CURRENT DEVELOPMENTS: TERMINATION OF PROVISIONS IN LEASES

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1. INTRODUCTION

A spate of cases in the last few years, culminating in Amev-UDC [1], has indicated how hazardous it can be for a financier to finance the chattel acquisitions of its customers by way of lease, rather than by way of a cash advance (whether or not secured by a bill of sale). I say "hazardous", because in choosing to conduct their business in this way, financiers have allowed what are essentially money lending transactions [2] to be subjected to the technical, and often illogical, laws as to penalties when seeking to recover damages for breach of contract from the lessee. Despite what all commentators see as the unsatisfactory nature of the present state of the law, and despite the fact that by no means can the law be regarded as settled in every respect, I believe that it is possible to draw some reasonably firm conclusions from the cases which will be of assistance to all involved in the finance industry.

My task - and in view of the short time available to me it will of necessity need to be brief - is to examine the case law and highlight some of the problems that have emerged. Michael Macnamara will then discuss the manner in which these problems can be overcome by appropriate drafting.

This paper only deals with the general law position - I do not propose to discuss the Credit Act legislation for example, which is of only minimal importance.

2. The Problem

The problem for a financier is to ensure that if its lessee defaults part way through the lease period, it can recover damages for the loss of its bargain - i.e. damages which arise because the lease is prematurely terminated. Were the transaction to be characterised as one of a simple loan of money at interest, the financier would be looking to recover its outstanding principal investment (being the original purchase price of the goods) together with interest to the date of termination [3]. In the context of a lease of goods, where each

instalment of rent and (I would submit) the residual value has a "principal" and an "interest" component, the financier would be receiving far more than its outstanding principal plus accrued interest if it could recover the arrears of rental, all future rentals and the residual, for the simple reason (as I have said) that such future rentals and the residual have an interest component. Until as recently as the High Court's decision of 1983 in O'Dea [4] it had been generally assumed that, with appropriate drafting, a financier could in fact recover this, although industry practice was generally (although as we shall see by no means uniformly) to provide a defaulting lessee with a rebate or discount on account of the early receipt of the future rentals, and to provide him with a credit for any amount received on the sale of the leased goods in excess of the (normally unrebated) residual value. Although the courts will now treat any termination provision which does not do this as a penalty - with disastrous results for the financier- it is important to understand that there are a number of situations where the issue of penalties simply does not arise, and it is to these that I now turn.

3. Where No Issue of Penalty Arises

(a) Repudiation

It is clearly established that if the defaulting lessee has repudiated the lease, and the financier accepts such repudiation, then the financier is entitled to loss of bargain damages irrespective of whether the termination provision amounts to a penalty [5]. In Shevill [6], Gibbs CJ [7], who delivered the main judgment, recognised three types of "repudiation".

(i) The first is where one party "evinces an intention no longer to be bound by the contract ... or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way".

It is no easy thing to establish a repudiation of this type: repeated late payment of rent is not enough (as in Shevill), although in Tabali [8] and Wood Factory [9] non-payment of rent, coupled with other breaches, was held to amount to a repudiation. A clear case of repudiation was found in W. & J. Investments, where the lessee was considerate enough to advise the financier that he could not afford to meet the repayments, and accordingly would be returning the equipment in question, which he did. Since the termination provision in that case was clearly penal, the lessee would have been better advised (as we shall see) to have been less co-operative. On the other hand, in Amev-UDC the lessee had granted a debenture to a related company which had appointed a receiver; a petition to wind up had been filed by a creditor; the lessee had failed to pay 3 instalments of rent and the lessee was

insolvent. However, although these facts taken together would almost certainly have been capable of amounting to repudiation, since, at the time of terminating, the financier was not aware of most of them, Priestley JA (with whom Mahoney JA agreed) held that it could not rely on them - i.e. it could not say that in terminating the lease it was accepting the repudiation.

(ii) The second kind of repudiation alluded to by Gibbs CJ was if "one party, although wishing to perform the contract, proves himself unable to do so, his default in performance will give the other party a right to rescind the contract, if the breach goes 'so much to the root of the contract that it makes further commercial performance of the contract impossible': Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26 at p.64".

(iii) The third, and for present purposes, perhaps the most important situation where the financier can rescind the contract and sue for loss of bargain damages is "where there has been a breach of a fundamental or essential term of the contract". Gibbs CJ then cited with approval the words of Lord Upjohn in Suisse Atlantique [10]:

> "A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach.

Gibbs CJ then went on to refer to the very clear authority to the effect that "the parties to a contract may stipulate that a term will be treated as having a fundamental character although in itself it may seem of little importance, and effect must be given to any such agreement" [11]. This principle has been recently restated by the English Court of Appeal in Lombard North Central plc v. Butterworth [12]. However, the courts will clearly not be too ready to find that the parties really did intend to make a trivial breach a breach of a condition or fundamental term: it would require "very clear words" to bring about such a result, which could be "quite unjust" [13].

It is clear from Shevill that, in the absence of very special circumstances, the obligation to pay rent is not per se a condition; and yet, such an obligation must be capable (with the appropriate words) of being made into a condition [14]. In Citicorp Australia Limited v. Hendry [15], the lease contained a clause which stated that "Time shall be of the essence of the Lessee's obligations hereunder". The NSW Court of Appeal held that, as a

> matter of construction - and I think rightly - this clause did not convert the lessee's obligation to pay rent into a condition: after all, as Mahoney JA pointed out [16], this clause operated with respect to all of the lessee's obligations, and not just its obligation to pay rent. As if on cue, the Court of Appeal in Lombard North Central has now held that a clause which stipulated that the punctual payment of each rent instalment was of the essence made prompt payment into a condition, the breach of which entitled the financier to terminate the lease and recover damages for the loss of the whole transaction.

The above analysis seems to me to make it clear that where there is a "repudiation" by the lessee (in any of the above senses) which is accepted by the financier, the issue of penalties simply does not arise. Of course, and as we shall see, this does not mean that an agreed damages clause will be upheld as valid (and not penal) simply because it operates on the occurrence of a repudiatory breach. Imagine an obligation -expressed as a condition - to pay $1 million "agreed damages" for failing to pay a $100 debt on the due date! Thus in Citicorp Australia Ltd v. Hendry, Priestley JA considered [17] that even if the obligation to pay rent was a fundamental term, that did not prevent him from finding the agreed damages clause to be a penalty. And in Lombard North Central v. Butterworth, Mustill LJ's seventh proposition [18], which he considered to be uncontroversial [19] was that:

> "A term of the contract prescribing what damages are to be recoverable when a contract is terminated for a breach of condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage, in the same way as a clause which prescribes the measure for any other type of breach. No doubt the position is the same where the clause is ranked as a condition by virtue of an express condition of the contract."

(b) Present debt principle

It has long since been established [20] that where a present debt is due and payable, but the creditor allows his debtor to pay this present debt at some future time (or in a lesser amount) provided certain conditions are satisfied, then no question of penalty arises if one of those conditions is not satisfied and the creditor seeks the immediate recovery of this present debt. In Lamson [21], a 1906 case, a majority of the High court believed that this was the proper construction of a lease which made the entire 10 years' rental payable in advance, but allowed the lessee to pay this "entire rent" by instalments provided no default occurred. Lamson's case has never been formally overruled, and was very clearly still regarded as good law by the High Court in IAC (Leasing) Limited v. Humphrey [22].

However, all this changed in O'Dea in 1983, where the High Court, faced with a similar provision, found that on its true

construction, the lease in question did not fall within this "present debt" principle: for here, the obligation to pay the entire rental only arose on breach - how could the lessor be entitled to both the entire rent and the right to early repossession of the leased equipment? It is not difficult to distinguish Lamson's case, which was not a financing transaction at all, but involved equipment which the lessor had a very real commercial interest in ensuring was leased for the full 10 year term. Whether or not Lamson is still good law [23], and whether or not it is still possible to draft an entire rent clause that works (from a financier's viewpoint) [24], it is significant that when both Citicorp v. Hendry and Amev-UDC were before the courts [25], the question was not raised.

(c) Voluntary termination

Because the question of penalties is said to arise only where a sum is payable upon breach [26], it follows that if the lease stipulates the amount which becomes payable by the lessee upon his voluntarily returning the leased equipment, no question of penalty can arise. This was the decision of the English Court of Appeal in Associated Distributions Ltd v. Hall [27], and was the point at issue before the House of Lords in Bridge v. Campbell Discount Co Ltd [28], where it was held, on the facts, that the hirer had not voluntarily terminated the hire purchase agreement. Nevertheless, as Lord Denning pointed out [29] if this principle were correct, it would lead to the absurd paradox that the law would grant relief to a man who breaks his contract and penalize another who keeps it. While it will not surprise you to learn that Lord Denning considers that the underlying principle is not correct, the High Court does not appear to have accepted its correctness in IAC (Leasing) Ltd v. Humphrey [30]; in Amev-UDC, the three majority judges expressly left the point open [31], although in their joint judgment Mason and Wilson JJ [32] seemed to incline to the view that it was correct. Of the minority, Deane J [33] would prefer to explain this whole line of cases on a different basis, although Dawson J [34] seemed to accept it as correct.

4. What is a Penalty?

Suppose the financier wishes to terminate the lease as a consequence of breach by the lessee but it is not able to rely on a "repudiation" by the lessee (in the extended sense referred to earlier): in such a case, there is no reason why the financier should not terminate the lease, if it had a contractual right to do so. But what damages can the financier recover in such a case?

The answer to this question does reveal a certain confusion amongst the courts. On the one hand, the decision of the High Court in IAC (Leasing) Ltdv. Humphrey makes it clear that it is possible for a financier to recover his actual loss following its termination of a lease consequent upon a non-repudiatory breach by the lessee: the recent decision of the Full Court of the

Supreme Court of South Australia in Plessnig v. Esanda Ltd [35] is also an illustration of this. (Shevill is not an authority to the contrary since in that case there was no agree damages clause). Moreover, this possibility was expressly alluded to by Mason and Wilson JJ [36] in their joint judgment in Amev-UDC. On the other hand, in the conclusion drawn from their review of the doctrine of penalties, Mason and Wilson JJ also point out [37] that an agreed damages stipulation, to be valid, must restrict the financier "to the recovery of an amount of damages no greater than that for which the law provides". This, of course suggests that an agreed damages stipulation which operates otherwise than as a consequence of a repudiatory breach must be penal [38]. It is this very conflict which seems to be at the heart of the difference of opinion in the High Court itself in Amev-UDC as to the proper measure of damages where the contractual stipulation is a penalty.

For the moment, however, let us assume that the IAC (Leasing) Ltd v. Humphrey decision - and the strong dicta of Mason and Wilson JJ - is correct: the method by which the financier's actual loss can be recovered is by means of an "agreed damages" clause. The purpose of the so-called "agreed damages" clause is to overcome the requirement to prove actual loss in a claim for damages. Such a provision will be valid so long as, judged as at the time the contract is made, the amount stipulated for is a genuine pre-estimate of loss. As Lord Dunedin put it in his classic statement of the principles in Dunlop [39], 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". On the other hand, as in Dunlop itself, 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".

Although the circumstances in which the courts intervene to find that the stipulated sum is a penalty have been criticised severely in recent years [40], the principles seem too well entrenched in the leasing area to be thrown aside by the courts - statutory intervention would be necessary. So what have the courts taken objection to? It is clear that two things at least must be done in order to ensure that the stipulated sum is not found to be a penalty:

(a) first, the instalments of rent which would, in the absence of default, have been paid after the date of termination, must be suitably discounted for early receipt; and

(b) secondly, credit must be given for the fact that the goods are recovered earlier than would otherwise have been the case had the lease run its course.

It is convenient to deal with these two aspects together because they tend to either both be present or both be absent. They were

both absent in O'Dea and in Amev-UDC, and in both cases the stipulated sum was held to be penal. Thus in O'Dea Gibbs CJ observed [41] that:

> "In the event of a breach the first respondent (financier) was entitled to repossess and resell the vehicle, but it was not bound to account to the lessee for any amount received on resale, even if it exceeded (as it did) the appraisal (sc. residual) 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 those 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."

On the other hand, in IAC (Leasing) Ltd v. Humphrey, both these aspects were present: on default, the agreed damages clause required future rentals to be rebated at 10% so as to reflect their present value; and the lessee was to obtain a credit to the extent that the net sale proceeds exceeded the residual value: as Walsh J put it [42], by such means the financier could not make an unwarranted "profit" out of the early termination.

But life was never meant to be easy, at least not for lease financiers, for in Citicorp Australia Ltd v. Hendry, Clarke J - in a decision upheld by the NSW Court of Appeal - struck down as penal termination provisions in a lease almost identical in terms to that considered by the High Court in IAC (Leasing) Ltd v. Humphrey on the basis that the implicit interest rate (24.04%) was so much higher than the discount rate (10%) that it substantially exceeded the greatest loss that the financier could suffer; this conclusion was aided by the fact that the 10% figure was included in the financier's pre-printed lease form, which indicated that no real attempt was made by the financier to provide a genuine pre-estimate of the loss. In the Court of Appeal, Priestly JA highlighted [43] the effect of such a large differential were the lease to have been terminated shortly after the lease commencement date.

At this juncture I should like to make the following points:

(i) In Dunlop, one of Lord Dunedin's principles was that there was a presumption (but no more) that if a single lump sum is made payable on the occurrence of one or all of several events, some of which may occasion serious and others but trifling damage, that lump sum should be treated as a penalty. In Lombard North Central v. Butterworth this presumption was elevated to a higher plane by the English Court of Appeal, where it was indicated (strictly obiter) [44] that this feature of the termination clause would, in the absence of a repudiatory breach, have rendered the

clause unenforceable as a penalty. Such a conclusion would run directly counter to the ratio of IAC (Leasing) Ltd v. Humphrey, and to the dicta of Mason and Wilson JJ in Amev-UDC [45].

(ii) Secondly, granted that future rentals should be discounted, what is the appropriate discount rate? Lest I encroach too much onto Michael Macnamara's domain, let me simply say that this question has really only become a relevant one to ask since Citicorp Australia Limited v. Hendry. Priestley JA indicated [46] that in a period of relatively stable interest rates it will be reasonable for the discount rate to be "below but not markedly different from" the yield rate as calculated by the financier at the date of lease commencement; on the other hand, in a period of volatile interest rates, the above approach might carry "unacceptable risks" for the financier but there would be no objection if the discount rate was related to "some appropriate and objective index". The High Court has yet to give any guidance on this point and hence financiers may yet hope for a reversal of the Citicorp decision: it is hard not to have sympathy for the Meagher argument [47] that the difference between the 10% and the 24% is irrelevant, for "if the future instalments owing represent, from the lessor's viewpoint, a profit element of whatever proportions, on an accepted repudiation he is entitled to a sum representing the present value of (inter alia) that profit element". In other words, the Citicorp approach assumes that the financier can reinvest the capital returned to him on an early termination of the lease at the same rate - which of course may not be the case [48]. This would not appear to satisfy Priestley JA's own test [49] that to be a genuine pre-estimate, the stipulated amount had to be such that, if re-invested for the balance of the term, the financier would be in the same position as if default had not occurred.

(iii) Related to this question is the further question - to which no clear answer has yet emerged - as to whether the residual itself should be discounted on an early termination for breach. This is probably a consequence of the fact that in most of the cases that have come before the courts, the "agreed damages" formulation does not contemplate that the residual should be discounted. In IAC (Leasing) Ltd v. Humphrey, Walsh J held that a provision which indemnified the financier against any capital loss which it might incur if the sale proceeds of the goods were less than the residual value was valid, at least where the residual value was a bona fide estimate. The correctness of this view has not, to my knowledge, been questioned [50] and it of course proceeds on the basis that the residual need not be discounted. Only one judge that I am aware of - Lee J in W & J Investments Limited v. Bunting [51] - has suggested that the residual

should be discounted, and with respect, this does seem the better view. There does seem a considerable difference between an indemnity against capital loss arising on lease termination (when the full residual is payable) and what amounts to an early receipt of the residual following a sale of the goods upon an early termination of the lease. Given that the function of the residual as a balancing charge has now been judicially recognized [52] - that is, that the amount does not represent (to the financier) a purely principal amount, but represents part of its return in the fullest sense (i.e. both principal and interest) (the fact that it may be a capital amount for income tax purposes seems irrelevant), there seems no reason in principle why it should be treated any differently from future instalments of rental, although I recognise that there are other views on this [53].

5. Consequences of a Penalty

What is the consequence of an agreed damages clause being held to be a penalty? This was the very issue before the High Court in Amev-UDC, where two quite different views were expressed. The majority judges held that the financier could only recover the rental arrears to the date of termination plus interest thereon [54]: two different reasons were given by the majority for this:

(i) Gibbs CJ, in particular, indicated that the financier could only recover the actual damage which it sustained as a result of the breach - but here, the financier's loss flowed from his own act in terminating the lease, and not from the lessee's breach [55].

(ii) Mason and Wilson JJ additionally pointed out that to adopt the financier's argument and allow it to recover its actual loss notwithstanding the penal nature of the agreed damages clause, would be to invite the Court to develop a new law of compensation, distinct from common law damages - and this their Honours would not do [56].

The decision is perhaps an unfortunate one, and on the facts, certainly worked against the financier, who was thus not able to recover his actual loss. With respect, the reasoning of the minority was far more appealing. Dawson J [57], for example, considered it illogical to restrict recovery to the loss actually flowing from the relevant breach, disregarding any loss occasioned by the termination of the agreement - an approach which will only give the financier loss of bargain damages where the breach was a repudiatory one. After all, it was in the contemplation of the parties that damages should be payable following the termination of the lease consequent upon the lessee's breach. This feature distinguished the case from Shevill [58].

6. The Future

The minority view in Amev-UDC would, of course, lead to greater weight being given to the parties' freedom to contract, without judicial interference. It is somewhat ironic, then, although heartening for a financier, that Mason and Wilson JJ should have indicated that "the courts should give the parties greater latitude to determine the terms of their contract" [59]. Their Honours then went on to indicate the circumstances where the courts may rely on the doctrine of penalties to impinge on that freedom, something, however that the courts should not be too ready to do:

> "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."

In Citicorp Australia Ltd v. Hendry, Kirby P [60] suggested that he would like to see the law take inequality of bargaining positions into account when deciding whether a stipulated sum was penal. But he was certainly not suggesting - as Mason and Wilson JJ clearly were - that this was the law. Such a suggestion - which seems to me akin to the suggestion that the doctrine of penalties should be replaced by another doctrine which would allow the courts to intervene in cases of "unconscionability" - has been criticised by certain commentators, in my view rightly, since it hardly makes for certainty [61].

The law as to penalties is thus something of a minefield of technical rules and inconsistencies, with many uncertainties still surrounding its continued application. Of the 9 judges who sat in the three courts which heard the Amev-UDC case, 5 were of one view and 4 of another, and hence the possibility of a future High Court of a different complexion changing its mind cannot be ruled out. In the meantime, if the remarks of Mason and Wilson JJ are anything to go by, the courts in the future will be perhaps more reluctant to intervene and find an agreed damages stipulation to be penal, and in the meantime, with the active and positive encouragement of those judges, clever draftsmen are being invited to overcome the unfair result that came about in that case [62]. That sounds like a cue for Michael Macnamara - and it is. However, before I sit down, just let me say that I do not believe that a completely satisfactory situation - one that is fair to financiers and lessees alike - will be possible in the absence of legislative intervention, and perhaps it is now appropriate for pressure to be placed on the legislators to achieve this result.

Footnotes

[1] Amev-UDC Finance Limited (formerly United Dominions Corporation Limited) v. Austin (1987) 68 ALR 185 (HCA): the decision of Rogers J is reported in [1983] 1 NSWLR 637, and of the New South Wales Court of Appeal in [1984] 2 NSWLR 612.

[2] the commercial nature of these transactions has long since been recognised: see, for example Financings Ltd v. Baldock [1963] 2 QB at 116-117per Diplock LJ.

[3] Cf. the decision of Holland J of the Supreme Court of NSW (upheld by the NSW Court of Appeal) in Van Kempen v. Finance and Investments Pty Limited (unreported, 21/8/1984) where it was held that as a matter of equity a mortgagee of land could not recover more, following default by the borrower/mortgagor, than the principal sum outstanding together with interest accrued thereon.

[4] O'Dea v. Allstates Leasing System (WA) Pty Limited (1983) 152 CLR 359.

[5] In Amev-UDC (1987) 68 ALR 185, the High Court expressly left open the question whether in an action for damages where the financier sought to disregard the penalty clause, the amount stipulated for in the penalty clause acted as an upper limit to the amount which could be recovered. In W & J Investments Ltd v. Bunting [1984] 1 NSWLR 331, Lee J held that it did not act as a limit, and on general principles, this seems the better view.

[6] Shevill v. The Builders Licensing Board (1982) 56 ALJR 793.

[7] Ibid, at pp 794-5.

[8] The Progressive Mailing House Pty Ltd v. Tabali Pty Ltd (1985) 59 ALJR 373.

[9] Wood Factory Pty Ltd v. Kiritos Pty Ltd [1985] 2 NSWLR 105.

[10] Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 AC 361 at p 422.

[11] 56 ALJR at p 795.

[12] [1987] 1 All ER 267 at p 271.

[13] 56 ALJR at p 796.

[14] As Diplock LJ pointed out in Financings Ltd v. Baldock op. cit. at pp 118-119, it is difficult to see how, as a matter of construction, the time for payment can be of the essence if another provision allows the financier to charge interest on overdue rent instalments "thus providing an express remedy in damages, of which the measure is agreed, for breach of the hirer's obligation to pay an instalment on the due date".

[15] [1985] 4 NSWLR 1 (Clarke J); [1985] 4 NSWLR 22 (Court of Appeal).

[16] Ibid, at p 28.

[17] Ibid, at p 34.

[18] Op. cit., at p 272.

[19] Ibid, at p 273.

[20] Thompson v. Hudson (1869) LR 4 NL 1: for a detailed examination of the law in this area, see DSK Ong, "Chattel Leasing: Indulgences, Liquidated Damages and Penalties" in 60 ALJ 272.

[21] Lamson Store Service Co Ltd v. Russell Wilkins & Sons Ltd (1906) 4 CLR 672.
[22] (1972) 126 CLR 131.
[23] In O'Dea, Gibbs CJ (at p 374) would clearly have been prepared to overrule Lamson if it could not be "confined to its own special facts"; Murphy J (at p 375) felt Lamson should be overruled; Wilson J (at p 383) did not feel it necessary to consider the correctness of the decision; Brennan J (at p 387) clearly felt the decision was unsatisfactory, as did Deane J (at p 403).
[24] As Ong suggests, op. cit. at p 282.
[25] The leases in both of these cases contained "entire rent" clauses.
[26] See, for example, Alder v. Moore [1961] 2 QB 57 where a professional footballer was required to repay the proceeds of an insurance claim received for permanent total disablement upon starting to play football again; and more recently the House of Lords in Export Credits Guarantee Department v. Universal Oil Products Co [1983] 2 All ER 205, where a truly extravagant sum was held to be payable under a performance bond upon the occurrence of the stipulated event. However, it seems well established that where the stipulated sum becomes payable on the occurrence of a number of events, some of which are breaches and some of which are not, then where the lease is terminated by reason of he lessee's breach, the question of penalty can arise: see Cooden Engineering v. Stanford [1953] 1 QB 86, Campbell Discount Co Ltd v. Bridge [1962] AC 600, O'Dea at p 367 (per Gibbs CJ) and Amev-UDC at p 195 (per Mason and Wilson JJ).
[27] [1938] 2 KB 83.
[28] [1962] AC 600.
[29] Ibid, at p 629.
[30] (1972) 126 CLR at 143.
[31] See also O'Dea (1983) 152 CLR 359 at pp 367-368 per Gibbs CJ.
[32] (1987) 68 ALR 185 at p 195.
[33] Ibid, at p 205.
[34] Ibid at p 217.
[35] (1987) ASC 55-533.
[36] (1987) 68 ALR at p 202.
[37] Ibid, at p 199.
[38] See discussion by Barnes (1986) 14 ABLR 63 at p 79.
[39] Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1915] AC 78 at 87-8.
[40] See especially Muir, "Stipulations for the Payment of Agreed Sums" (1985) 10 Syd Law Rev 503, noted in Amev-UDC by Mason and Wilson JJ at p 194. See also Citicorp Australia Limited v. Hendry [1985] 4 NSWLR at pp 23-24 per Kirby P.
[41] (1983) 152 CLR 359 at p 369.
[42] (1972) 126 CLR 131 at p 142.
[43] [1985] 4 NSWLR 1 at p 35.

[44] [1987] 1 All ER 267 at p 277 (per Nicholls LJ). Meagher, "Penalties in Chattel Leases", in Finn (ed) "Essays in Equity" at p 56 appears to be of the same view.

[45] (1987) 68 ALR 185 at p 192. For other decision in which an agreed damages clause (which operated on serious and trivial breaches) was upheld as valid, see W & J Investments Ltd v. Bunting and Plessnig v. Esanda Ltd.

[46] [1985] 4 NSWLR 1 at pp 34-35. Note also the suggestion of Lee J in W & J Investments Ltd v. Bunting op. cit. at p 339 that the discount rate should be based on the rate of interest in the agreement or if there were none, the interest rate or average interest rate prevailing during the term of the agreement.

[47] Op. cit., at pp 54-55.

[48] See also Barnes, op. cit., especially at p 77.

[49] [1985] 4 NSWLR 1 at p 34. See, for example Citicorp Australia Limited v. Hendry [1985] 4 NSWLR 1 at p 29 (per Mahoney J).

[50] See for example Amev-UDC (1987) 68 ALR at p 192 per Mason and Wilson JJ.

[51] [1984] 1 NSWLR 331 at p 339.

[52] See, for example Amev-UDC [1984] 2 NSWLR 612 at p 623 (per Priestley JA).

[53] Meagher, op. cit., at p 55 takes a different view, as does Weingarth, "Penalties & Commercial Lease Termination", from BLEC Workshop "Pitfalls in Enforcing Securities" at p 25 (25 July 1986); but contra Walter, "Penalties in Leases: the High court decision in the Amev-UDC Case", from BLEC Seminar held 25 February 1987, at p 3.

[54] In doing so, the majority adopted the reasoning of the English Court of Appeal in Financings Ltd v. Baldock [1963] 2 QB 104 and Moffit J in Lessors (Aust) Pty Ltd v. Westley [1964-65] NSWR 2091.

[55] See also per Mason and Wilson JJ ibid at p 200.

[56] This was a direct consequence of the penalty provision being unenforceable, or perhaps void, ab initio: ibid, at p 201.

[57] Ibid, at p 216.

[58] Ibid, at pp 219-220.

[59] Ibid, at p 201.

[60] [1985] 4 NSWLR 1 at p 23.

[61] See Barnes, op. cit. at p 85 and Meagher, op. cit. at pp 57-8.

[62] See (1987) 68 ALR 185 at p 202.