

LAW3103 Equity – Semester 1 2015 Exam Notes

1. Rule against penalties and relief from forfeiture
2. Estoppel
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SAMPLE

1 Rule against Penalties & Relief from forfeiture

1.1 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] 2 NSWLR 612.
- 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] WASCA 180.
- While if the rule is legal the standard is reasonableness: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79.
- The case law suggests that reasonableness is the better approach: *Bridge v Campbell Discount Co Ltd* [1962] AC 600.

In contract

- Penalties arise in the context of legally regular contracts: *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504.
- 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) 224 CLR 656; *AMEV-UDC Finance Ltd v Austin* (1988) 162 CLR 170.
- 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) 152 CLR 359.
- The rule that penalties only arose in breach of contract does not apply in Australia: *Andrews v ANZ Banking Group Ltd* (2012) 247 CLR 205.
 - see also *Paciocco v ANZ* [2014] FCA 35 – 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) 19 VR 358
- 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) 33 NSWLR 504 Cole J, 527
- 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* [1994] 33 NSWLR 551.

- The right to withhold payments: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689.
- The recovery of property previously transferred: *General Trading Company (Holdings) Ltd v Richmond Corporation Ltd* [2008] 2 Lloyd's Reports 475
- 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) 5 QBD 121

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

Test for penalty

- The established test for a penalty was laid down in: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79 and affirmed in: *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656.
- The court looks to:
 - The nature of the contract at the time of entering the contract;
 - the substance of the clause;
 - the object of the clause: *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1,428
 - the amount of the penalty/debt;
 - the formula and the meaning of valuing the sum: *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504; *De Francesch Builders Pty Ltd v Riley* [2000] WASC 301.
 - the circumstances under which:
 - the contract is entered;
 - the contract is performed; or
 - the payment is paid;
 - the amount of the loss be effectively estimated at the time of entering the contract: *Tasmania v Leighton Contractors Pty Ltd* (2005) 15 TasR 243 The Court, 252.
- Nature
 - The clause is to be construed according to the circumstances as at the time of entering the contract, including the:
 - nature of the contract;
 - purpose of the contract; and
 - the position of the parties to protect their interests: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79; *Public Works Commissioner v Hills* [1906] AC 368; *Webster v Bosanquet* [1912] AC 394.
- Substance
 - the review looks to the substance of the clause not its title: *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Yzquierdo y Castanenda* [1905] AC 6.
- Object
 - What is it seeking to achieve?

- Amount, is it unreasonable?
 - If the clause provides for an extravagant and/or unconscionable amount in comparison to the amount of the likely loss it is likely to be a penalty: *AMEV-UDC Finance Ltd v Austin* (1988) 162 CLR 170.
 - When considering the reasonableness of the Liquidated damages compared to the actual loss, the freedom of the parties should not be limited lightly: *Lordsvale Finance Ltd v Bank of Zambia* [1996] QB 752; *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1,428, Diplock LJ, 1,447; *AMEV- UDC Finance Limited v Austin* (1986) 162 CLR 170 Mason & Wilson JJ, 190.
- Where the breach of contract is the failure to pay an amount, a clause that requires the payment of a larger amount is prima-facie a penalty: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79.
- The effect of the clause can be to create a debt that the “breaching” party must pay, but it can be a deduction from the price that the “injured” party has to pay: *Tasmania v Leighton Contractors Pty Ltd* (2005) 15 TasR 243.
- **Proportionality?** Where the clause provides for a set outcome that does not vary with the extent of the harm or the seriousness of the breach that is prima-facie a penalty: *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79; *AMEV-UDC Finance Ltd v Austin* (1988) 162 CLR 170; *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131.