SUPREME COURT OF QUEENSLAND

CITATION:	*GWC Property Group Pty Ltd v Higginson & Ors* [2014] QSC 264
PARTIES:	**GWC PROPERTY GROUP PTY LTD** **ACN 076 760 355** (plaintiff) **v** **FRANK CHARLES HIGGINSON** (first defendant) and **ROBERT HYNES** (second defendant) and **WARREN PETER JIEAR** (third defendant) and **GLENN RAYMOND VASSALLO** (fourth defendant)
FILE NO/S:	807/2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2014
JUDGE:	Dalton J
ORDER:	**Judgment for the first, second and third defendants against the plaintiff.**
CATCHWORDS:	*AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 *Andrews v ANZ Banking Group Ltd* (2012) 247 CLR 205 *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* [2014] VSCA 32 *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86 *Manks v Whiteley* [1912] 1 Ch 735 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1982-1983) 152 CLR 359 *Ringrow Pty Ltd v BP Australia Pty Ltd & Ors* (2005) 224 CLR 656 *Talal El Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539

COUNSEL:	M Luchich for the plaintiff L Harrison QC for the first, second and third defendants No appearance for the fourth defendant
SOLICITORS:	Herbert Smith Freehills for the plaintiff QBM Lawyers for the first, second and third defendants

[1] This is an application by the first, second and third defendants for summary judgment.[1] The plaintiff owns office premises at Montpelier Road, Bowen Hills. Its predecessor in title let the premises to Hynes Lawyers Pty Ltd, now in liquidation. There were two documents, a lease and an Incentive Deed. The first, second and third defendants guaranteed the obligations of Hynes Lawyers pursuant to both documents. This proceeding involves no claim on the lease and no claim against the tenant, Hynes Lawyers. The first, second and third defendants are sued as guarantors under the Incentive Deed. The plaintiff claims some $1.2 million as the amount of incentives which Hynes Lawyers received pursuant to the provisions of the Incentive Deed and has failed to repay on termination, in accordance with the terms of the deed. The defendants say that the provisions pursuant to which the plaintiff claims are penalties.[2]

Summary judgment

[2] The application is brought pursuant to r 293. I have regard to the *Deputy Commissioner of Taxation v Salcedo*[3] – there is no gloss to be added to the words of the rule. The question is whether there is any real prospect of the plaintiff succeeding on its claim.

[3] The plaintiff urged that I ought not determine this matter on a summary judgment because it involves difficult questions of law. That has never been a reason not to determine a matter summarily. In *AMEV-UDC Finance Ltd v Austin*,[4] Mason and Wilson JJ described the doctrine of penalties as having pursued a "tortuous path in the course of its long development". This is undoubted, and the decision in *Andrews v ANZ*[5] raises questions as to the future development of the doctrine: cf the statement earlier in the *AMEV* judgment, "any attempt to exhume a discretionary jurisdiction to grant relief, which has not been exercised for more than a century, is bound to bring complications in its train". For reasons which I explain, I am not of the view that those complications particularly beset this matter and, in any case, they are no more easily solved after a hearing at trial than after hearing an application. I am not convinced that there is any factual uncertainty as to the matters for my determination on this application. I accept that issues ought not be finally determined in a summary way except in clear cases, but nonetheless, I am content to proceed to determine this matter on a summary judgment application. It

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1 The fourth defendant did not attend the application.

2 I should note that the point about penalties is not the only defence raised in the proceeding and that my outline of facts is only of those few facts which are relevant to the penalty point; it is not complete.

3 [2005] 2 Qd R 232, [11], [17].

4 (1986) 162 CLR 170, 186.

5 (2012) 247 CLR 205.

was set down in the civil list and fully argued by respected counsel on both sides of the bar table.

The Documents

[4] The lease and the Incentive Deed were entered into on the same day – 11 November 2010. The lease was in a standard form. The lease was for a term of seven years, with three options. Rent was $767,715 per annum, to be paid monthly. There was a "signage fee" of $15,000 per annum, to be paid annually. The tenant was prohibited from assigning or sub-letting, without the landlord's consent (which was not to be unreasonably withheld).

[5] The first, second and third defendants signed the lease as guarantors, according to cl 27.2, in consideration for the landlord agreeing to grant the lease to the tenant at the request of the guarantors. They promised to guarantee the tenant's obligations under the lease and to indemnify the landlord against liability, loss or damage arising from the tenant's breach or repudiation of the lease.

[6] The Incentive Deed is recited to be "intended to supplement the Lease". It is recited that the landlord had agreed to make a contribution to the tenant's fit-out; grant a rent abatement; and grant a signage fee abatement. The Incentive Deed is a short document which, apart from an obligation on the tenant to keep its provisions confidential, contains no substantial primary obligations on the part of the tenant, but rather provisions by which the landlord is obliged to allow the tenant money or monies-worth.

[7] The Incentive Deed provided for a payment per square metre of net lettable area as the landlord's contribution to the tenant's fit-out. There are some conditions as to the payment of that contribution, and then the following clause:

> "**2.4 Repayment of Contribution**
>
> (a) If the Lease is terminated at any time during the initial Term (other than by expiry of the term or by reason of the Lessor's default), or the Lessee otherwise parts with possession of the Premises by assignment or subletting without the consent of the Lessor as required under the Lease, then the Lessee will pay to the Lessor a sum calculated as follows:
>
> $$\frac{DR \times C}{DT}$$
>
> Where:
>
> (i) DR is the number of days between the date the Lease is terminated or the Lessee parts with possession (as the case may be) and the Expiry Date;
>
> (ii) DT is the number of days between the Commencement Date and the Expiry Date; and
>
> (iii) C is the Contribution.
>
> (b) The amount in clause 2.4(a) is payable within five (5) business days after the date the Lease is terminated or the Lessee parts with possession (as the case may be).

(c) The Lessee's obligations under clause 2.4(a) and 2.4(b) do not affect any other rights of the Lessor against the Lessee.

(d) If the Lessee assigns or transfers its interest in the Lease in accordance with its terms, then in lieu of having to comply with clauses 2.4(a) and 2.4(b), the Lessee must obtain a covenant from the assignee/transferee (as the case may be) in favour of the Lessor on terms acceptable by the Lessor to honour the obligations of the Lessee under this deed."

[8] By cl 2.2 of the Incentive Deed the landlord and tenant agreed that the landlord would own all items paid for with the fit-out contribution.

[9] At cl 3.1 of the Incentive Deed was a provision whereby the landlord granted the tenant a rent abatement over the first three years of the lease. The rent abatement amount was calculated as a lump sum; divided by 36, and was to be allowed to the tenant at monthly intervals. There is no provision making the monthly abatement conditional upon timely payment of the rent, or the tenant otherwise being in good standing. Clause 3.1(a) simply provides that, "the rent payable for each month of the first three years of the initial term will be reduced by an amount equal to the contribution divided by 36". Then there was the following clause:

"**3.3 Repayment of Rent Abatement Amount**

If:

(a) the Lessee terminates the Lease otherwise than in accordance with its rights under the Lease or at law; or

(b) the Lessor validly terminates the Lease consequent upon a default of the Lessee (and the Lessee does not obtain relief against forfeiture in respect of that termination),

the Lessor is entitled to claim (without prejudice to any other claim the Lessor has against the Lessee or the Lessee's Associate) as a liquidated debt from the Lessee and the Lessee must pay on demand from the Lessor, such of the Rent Abatement Amount that has been abated by the Lessee pursuant to this clause 3."

[10] Lastly, the Incentive Deed provided that the landlord granted the tenant a signage fee abatement for the first three years of the lease. It appears that there is simply no amount payable as signage fees for those three years – cl 4.1(a). Then cl 4.3 made a provision in identical terms to cl 3.3 set out above, save that the words "signage fee" were used in the final sentence rather than the words "rent abatement amount".

[11] At cl 12 of the Incentive Deed is a guarantee and indemnity. The first, second and third defendants guarantee the observance and performance of the tenant's obligations under the deed and promise to indemnify the landlord against liability, loss and damage arising from the tenant's breach or repudiation of the deed. They do so in consideration of the landlord agreeing to enter into the deed with the tenant at the request of the guarantors.

[12] The lease was to be registered. The Incentive Deed contained a clause that its terms and conditions were private and confidential between landlord and tenant. The

tenant promised not to divulge any details of the deed, except in limited circumstances – cl 5.

[13] The tenant entered into possession. The plaintiff's predecessor in title paid the amounts due for fit-out and allowed the tenant the benefit of the rent abatement and signage fee abatement. Then the predecessor in title sold the premises to the plaintiff. I assume without deciding that the plaintiff took an assignment of all the rights and interests of its predecessor under the Incentive Deed.

[14] The lease was terminated by the plaintiff. It is pleaded that on 20 May 2013 the tenant abandoned the premises in breach of the lease and that on 12 June 2013 the plaintiff accepted that repudiation and terminated the lease. The plaintiff's affidavit material swears to this, and was not contradicted by material on behalf of the defendants. There is nothing substantive pleaded by way of dispute to this allegation in the defence.

[15] The lease and Incentive Deed were signed on the same day between the same parties. They deal with the same tenancy of the same premises. The Incentive Deed is recited to be supplementary to the lease and its substance is supplementary to it: it reduces the tenant's obligation to pay rent and signage fees and obliges the landlord to fit-out the premises. The Incentive Deed provides at cl 1(b) that words defined in the lease have the same meaning in the Incentive Deed. The lease was to be registered. Therefore its commercial terms would be public knowledge. The reason for a separate Incentive Deed may well be found in the confidentiality provision in that deed. It is no doubt in the landlord's interest that the market perception of the value of the leasehold is high.

[16] Documents entered into at the same time, between the same parties, and dealing with the same subject matter, are construed as if they were one document.[6] This is more than a rule of construction. The reason is as Fletcher Moulton LJ said in *Manks v Whiteley*,[7] "Each [of the several documents] is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole". The parties' rights are to be determined having regard to the provisions of the lease and the Incentive Deed.

Events Triggering Obligation to Repay Incentives

[17] I deal first with the nature of the events upon which the rights to the impugned payments arise, although perhaps this point is only of historical interest. The position is stated very succinctly by Harder:

> "Contractual clauses that purport to impose a penalty in the event of breach are unenforceable at common law. In *Andrews v ANZ*, the High Court of Australia held that the rule against penalties can apply even though the event triggering the alleged penalty is not a breach of contract. This differs from the law in all jurisdictions of the

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6 Lewison and Hughes, *The Interpretation of Contracts in Australia* (Lawbook Company, 2012) [3.03] and the cases cited there. See also *Eaton v LDC Finance Limited (in receivership)* [2012] NZHC 1105, [288] ff.

7 [1912] 1 Ch 735, 754-5.

> United Kingdom and from the previous understanding of Australian law."[8]

[18] In *Andrews*, at paragraph [10], the High Court said:

> "In general terms, a stipulation *prima facie* imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation."

[19] It can be seen that the clauses at 2.4, 3.3 and 4.3 are in the nature of secondary obligations on the tenant to pay amounts of money to the landlord. The occasion for that payment differs as between cl 2.4 on the one hand, and cll 3.3 and 4.3 on the other.

[20] The obligations to pay pursuant to cll 3.3 and 4.3 arise either upon a wrongful termination by the tenant (a breach) or termination by the landlord for breach by the tenant. In either case there must be a breach by the tenant, although the trigger in the second case is termination by the landlord, ie., acceptance of that breach. At least since the decision in *Cooden Engineering Co Ltd v Stanford*[9] a payment to be made on such an event will attract consideration of the law of penalties, for notwithstanding the requirement for acceptance of it, the amount to be paid is, "plainly a sum to be paid in consequence of the breach".

[21] Money will be payable pursuant to cl 2.4 if (i) the lease is terminated during the initial term other than by effluxion of time or the landlord's default or (ii) the tenant wrongfully assigns or sub-lets. Viewing the matter as at the time of execution, it was possible that there would be termination during the initial term which was other than by expiry of time or default on the part of either landlord or tenant. There could be termination after a natural disaster – see cl 18.7. There could also be termination if the tenant was wound up: see cl 18.1 and the definition of Event of Default. In short, it was possible for the lease to be terminated within the meaning of cl 2.4(a) of the Incentive Deed without the tenant being in breach of the lease.

[22] Thus one of the events which gives rise to the obligation to repay at cl 2.4 is a termination which may be for breach, but may also be for other reasons, eg., the tenant going into liquidation in circumstances where it does not promise to prevent that, or an event beyond anyone's control, such as a natural disaster. The clause considered in *Cooden Engineering* was a similar type of clause.[10] So was the clause in *AMEV-UDC*.

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8 Harder, S, "The Relevance of Breach to the Applicability of the Rule against Penalties" (2013) 30 *Journal of Contract Law* 52.

9 [1953] 1 QB 86, 96-97.

10 Clause 11, see p 93 of the judgment.

[23] The clause in *Cooden* provided that the sum became payable on breach or if the hirer should die. Jenkins LJ dissented in *Cooden* on the basis that were the amount of money to become due on death of the hirer, there would be no breach and therefore no penalty, "… and that being so it seems to me impossible to invest the same sum with the character of a penalty where the determination by reason of which it becomes payable happens to be brought about by notice founded on … some breach of contract on the part of the hirer".[11] This reasoning probably does sit more comfortably with the rule that the question of whether or not a clause is a penalty should be determined as at the date the contract is made, rather than at the date of breach. Jenkins LJ however was in the minority in that case. Somervell LJ and Hodson LJ concluded that because, in fact, that contract had been terminated for breach, it was proper to consider whether or not the clause was a penalty.[12] Lord Hodson said he reached the conclusion because he thought it was "undesirable to be over-subtle in dealing with commercial documents of this kind" – p 113 – and said of the contrary view, "I am unable to accept this contention, which seems to involve that a draftsman of a written contract can always draw his document in such a way as to defeat the common law by incorporating in the same clause provisions dealing with the right to determine the contract on the occurrence of an infinite number of events only one of which is a breach of contract" – p 116.

[24] In *O'Dea v Allstates Leasing System (WA) Pty Ltd*[13] Gibbs CJ said:

> "There was some controversy as to the position when the owner's right to terminate the contract and receive payment arose on the happening of any of a number of events, some of which were breaches and some of which were not, but it has now been settled in England that in such a case where the agreement is terminated by reason of a breach committed by the hirer, the sum payable will be a penalty unless it is a genuine pre-estimate of the loss suffered by the owner by reason of the breach: *Cooden Engineering Co Ltd v Stanford; Campbell Discount Co Ltd v Bridge; Financings Ltd v Baldock.* I respectfully agree with that conclusion." (footnotes omitted).

[25] There was no view expressed to the contrary of this in *O'Dea*, although the clause in that case provided for payment only on breach.

[26] In *AMEV-UDC*[14] Mason and Wilson JJ also expressed support for the majority view in *Cooden* on this point:

> "What is the position if the option is exercisable by the owner in a hire purchase agreement or the lessor in a chattel lease on the happening of any one of a series of events, some of which are breaches of contract on the part of the hirer and some of which are not? If the option is exercised on the occasion of the hirer's breach of contract, it accords with principle and authority to say that the sum is payable in respect of the breach of contract and is a penalty, unless it is a genuine pre-estimate of damage … The point is that the doctrine is concerned with matters of substance, not of form …"[15]

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11 (Above) pp 110-111, and see the authorities cited there.

12 Page 98 per Somervell LJ and pp 113-116 per Hodson LJ.

13 (1982-1983) 152 CLR 359, 367.

14 (Above) pp 184-185.

15 Citations omitted, including to the passage of Gibbs CJ in *O'Dea* and to *Cooden Engineering.*

Dawson J was of the same view – pp 210-211.

[27] Thus it seems to me that before *Andrews,* the better view in Australia, as well as England, was that a clause such as cl 2.4 in the present case was of the type which would be examined to see whether it was a penalty in a case such as this where termination was for breach. I do not read the decision in *Andrews* as compelling to the contrary, notwithstanding that the words in paragraph [10] of that case do not readily accommodate the contractual facts here, see below at [37].

Payment on Condition

[28] The plaintiff argued that the repayments it sought were properly viewed not as punitive payments on breach but as restitutionary repayments. It was said that the incentives offered to the tenant were conditional and that termination of the lease merely provided the occasion for the relevant repayment condition to be activated. It was said that the conditional payment was just part of the price or consideration for the parties' bargain, ie., part of the overall commercial exchange. I reject these arguments.

[29] Once again I think that there is a conceptual difference between cl 2.4 on the one hand and cll 3.3 and 4.3 on the other. With regard to the latter clauses, the parties made provision for the payment of rent at a higher rate, and signage fees, and then modified these obligations by the abatement clauses. The provision at cl 2.4 is different in that there there was no primary obligation on the tenant to fit-out the premises, or to fit-out the premises to any particular standard. By the Incentive Deed the obligation was on the landlord to contribute to fit-out; that was not in modification of any pre-existing obligation on the tenant.

[30] Notwithstanding this difference, it seems to me that all three payments contended for by the plaintiff share the characteristic that had the tenant not breached the lease agreement, or had it breached the lease agreement only in ways which did not move the landlord to terminate, the sums of money claimed in this proceeding would never have been payable. These sums are not analogous to the acceleration of a delayed payment of monies which will eventually be paid if the contract is fully performed. Nor do I think they are analogous to the types of payments discussed in *Astley v Weldon*[16] where a higher price is paid if a payment is made at a later date, but nevertheless in the course of an ongoing contract. They are pecuniary obligations which will never arise except on termination.

[31] The payments pursuant to cll 3.3 and 4.3 lend themselves most closely to the type of argument advanced in *O'Dea* viz., that the higher rent and the signage fees were due pursuant to the lease, but for the conditional indulgence granted in the Incentive Deed, so that termination just brought about the withdrawal of that indulgence.[17] The difficulty is, however, that unabated rent and signage fees could never have

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16 (1801) 126 ER 1318, 1322-1323. "It is a well known rule in equity, that if a mortgage covenant be to pay 5 per cent and if the interest to be paid on certain days then to be reduced to 4 per cent the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay 4 per cent and if the party do not pay at a certain time it shall be raised to 5 there the Court of Chancery will relieve."

17 cf Dawson J in *AMEV-UDC* at p 209.

been said to be due while the lease and Incentive Deed remained on foot. In this respect the case for the defendants is a stronger one than the hirer's case in *O'Dea.*

[32] The plaintiff's argument is simply that it is suing for a contractual sum due on a specified event. The difficulty is that the specified event is termination of the lease on breach by the tenant and, even on the pre-*Andrews'* law, such a clause was subject to review as a penalty – cf Roskill LJ in *Export Credits Guarantee Dept v Universal Oil Products Co*, "The clause was not a penalty clause because it provided for payment of money on the happening of a specified event other than a breach of contractual duty owed by the contemplated payor to the contemplated payee".[18] This case contrasts.

[33] The plaintiff's argument was similar to that which was rejected in *Talal El Makdessi v Cavendish Square Holdings BV.*[19] In that case a contractual provision that a party would pay a sum of money upon his breach of contract was described as "the paradigm case in which the law of penalties is engaged" – [46]. Similar to that is the statement in *Ringrow Pty Ltd v BP Australia Pty Ltd & Ors*,[20] "The law of penalties, in its standard application, is attracted where a contract stipulates that on breach the contract-breaker will pay an agreed sum." In that case the idea that the penalty doctrine did not apply because the impugned provision was part of the consideration was rejected by the High Court – see [37] and [38]. The Court said of this argument, "By itself, that point could not prevent a conclusion that a contractual term was a penalty, for in almost every case the impugned term will be part of the consideration for the innocent party's promises, and it can be said that if it had not been so, the other elements of the consideration required by the innocent party would be more valuable".

[34] Part of the plaintiff's argument was the idea that the Incentive Deed was to be looked at separately from the lease. The Incentive Deed, it was said, contained no stipulation that the tenant was to comply with the terms of the lease; the purpose of the Incentive Deed was to persuade the tenant to enter into the lease and the repayment clauses in the deed were thus restitutionary in nature, for they came into operation only when the landlord had not obtained what it paid the incentive for. For the reasons outlined above, I reject this approach as commercially artificial. The bargain between the parties was as evidenced by the combined terms of the lease and Incentive Deed: it was that the tenant would pay the abated prices for rent and signage fees on condition that the landlord paid for the fit-out.

[35] The report of *Ringrow* at first instance[21] sets out the successful argument that the option to purchase in that case was not a penalty but part of a restitutionary benefit given "as part of the vendor and purchaser arrangement" – [107]. In that case there was a series of agreements and an option to re-purchase a service station site became exercisable upon termination of another agreement. Hely J held on all the facts there that the option deed was "not a means of providing BP with any form of compensation in respect of a breach of the [terminated agreement]" – [109]. The option was properly seen as a contractual means of the parties disengaging when the arrangements between them came to an end on termination of one of the central contracts between them.

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18 [1983] 1 WLR 399, 402.
19 [2013] EWCA Civ 1539.
20 (2005) 224 CLR 656, [10].
21 (2003) 203 ALR 281 at [95] ff.

[36] The situation here contrasts in substance. By the bargain contained in the lease and Incentive Deed, the landlord obtained abated rent and fees in consideration for its lease of the premises, together with the fit-out payment. Had the contract been performed according to its terms, that is all the landlord was entitled to. The repayment clauses at cll 2.4, 3.3 and 4.3 of the Incentive Deed sought to give the landlord an advantage which it would not have had if the lease were performed according to its terms. Before the lease and Incentive Deed were signed the landlord was in the position that its potential tenant would contract only on the basis that it received abatements and a fit-out. The impugned clauses do not restore the landlord to that pre-contractual position; they give it an advantage which it would never have had if the lease had uneventfully run its term.

[37] As a matter of semantics, it is difficult to accommodate the words of paragraph [10] of *Andrews* to the contractual provisions here. To do so, the repayment provisions must be regarded as collateral to the primary promises of the tenant not to breach the lease in such a way as to repudiate it. This is a little untidy, but the introductory words to paragraph [10], "in general terms", show that the High Court was not defining, but describing. As I read it, the case marks a return to a more flexible approach to the law about penalties, so that the "general terms" of paragraph [10] should not be used as though they were a formula to be rigidly applied. The decision in *Andrews* could certainly not be regarded as one which narrowed the scope of the penalties doctrine as it was understood before the case and, as I hope the above discussion has demonstrated, the contractual facts of this case fit within those older cases. Certainly the second half of paragraph [10] in *Andrews* applies comfortably enough here – upon failure of the tenant to refrain from breaches allowing the landlord to terminate, the repayment clauses imposed upon the tenant an additional detriment to the benefit of the landlord.

[38] The impugned clauses thus fall to be examined to see whether they are penal or acceptable as payments of liquidated damages.

Genuine pre-estimate of Damages

[39] To establish that they are penal, the defendants needed to show that the impugned clauses stipulated for repayments which were extravagant and unconscionable in comparison with the maximum loss that might be suffered on breach of contract.[22] The test is an objective one not related to the parties' states of mind. Matters are to be judged as at the time the contract was made. In my view the repayment clauses here do impose obligations which are substantially in excess of any genuine pre-estimate of damages. In addition to contractual damages for breach of the lease, the landlord was entitled, by the repayment clauses, to recover monies to which it would never have been entitled had the lease run its course. In effect, it was entitled to recover as though the tenant had agreed to the rent and signage fees without any abatement, and as though it had not been necessary for the landlord to pay the fit-out incentive in order to complete the bargain with the tenant. It is true that all three impugned clauses limit repayment to specified times, rather than require repayment for the whole period relevant to contractual damages. Nonetheless, the repayment clauses meant that on termination the landlord was entitled to damages

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22 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, 86-87 cited in *Ringrow* in the High Court (above), and see *Paciocco v ANZ Banking Group Ltd* [2014] FCA 35, [44].

for breach of the bargain it had made, and substantial additional payments by reference to a bargain it had not made.

[40] There was evidence on the application before me from a Mr Douglas on behalf of the plaintiff to the effect that the benefits given to the tenant by way of fit-out contribution and abatement in the Incentive Deed reflected prevailing market conditions. This is the very point. Only with those substantial financial concessions did the landlord obtain the lease it did. It is entitled to damages for breach of that lease but it is not entitled to extra payments on the basis that it might have obtained a higher price for its premises had the market conditions been better for it. It is not to the point that Mr Douglas opines that the fit-out may not be attractive to future tenants, or that future tenants might also require incentives such as those contained in the Incentive Deed. The parties' bargain was that the landlord would own the fit-out. If the landlord has difficulty in re-letting the premises, that fact will be adequately reflected in its contractual damages.

Compensation

[41] Based on the final words from paragraph [10] of *Andrews*, the plaintiff contended that judgment ought not be given against it because the question of whether or not, and in what amount, it should be compensated, in lieu of receiving the repayments stipulated at cll 2.4, 3.3 and 4.3, ought to go to trial.

[42] Before the Judicature Acts, "when equity granted relief against a penalty, it always required the recipient of its favours, as a condition of relief, to pay the damage which the other party had really sustained".[23] After the Judicature Acts there appears not to be any reported instance of this mode of proceeding, but instead penalty provisions were not enforced and damages were assessed according to contractual principles.[24] There was debate about whether or not penalty clauses were void *ab initio* or simply unenforceable.[25]

[43] It appears from the final sentence at paragraph [10] in *Andrews*, and also from the comments at [58] and [60] in that case that, consistent with the High Court's reassertion of the penalty doctrine as a rule of equity not law, a penalty clause will no longer be regarded as ineffective, but will be enforced to provide compensation "for the prejudice suffered by the failure of the primary stipulation". That is how *Andrews* has been interpreted, see *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd*.[26] A question arises as to the basis upon which this compensation is to be assessed – ie., is it to be any different from that on which contractual damages are assessed.

[44] *AMEV-UDC* in the High Court was concerned with the amount of damages to be paid on an assessment after a clause in a hire purchase agreement was found to be a penalty. In that case the owner terminated the hire purchase agreement when one instalment of rent had not been paid within seven days of the due date. The termination was not for repudiation, for such a breach did not amount to repudiation at common law, but was pursuant to a term in the hire purchase contract allowing

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23 Per Lord Denning in *Campbell Discount Co Ltd v Bridge* [1962] AC 600, p 632, cited by Mason and Wilson JJ in *AMEV-UDC* (above).

24 *AMEV-UDC* (above), for example, p 189.

25 *AMEV-UDC* (above), p 192.

26 [2014] VSCA 32, [55]-[56].

termination in those circumstances. The clause, which provided that on termination by the owner the entire rent was to become due and payable, was found to be a penalty. The primary judge assessed damages on the basis that the owner was entitled in contract law to recover the balance outstanding as at the date of the breach of contract, but was also entitled to recover something extra, broadly speaking, as compensation for the non-enforcement of the penalty clause. Gibbs CJ summarised the primary judge's reasoning as follows: "He said that even though the provision in the lease was a penalty it was not to be completely disregarded, and that to restrict the appellant's right to damages to rentals which had accrued prior to termination might mean that the equitable power to relieve against penalties would work an injustice to the appellant." – p 174.

[45] The High Court rejected that approach. The owner was entitled only to the damages recoverable in accordance with contract law principles. In a case where there had been termination on the basis of a contractual right, but no repudiation by the hirer, that amount was limited to the damage which flowed from the breach. In that case there was loss on the overall transaction, but it flowed from the owner's determining the agreement, not from the breach, and was accordingly irrecoverable – see Gibbs CJ at pp 174-176 and Mason and Wilson JJ at p 186.

[46] In *AMEV-UDC* the reasons of Mason and Wilson JJ in particular show that the restriction to the recovery of "an amount of damages no greater than that for which the law provides"[27] is linked to the notion that penalties were unenforceable at common law. There is no doubt that *Andrews* reasserts the equitable nature of the jurisdiction to relieve against penalties. However, it does not necessarily follow that *Andrews* changes the law that compensation for the failure of the primary stipulation will be assessed on some basis other than common law rules as to damages. In fact, the contrary appears from the High Court's express approval of the following statements from the judgment of Mason and Wilson JJ in *AMEV-UDC.* At paragraph [65] of *Andrews* the High Court expressly approves a statement from *AMEV-UDC* in which Mason and Wilson JJ dealt with this very topic:

> "(1) equity would only relieve where compensation could be made for the actual damage suffered by the party seeking to recover the penalty; (2) the actual damage suffered by the party was assessed in an action at common law, such as an action of covenant, or upon a special issue quantum damnificatus which could be joined in an action on the case … (3) the expression 'actual damage' seems to have been used in contradistinction to 'agreed sum' or 'liquidated' or 'stipulated' damages, not by way of opposition to damage which was recoverable at law; (4) there seems to have been no instance of equity awarding compensation over and above the amount awarded as common law damages, other than cases in which equity would not relieve against the penalty; and (5) relief was granted, in the case of penal bonds, where there was no express contractual promise to perform the condition (see *Hardy v Martin* [(121)]), though it seems such a promise could in many cases readily be implied." (my underlining).

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27 (Above) p 190.

[47] In *Andrews* the High Court disapproved the fifth of the above propositions, but expressly approved the other four. The third and fourth numbered points are to the effect that compensation for actual damage is in fact damages assessed according to common law principles. In the *AMEV-UDC* judgment, this series of numbered points comes at the end of an extensive review by Mason and Wilson JJ of the cases and history as to this very point. It is followed by a discussion at p 191 ff of that judgment as to the difficulties in awarding compensation on any other basis: see the statement at the foot of p 192, "In the majority of cases involving penalties, the courts, if called upon to assist in partial enforcement of the kind suggested by the appellant, would be required to undertake an unfamiliar role". And at p 193: "In the ultimate analysis, in whatever form it be expressed, the appellant's argument [that the penalty clause should be enforced to the extent to which it was not a penalty] amounts to an invitation to the Court to develop a new law of compensation, distinct from common law damages …"

[48] I allow for the possibility that there may come a time when the High Court does consider such a new law of compensation. That time has not yet come. There is no authority for the idea that compensation is to be assessed on any basis but damages recoverable at common law. The assessment is of compensation "for the prejudice suffered by failure of the primary stipulation" – *Andrews,* [10]. It is not compensation for the Court's refusing to enforce the penalty. In the simplest of cases where the failure of the primary stipulation is brought about by breach of contract, that assessment is exactly what common law damages for breach of contract does. More difficult questions may arise in cases where the failure of the primary stipulation is brought about by something which is not a breach of contract.

[49] The facts of this case provide no reason to doubt that common law damages would not be an adequate remedy. In this case the failure of the primary stipulation was brought about by, indeed was, a breach of contract. This was a commercial leasing transaction. The repayment clauses were wholly penal in their operation: providing for significant sums to be paid over and above damages which would be payable to the landlord at common law. Each of the repayment clauses expressly preserved the landlord's common law rights to damages.

[50] In practical terms there is a difficulty for the plaintiff, or at least that is what appears from the pleadings. It seems that the tenant has no money, so that if recovery is to be had, it will be recovery from the guarantors. It further appears that the landlord released the guarantors from their guarantee under the lease, or at least agreed to take a bank bond in satisfaction of that obligation. In the plaintiff's favour I assume that these things are so, and assume that the bank bond is inadequate to meet the whole amount of the landlord's common law damages for repudiation of the lease. The situation in which the landlord finds itself is a result of its own commercial decisions. There is nothing compelling in this circumstance which would warrant any compensation being made to the landlord under the Incentive Deed.

Disposition

[51] The plaintiff sues upon clauses which are wholly penal. For the reasons I have given, they should not be enforced. The plaintiff does not sue on the lease, only on the Incentive Deed. That deed does not contain substantial obligations on the part of the tenant apart from the secondary obligations in the clauses which I have found to be penal. There are no primary stipulations in the deed which the defendants

have breached, or which have otherwise failed. I am satisfied there is no injustice in my not enforcing the penalty clauses, for the plaintiff has, or has had, its rights at common law pursuant to the lease and the guarantees contained therein. In those circumstances, I give judgment for the first, second and third defendants against the plaintiff.

[52] I will hear the parties as to costs.