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Update Summary

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COMMERCIAL DAMAGES

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Commentary and case materials have been updated in the following chapters which have been revised:

- Liquidated Damages and Penalties;
- Time Aspects of Damages

New discussions which have been added include:

Summary of legal and equitable jurisdiction to relieve against penalties

The requirements for both jurisdictions run along parallel lines for most of the way but diverge at a certain point: see the discussion by Gordon J in *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35 at [17] ff.

The identification of a breach of contract is a prerequisite to engaging the common law's jurisdiction to relieve against penalties. Equity looks at substance, not form, and hence the jurisdiction of equity to relieve against penalties is engaged where a stipulation imposes an additional detriment

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(the penalty) on a party (“the first party”) to the benefit of the second party, collateral to (or accessory) to a primary stipulation, upon the failure of the primary stipulation: *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35 at [22] ff; *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; 86 ALJR 1002; [2012] HCA 30 (“*Andrews High Court*”) at [10].

The primary stipulation may be the occurrence or non-occurrence of an event which need not be the payment of money (*Andrews High Court* at [78]). Australian law thus travels wider than the English concept of penalty: cf at [191] of *Fahim Imam-Sadeque v BlueBay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB); at [96] of *Lancore Service Ltd v Barclays Bank Plc* [2008] EWHC 1264 (Ch).

A stipulated payment is more likely to be regarded as a bargain between the parties pre-estimating loss or compensation, and not as a penalty, when the consequences of the breach (or failure of the primary stipulation) upon which the payment is due are difficult or impossible to estimate: para [14] of *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35. See [13.10].

The policy context

The dichotomy between a “genuine pre-estimate” and a “grossly disproportionate preestimate”, is between compensation and deterrence. Whilst any clause which stipulates that money must be paid will operate to a degree as a deterrent, where the main focus is compensation, that is not objectionable. What is objectionable is where the clause has the predominant function “to deter breach in contradistinction to any function it has by way of compensation”: at [189] of *Fahim Imam-Sadeque v BlueBay Asset Management (Services) Ltd* [2010] EWHC 3511 (QB). See [13.15].

Steps for considering whether a clause is void as a penalty

The following steps have been suggested by Gordon J at [15] of *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35 as useful in considering whether a clause is void penalty in law or in equity. See [13.20].

Banking and lending cases

Late payment fees on consumer credit cards

Late payment fees on consumer credit cards may constitute penalties: *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35 per Gordon J. In that case, HH summarised the wider framework of established principles concerning the relationship of banks and their

customers, in which one must examine the particular contractual provisions in any given case. See [13.1215].

Banker's honour fees and over limit fees

Terms in the contract between customer and banker that allow the bank to charge fees if an account is overdrawn and the bank, in its discretion, approves a withdrawal eg from an ATM or by cheque, does not necessarily constitute a penalty. Such a fee is not payable upon a breach - it is in substance a fee for approving a loan application. Nor is it a fee as security for a collateral stipulation: see *Paciocco* at [188] ff. See [13.1220].

Sale of land

Obligation to reconvey land

An obligation to reconvey land the vendor could constitute a penalty – see: *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656; 80 ALJR 219; 222 ALR 306; [2005] HCA 71. See [13.1840].

Clogs on the equity of redemption: moulding penalties into securities

The law was recently summarised in *Sun North Investments Pty Ltd as trustee v Dale* (2013) 7 BFRA 875; [2013] QSC 44. See [13.1860].

Contracts for services

Contracts for services and the doctrine of penalties

The doctrine of penalties has been held applicable in a contract for commercial services: *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* [2014] VSCA 32 (7 March 2014). See [13.1920].

TABLES

The Tables of Cases and Statutes and the Index have been updated.

Note

The author welcomes any positive criticism, comment, or indeed any dialogue on the topics covered by this work. Correspondence should be addressed to sjacobs@wentworthchambers.com.au, and may be copied to Thomson Reuters at ariel.galapo@thomsonreuters.com.