



Supreme Court of New South Wales

BANKING & FINANCIAL SERVICES LAW
ASSOCIATION CONFERENCE

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Judicial case law update - Australia

Concept of penalty - Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd (1915)

- Essence of a penalty is a payment of money stipulated as in terrorem. Whether a sum stipulated is a penalty is a question of construction, determined at time contract made, not at time of breach.
- Relevant factors include whether amount is “extravagant and unconscionable ... in comparison with the greatest loss that could conceivably be proved to have followed from the breach”.
- Presumption of penalty when single amount payable for both serious and trivial breaches.
- See also *Legione v Hateley* (1983); *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005)

Andrews proceedings

- Concerned “honour”, “dishonour” and “non-payment fees” charged for consumer and business deposit accounts and “over-limit” and “late payment” fees for credit card accounts.
- Attacked as contractual penalties and under statutory provisions.
- *Andrews FCA* (2011) (dealing with separate questions) – Gordon J held only late payments fees for credit cards were payable on breach and were penalties.
- *Andrews HCA* (2012) – disapprove *Interstar* (NSWCA) – equitable jurisdiction applies in respect of provisions that are collateral or accessory to primary stipulation, not limited to breach of contract.
- *Paciocco HCA* (2016) – Gageler J note that occasions for equitable intervention comparatively rare.

Paciocco first instance and appeal

- *Paciocco FCA* (2014)
 - Fees other than late payment fee for credit cards not triggered by breach of contract or failure of primary stipulation, not penalties and not in breach of statutory provisions.
 - Late payment fees for credit cards payable on breach of contract and were penalty – loss provision costs, regulatory capital costs and fixed collection costs not taken into account.
- *Paciocco FCAFC* (2015)
 - Upheld finding that fees other than late payment fee for credit cards not penalty and not in breach of statutory provisions.
 - Late payment fees for credit costs not penalty and not in breach of statutory provisions.
 - Different approach to when costs assessed and what costs are relevant - loss provision costs, regulatory capital costs and fixed collection costs properly taken into account.

Intervening decisions

- *Cavendish Square Holding/Parking Eye* (2015) (UK Supreme Court)
 - Considered commercial and consumer contract, seven judges sat, complex decision.
 - Lords Neuberger and Sumption (Lord Carnwath agreeing) held (1) penalty principle does not extend beyond breach of contract (2) a clause is enforceable if it does not impose a detriment on the party in breach of contract that is disproportionate to the legitimate interest of the innocent party.
 - Lords Mance, Hodge, Clarke and Toulson adopt somewhat different approaches, including reference to whether a sanction is extravagant or unconscionable.
- *Torchlight Fund No 1 LP (in receivership) v Johnstone & Ors* (2015) (NZHC).

Paciocco HCA (2016)

- Appeals limited to late payment fees on credit cards, payable on contractual breach, so contractual rather than equitable jurisdiction was engaged.
- Majority (Nettle J dissenting) held that the losses that could be taken into account in determining whether a secondary stipulation is extravagant and unconscionable not limited to damages recoverable under *Hadley v Baxendale* for breach of contract.
- Majority (Nettle J dissenting) took same approach as Full Federal Court as to wider categories of loss that could be taken into account (but differ as to relevance of evidence of actual loss).
- Keane J gave detailed consideration to statutory claims (French CJ, Kiefel J agreeing).

Implications

- Equitable jurisdiction remains available in respect of clause that is collateral or accessory to primary stipulation; contrary to UK position.
- Occasions for equitable intervention may be comparatively rare (*Paciocco HCA* per Gageler J).
- Focus on legitimate interests of party which has benefit of clause, but not as wide as *Cavendish* as to non-financial interests, and whether a clause is penalty determined at time of entry into a contract.
- Range of loss (or costs) taken into account in determining whether a clause is penalty not limited by rule in *Hadley v Baxendale*.
- Fee that is in fact extravagant, by reference to greatest loss that could conceivably follow from breach, assessed at time of contract, would still constitute a penalty at general law or in equity.
- Breach of statutory provisions unlikely to be established by criticism of price for service without misuse of market power, concealment, financial pressure etc.

Recent decisions under the PPSA

- Section 267 of the PPSA - security interest vests in company that granted it, if order made for winding up or administrator is appointed or deed of company arrangement executed, and security is unperfected on the date the winding up is taken to commence under ss 513A–513C of the *Corporations Act*
 - *White v Spiers Earthworks Pty Ltd* (2014); appeal pending.
- Section 588FL of the *Corporations Act* - certain interests covered by PPSA that are not registered within specified time vest in company that is being wound up or is in administration.
 - *Carrafa (as liquidators of Relux Commercial Pty Ltd) (in liq) v Doka Formwork Pty Ltd* (2014).
 - *Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd) v General Electric International Inc* (2016)

Other recent decisions

- Effect of a deed of company arrangement on secured creditors - *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* (2014); *Re Bluenergy Group Ltd (subject to a deed of company arrangement) (admin apptd)* (2015)
- Voidable transactions
 - Power to make shelf orders confirmed: *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015)
 - Procedural rules do not allow extensions beyond time limit in s 588FF(3): *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015)
 - Directors are affected by extension orders for voidable transaction claims against the Commissioner of Taxation and should have notice: *Fletcher v Anderson* (2014)
 - Whether a court can grant leave to amend pleading to extend an existing preference claim, outside the time limit in s 588FF(3): *Rodgers v Federal Commissioner of Taxation* (1998); *Re Cardinal Group Pty Ltd (in liq)* (2015) (on appeal)

Law reform

- Insolvency Law Reform Act - expected to commence partly 1 March and partly 1 September 2017
- Introduction of Insolvency Practice Schedule (Corporations) and proposed rules – deal with registration, regulation and discipline of insolvency practitioners
- Introduction of common rules regarding:
 - remuneration and benefits received by external administrators;
 - provision of information by external administrators;
 - meetings of creditors during an external administration;
 - committees of inspection; and
 - external review of the administration of an insolvency.
- Range of matters that presently require Court applications may be addressed by creditors or ASIC
- Several commonly used sections are repealed and other sections are significantly amended - complex transitional provisions
- Proposed safe harbours from insolvent trading