL 74.

14. [2004] TASSC 132 at para [36]

15. Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, 539 per Asquith

16. Per Parke B in Robinson v Harman (1848) 1 Ex 850, 855; and per Viscount Haldane LC in British Westinghouse Electric and Manufacturing Co v Underground Electric Railway of London [1912] AC 673, 688–9; Hadley v Baxendale (1854) 9 Ex Ch 341;

The Heron II: Koufos v Czarnikow Ltd [1969] 1 AC 350

17. See Wenham v Ella (1972) 127 CLR 454, per Gibbs J at 471

18. Clydebank Engineering Co v Don Jose Yzquierdo y Castaneda [1905] AC 6. A contract for the building of four defence torpedo boats provided for a penalty for late delivery at a specified sum per week for each vessel. The vessels were delivered late and the court held that the sum specified (large at that time) was liquidated damages and not a penalty.

19. Baltic Shipping Co v Dillon (1991) 22 NSWLR 1, 9 per Gleeson CJ sub nom High Court [1993] HCA 4; (1993) 176 CLR 344. The exceptions to these rules arise where the agreement should be set aside for fraud, misrepresentation or mistake. This paper does not address these exceptions.

20. Progressive Mailing and Sunbird Plaza Phot Production Ltd v Securicor Ltd [1980] AC 827 at 845 (Lord Wilberforce) and 849 (Lord Diplock), cited in Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245 at 261 (Mason CJ)

21. Robinson v Harman (1848) 1 Ex. 850 (Parke B). See also footnote 6 above.

22. See also the Scottish decision Dingwall v Burnett 1912 SC 1097 where a modest 'penalty' was held to be unenforceable because the same amount was payable for breaches of different degrees of seriousness and could not therefore be a genuine pre–estimate of the loss flowing from each of the different breaches.

23. Public Works Commissioner v Hills [1906] AC 368

24. Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 (H.L); Esanda Finance Corpn Ltd v Plessnig (1989) 166 CLR 131 at 142; CRA Ltd v NZ Goldfields Investments [1989] VR 873; O'Dea v Allstates Leasing Systems (WA) Pty Ltd (1983) 152 CLR 359 at 400; Lax v Glenmore Pty Ltd (1969) 90 WN(pt 1)(NSW) 703; Findlay v Cameron (1878) 4 VLR (L) 191; Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309; Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 281 (TCC) (Jackson J)

25. Elsey v J G Collins Insurance Agencies (1978) 83 DLR (3d) 1 where the Canadian Supreme Court said (at 15):

It is now evident that the power to strike down a penalty is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

26. This is of course from the dicta in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 (HL) modified to take account of the observations of the High Court in Ringrow Pty Ltd v BP Australia Pty Ltd.

27. [2005] HCA 71 at para [12] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

28. [2005] HCA 71 at para [27]

29. (1986) 162 CLR 170, 193–194:

But equity and the common law have long maintained a supervisory jurisdiction, not to re–write contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing that distinction is one of degree and will depend upon a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term.

30. [2005] HCA 71 at para [12] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

31. Per Brennan J in Esanda Finance Corpn Ltd v Plessnig (1989) 166 CLR 131, (1988) 63 ALJR 238 at 244. A liquidated damages clause in a hire–purchase contract for a second–hand prime mover was upheld; the High Court said it was not sufficient to show that there were hypothetical situations covered by the clause when the agreed liquidated amount would exceed the likely loss.

See also Bridge v Campbell Discount Co Ltd [1962] AC 600; and Financings Ltd v Baldock [1963] 2 QB 104. See para below.

32. [2005] HCA 71 at para [12] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

33. Examples supporting the need for an 'exclusion (of liability) clause' are provided in: Aquatec–Maxcon v Barwon Region Water Authority (No 2) [2006] VSC 117; Hotel Services Ltd v Hilton International Hotels (UK) Ltd [2000] 1 All ER (Comm) 750; Addax Ltd v Arcadia Petroleum Ltd [2000] 1 Lloyd's Rep 493; Deepak Fertilisers & Petrochemicals Corpn v ICI Chemicals & Polymers Ltd [1998] 2 Lloyd's Rep 139; GEC Alstom Australia v City of Sunshine (1996) Federal Court (20 February 1996, Ryan J) BC9600288; Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd's Rep 55