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Update Summary

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COMMERCIAL CONTRACT CLAUSES

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Update Summary

Leigh Warnick SC has provided updated commentary. Highlights include the following.

Joint, several and proportionate liability

The broad/narrow scope issue – current status

Legislation in some States applies proportionate liability to actions for damages arising from a failure to take reasonable care. This requirement is open to broad and narrow interpretations. The broad view is that a claim is apportionable if it arises from a failure to take reasonable care. The narrow view is that a claim is only apportionable if the absence of reasonable care is an element of the cause of action on which the claim is based. Recent case law suggests that a claim is apportionable if the plaintiff must prove a failure to take reasonable care, in order to succeed in the claim; it would seem to follow as a matter of logic that if the plaintiff must prove a failure to take reasonable care in order to succeed, they must also plead a failure to take reasonable care. However, it has also been recently held that a claim, whatever the pleaded cause of action, which has been upheld on the basis that there was a failure to take reasonable care will constitute an apportionable claim: *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [2024] NSWCA 232. See [26030].

Exclusions from proportionate liability – specific exclusions

Each jurisdiction has specific exclusions from proportionate liability. Many relate to particular Acts or regulations of the relevant jurisdiction. The duties imposed on a builder and project manager under New South Wales building laws may be non-delegable duties attracting the *Civil Liability Act 2002* (NSW). As a result, a builder and project manager may be treated as vicariously liable for the work done on a project by other parties, and cannot exclude or limit their liability by apportioning any part of that liability to those other parties. However, it is still open to the builder and project manager to cross-claim against other parties who had breached a duty of care owed to them: *Pafburn Pty Ltd v The Owners–Strata Plan No 84674* (2024) 99 ALJR 148; [2024] HCA 49. See [26430].

Option and pre-emption clauses

Pre-emptive rights in closely-held group enterprises

Recognition of the legitimate economic interests protected by a pre-emption clause influences courts toward a reasonably liberal construction of such clauses: *Macquarie Retail Pty Ltd v Dexu Capital Funds Management Ltd* [2024] NSWSC 1413. See [41190].

Good faith clauses

Express obligations of good faith operate only within framework of contract

A pre-emption clause may be ineffective if it imposes obligations on a selling joint venturer's holding company rather than a subsidiary which is party to the agreement. A subsidiary has no power to compel its holding company to do anything. An obligation of good faith in a contract does not oblige the obligor to act contrary to its own interests, and in the interests of the other contracting party: *Re IG Power Callide Ltd (Administrators Appointed) (No 4)* [2024] FCA 1316. See [60283].

Good faith as an element of statutory unconscionable conduct

Failure to act with good faith may be a factor in the finding of unconscionable conduct. Breach of an express or implied duty of good faith may be pleaded as an element of a claim of statutory unconscionability under the Australian Consumer Law: *Lindfield NSW Pty Ltd v Netdeen Pty Ltd (t/as GJ Gardner Homes) (No 3)* [2024] NSWSC 1305. See [60930].

Penalty and forfeiture clauses

Default interest cases after *Cavendish Square* and *Paciocco*

A default interest rate of 0.05% per day (18.25% per annum) may be held to be penal and unenforceable, on the basis that it is out of proportion to, or unconscionable in comparison with, the maximum amount of damage that might be anticipated to flow from the breach: *Liu v Lam* [2024] NSWSC 1306. See [105341].

Application of the penalty doctrine after *Paciocco*

Where it is difficult to quantify the potential effect of the triggering event on the legitimate interests of the party protected at the time of making the contract, it is appropriate to uphold the parties' negotiated and agreed compensation regime: *New South Wales v Schofields Nominee No 5 Pty Ltd* [2024] NSWSC 1590. See [105361].

Onus of proof and evidence in penalty cases

Without evidence of likely loss calculated at the time of making a contract, there is no baseline for the calculation of "disproportionality", and no reason for the court to disturb the parties' agreed pre-estimate of otherwise unquantifiable potential loss: *New South Wales v Schofields Nominee No 5 Pty Ltd* [2024] NSWSC 1590. See [105395].

Relief against forfeiture of the tenant's interest in a lease – Court intervention

An application for relief against forfeiture may be opposed on grounds that a lessee is "hopelessly insolvent". However, even if that is established, that is not a decisive factor but a discretionary one: *Okami SA Newton Pty Ltd v Newton SC Pty Ltd* [2024] SASC 151. See [105680].

