

RULE AGAINST PENALTIES & RELIEF FROM GROM FORFEITURE

Equity will protect a person from the losses of property arising from a breach of contract where the injured party is benefited more by the breach of contract than by performance: *Hyman v Rose [1912]*

The Rule against Penalties

Penalties

- However, it, or a version of it, has been applied in both legal and equitable courts for many years: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd [1915] AC 79*.
- On one level the origin of the rule doesn't matter: *Austin v United Dominion Corporation [1984]*
- The better view is that it does matter because if the rule is equitable, then the standard of conduct that enables the rule is unconscientiousness: *Killarney Investments Pty Ltd v Macedonian Community of WA (Inc) [2007]*
- While if the rule is legal the standard is reasonableness: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd [1915]*
- The case law suggests that reasonableness is the better approach: *Bridge v Campbell Discount Co Ltd [1962]*

In contract

- Penalties arise in the context of legally regular contracts: *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992)*
- Freedom in the case included the broad, generally unrestricted, right to bind yourself to an agreement: *Ringrow Pty Ltd v BP Australia Pty Ltd (2005) CLR 656; AMEV-UDC Finance Ltd v Austin (1988)*
- Liquidated damages can occur on the unsuccessful completion of a contract: i.e. the two parties had both performed but one party is not satisfied with the performance that they have received.
- But, they can also arise under a contractual term during the performance of the contract: *O'Dea v Allstate Leasing Systems (WA) Pty Ltd (1983)*
- The rule that penalties only arose in breach of contract does not apply in Australia: *Andrews v ANZ Banking Group Ltd (2012)*
 - see also *Paciocco v ANZ [2014]* – breach required at law, not at equity – some additional detriment in the nature of a security for and in satisfaction of a primary stipulation.

Liquidated damages

- Genuine pre-estimate of loss in the form of a stipulated sum payable upon the happening of an event: *Environmental System Pty Ltd v Peerless Holdings Pty Ltd (2008)*
- With LD's in the K, the onus of proof reversed – enforcing party need not prove breach or damage (no duty to mitigate), generally just follow notice of breach process in contract
- The burden of showing that the "debt" is a penalty is on the person seeking to escape the "debt": *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992)*
- Most common is payable an amount on the occurrence of a particular event.
 - But it relief can be:
 - Transfer of personal property: *Wallondilly Shire Council v Picton Power Lines Pty Ltd*
 - The right to withhold payments: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974]*
 - The recovery of property previously transferred: *General Trading Company (Holdings) Ltd v Richmond Corporation Ltd [2008]*
- While a contractual right to recover the full value of the contract is enforceable, it must not provide a windfall, or other added benefit: *The Protector Endowment Loan Co v Grice (1880)*

Test for penalty

What is a penalty?

A Penalty is an amount provided in a Liquidated damages clause that is intended to punish the party who breaches the agreement: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd [1915] AC 79*

The established test for a penalty was laid down in: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd [1915]*

The court looks to:

1. The nature of the contract at the time of entering the contract;
2. The substance of the clause;
3. The object of the clause: *Robophone Facilities Ltd v Blank [1966]*
4. The amount of the penalty/debt;
5. The formula and the meaning of valuing the sum: *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992)*
6. The circumstances under which:
 - a. The contract is entered;
 - b. The contract is performed; or
 - c. The payment is paid;
7. The amount of the loss be effectively estimated at the time of entering the contract: *Tasmania v Leighton Contractors Pty Ltd (2005)*

A. At the time of entering the contract

The clause is to be construed according to the circumstances as at the time of entering the contract, including the:

1. Nature of the contract;
2. Purpose of the contract; and
3. The position of the parties to protect their interests: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd [1915]*