SUPREME COURT OF QUEENSLAND

CITATION:	*Grocon Constructors (Qld) Pty Ltd v Juniper Developer No. 2 Pty Ltd & Anor* [2015] QSC 102
PARTIES:	**GROCON CONSTRUCTORS (QLD) PTY LTD** **ACN 120 476 495** (plaintiff) **v** **JUNIPER DEVELOPERS NO. 2 PTY LTD** **(RECEIVERS AND MANAGERS APPOINTED)** **ACN 123 200 699** (first defendant) **RIDER LEVETT BUCKNALL (QLD) PTY LTD** **ACN 055 768 655** (second defendant) **JUNIPER DEVELOPER NO. 2 PTY LTD** **(RECEIVERS AND MANAGERS APPOINTED)** **ACN 123 200 699** (plaintiff) **v** **NORTON ROSE (A FIRM)** (defendant)
FILE NO/S:	BS No 9291 of 2011 BS No 2106 of 2013
DIVISION:	Trial
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	10, 11, and 12 September 2014
JUDGE:	Peter Lyons J
ORDER:	**1. The following question is answered 'no':** **Is clause 35.7 of the original contract pleaded in paragraph 4 of the statement of claim in proceeding BS9291 of 2011 void on the grounds that it imposes a penalty?** **2. It is declared that clause 35.7 of the building contract between the plaintiff and the first defendant in proceeding BS9291 of 2011 is neither void nor wholly or partly unenforceable.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK –

REMEDIES FOR BREACH OF CONTRACT – DISTINCTION BETWEEN PENALTY AND LIQUIDATED DAMAGES – where the first defendant contracted the plaintiff to design and construct a development – where the contract defined Practical Completion so that it might not be achieved if minor contractual obligations were not complied with – where a liquidated damages clause made liquidated damages payable if the plaintiff failed to achieve Practical Completion by the Date for Practical Completion – where the contract contemplated the first defendant's sale of residential units – whether delay of Practical Completion by reason of minor matters would prevent completion of sale of residential units – whether the liquidated damages clause was subject to the penalty doctrine and unenforceable – whether the liquidated damages clause stipulated a single sum for several events – whether the liquidated damages clause stipulated a sum that was extravagant and unconscionable in comparison with the greatest loss that could flow from a failure to achieve Practical Completion

INTERPRETATION – ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – WHEN EVIDENCE IS ADMISSIBLE – TO PROVE INTENTION OF PARTIES – OTHER CASES – where the parties led evidence regarding the negotiation of the liquidated damages clause including how the liquidated damages were to be calculated – whether extrinsic evidence is admissible in determining whether a liquidated damages clause is subject to the penalty doctrine

Acron Pacific Ltd v Offshore Oil NL [1985] HCA 63; (1985) 157 CLR 514, cited

Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 281 (TCC); (2005) 21 Const. L.J. 539, cited

AMEV-UDC Finance Ltd v Austin [1986] HCA 63; (1986) 162 CLR 170, cited

Andrews v Australia and New Zealand Banking Group Ltd [2012] HCA 30; (2012) 247 CLR 205, discussed

Ariston SRL v Charly Records Ltd (1990) Unreported; Court of Appeal (UK) 13 March 1990, distinguished.

Bridge v Campbell Discount Co Ltd [1962] AC 600; [1962] All ER 385, cited

Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd [2014] NSCA 32, cited

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1914] UKHL 1; [1915] AC 79, followed

Esanda Finance Corporation Ltd v Plessnig [1989] HCA 7; (1989) 166 CLR 131, followed

Fermiscan Pty Ltd v James [2009] NSWCA 355; (2009) 261 ALR 408, distinguished

GWC Property Group Pty Ltd v Higginson [2014] QSC 264, cited

Jarvis & Sons v Westminster City Council [1969] 3 All ER 1025, cited

Law v Local Board of Redditch [1892] 1 QB 127, cited

Lord Elphinstone v Monkland Iron and Coal Co (1886) 11 AC 332, followed

Luu v Sovereign Developments Pty Ltd [2006] NSWCA 40; (2006) 12 BPR 23, 629, cited

Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504, cited

Murray v Leisureplay plc [2005] EWCA Civ 963; [2005] IRLR 946, cited

Paciocco v Australia and New Zealand Banking Group Limited [2014] FCA 35; (2014) 309 ALR 249, discussed

Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50, discussed

Philips Hong Kong Ltd v Attorney General [1991] HKCA 205, discussed

Philips Hong Kong Ltd v Attorney General of Hong Kong [1993] 1 HKLR 269, cited

Riggall v Thompson [2010] QCA 144, followed

Ringrow Pty Ltd v BP Australia Pty Ltd [2005] HCA 71; (2005) 224 CLR 656, followed

Spiers Earthworks Pty Ltd v Landtech Projects Corporation Pty Ltd (No 2) [2012] WASCA 53; (2012) 287 ALR 360, discussed

Tasmania v Leighton Contractors Pty Ltd [2005] TASSC 133; (2005) 15 Tas R 243, cited

Waterside Workers' Federation of Australia v Stewart [1919] HCA 63; (1919) 27 CLR 119, cited

Zachariadis v Allforks Australia Pty Ltd, (2005) 26 VR 47, cited

COUNSEL: **In BS No 9291 of 2011**
JK Bond QC with MH Hindman for the plaintiff

P Dunning QC with P Franco for the first defendant
No appearance for the second defendant

In BS No 2106 of 2013
P Dunning QC with P Franco for the plaintiff
J McKenna QC with T Pincus for the defendant

SOLICITORS: **In BS No 9291 of 2011**
Minter Ellison for the plaintiff
Holding Redlich for the first defendant
No appearance for the second defendant

In BS No 2106 of 2013
Holding Redlich for the plaintiff
Bartley Cohen for the second defendant

[1] The relief which the plaintiff (*Grocon*) has sought in Action No 9291 of 2011 includes a claim for a declaration that clause 35.7 (*liquidated damages clause*) of its contract with the first defendant (*Juniper*) was void on the ground that it imposes a penalty. These proceedings are to determine that question, in advance of the trial of the action.

Background

[2] Juniper undertook the development of land located at the beach-side end of Cavill Mall in Surfers Paradise (*site*). The development is referred to as the Soul Project. It comprised underground car parking, some 40 retail outlets, and residential apartments or units. The material referred to a retail south tower; and to a 77 storey tower, principally to accommodate residential development.

[3] Under the contract, Grocon undertook the design and construction for the project. The General Conditions of Contract (*GCC*) were based on the standard form AS4300-1995, with modifications.

[4] Legal advice relating to the preparation of the contract was provided to Juniper by Deacons (now *Norton Rose*).

[5] Grocon has sued Juniper for an amount in excess of $10 million, generally for unpaid money for work under the contract, prolongation costs, variations and interest. Juniper has counterclaimed for liquidated damages in a sum of $33.6 million, or alternatively for $28.5 million for damages for delay; and has also made other claims. These parties sought the early determination of the question about cl 35.7, because it was anticipated that that might significantly reduce the length of the trial, with additional substantial savings relating to the costs of preparation for trial.

[6] In a separate action, Juniper has sued Norton Rose in relation to its role in the preparation of the contract. It is common ground that in that action, a question will arise as to whether the liquidated damages clause is in fact a penalty. Hence the participation of Norton Rose in the present proceedings.

[7] There was a contest about the admissibility of some evidence of events leading up to the formation of the contract. Consistent with the approach of the parties, I propose to deal with the question raised in these proceedings, without reference to that evidence; and then to consider its admissibility, and, if appropriate, its effect on the determination of the question. Before doing that, it is convenient to note some provisions of the contract.

Contract

[8] Under the contract, the work was divided into four Separable Portions (*SPs*). SP1 was the retail south tower and associated car parking; SP2 was residential development to Level 39 and associated car spaces (excluding some work below this level); SP3 dealt with what were described as the "Remaining Works" in the contract; and SP4, with what were described as the "Gold Coast Council Works".

[9] By GCC cl 3.1, Grocon was obliged to "bring the Works to the stage of Practical Completion." Clause 35.2 was as follows:

> "**35.2 Time for Practical Completion**
>
> The Contractor must execute the Work under the Contract so as to achieve Practical Completion by the Date for Practical Completion.
>
> On the Date of Practical Completion the Contractor must give possession of the Site and the Works to the Principal."

[10] These provisions used terms defined in the contract. Amongst the relevant definitions are the following:

> "**Date for Practical Completion** means the date specified in Annexure Part A, but if an extension of time for Practical Completion is granted by the Independent Certifier or determined in any dispute resolution process or extended by the Project Manager, it means the date resulting from that extension of time;
>
> **Date of Practical Completion** means:
>
> (a) the date certified by the Independent Certifier in a Certificate of Practical Completion to be the date upon which Practical Completion was reached; or
>
> (b) where another date is determined in any arbitration or litigation as the date upon which Practical Completion was reached, that other date."

[11] As to the application of these definitions and some other terms, cl 35.3 provided as follows:

> "**35.3 Separable Portions**
>
> The interpretation of:
>
> (1) Date for Practical Completion;

(2) Date of Practical Completion; and

(3) Practical Completion,

and Clauses 16, 35, 38 and 42.3 apply separately to each Separable Portion and references in those Clauses to the Works and to Work under the Contract mean so much of the Works and the Work under the Contract as is comprised in the relevant Separable Portion."

[12] It is sufficient to record the definition of Practical Completion for SP2. The same definition was used for SP3; and this definition was modified for the other two SPs, with adjustments to reflect the differences in the work. The definition was as follows:

> **Practical Completion for Separable Portion 2** is that stage in the execution of the Work under the Contract as identified in the Separable Portion Schedule when:
>
> (a) the Works comprising Separable Portion 2 other than Remaining Portion 2 are complete in accordance with the Contract and are fit for use or occupation by the Principal or any Related Entity of the Principal free from all identifiable omissions and defects, except those which the Independent Certifier may in its absolute discretion permit to exist at that time (but without affecting the Contractor's obligations expeditiously to complete the omissions and rectify the defects) and the Independent Certifier is satisfied that:
>
> (i) such defects do not prevent the Works from being used for their Stated Purpose;
>
> (ii) the Contractor has reasonable grounds for not rectifying those defects; and
>
> (iii) rectification of those defects will not prejudice the safe and convenient use of the Works for their Stated Purpose;
>
> (b) those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion, have been carried out and passed;
>
> (c) all warranties, spares, certificates, documents and other information required under the Contract which, in the opinion of the Independent Certifier, are essential for the use, operation and maintenance of the Works or any part of the Works, have been supplied to: the Independent Certifier;
>
> (d) the quality of each lot on the strata plan for the Works is greater than or equal to the quality of the relevant Prototype;
>
> (e) the Contractor has provided to the Independent Certifier:
>
> (i) 2 copies of all necessary authorities, certificates and approvals including, without limitation, the certificate of occupancy for each relevant part of the building required for the lawful occupation and use of the Works or required by the terms of the Contract have been issued by all Authorities; and

(ii) 2 originals and 2 copies of:

(A) the Contractor Warranty Deed; and

(B) each Subcontractor Warranty Deed;

(f) all rubbish, surplus material and minor items of plant and equipment pertaining to Separable Portion 2 has been removed from the Site so as to leave that part of the Site containing Separable Portion 2 in a clean and tidy condition, except those items which the Independent Certifier consents in writing to remain on the Site for the purpose of performing work during the Defects Liability Period;

(g) all services and installations, including without limitation the air-conditioning, fire protection services, lifts, all telecommunications systems, appliances (kitchen, laundry and other), lighting (including emergency lighting) and security systems perform as required under normal operating conditions and under simulated emergency operating conditions and as otherwise required by the Contract except where prevented by any defects arising out of any tenancy fitout work which does not form part of the Work under the Contract;

(h) 2 sets of keys for the Works fitted with plastic tags having approved label inserts have been supplied by the Contractor to the Independent Certifier and all construction locks have been replaced with the final lock barrels and have been checked and adjusted;

(i) all maintenance and product manuals have been provided by the Contractor to the Independent Certifier;

(j) all fire rating certificates for the Works as specified for various materials and forms of construction and certificates for such other parts of the Works as may be required by any of the Authorities have been provided by the Contractor to the Independent Certifier; and

(k) the following have been completed:

(i) all appliances and fittings where applicable, including, without limitation, all kitchen appliances, are installed, completed and fully operational;

(ii) any parts of the Works which have been used by the Contractor in the course of construction including, without limitation, defective light globes and lifts, have been restored or replaced;

(iii) all landscaping which the Independent Certifier reasonably determines should be finished has been fully finished;

(iv) all finishes are complete including painting and the whole of the Works has been professionally cleaned;

(v) external walls are complete and the building is totally secure and waterproof and weather tight both internally and externally;

(vi) all fixtures and equipment have been tested and are in proper working order;

(vii) detailed work is complete; and

(viii) the Contractor has constructed the Works such that the Principal is in a position to satisfy the Proforma Sale Contract."

[13] The liquidated damages clause was in the following terms:

"**35.7 Liquidated Damages for delay in Reaching Practical Completion**

If the Contractor fails to bring the works to the stage of Practical Completion by the Date for Practical Completion, the Contractor will be indebted to the Principal for liquidated damages in accordance with the Liquidated Damages Schedule.

The payment or allowance of liquidated damages does not relieve the Contractor from its obligations to complete the Work under the Contract or from any of its obligations and liabilities under the Contract.

Liquidated damages become due upon the issue of a notice by the Independent Certifier setting out the amount of liquidated damages payable by the Contractor to the Principal.

The Principal may recover the amount of liquidated damages by deducting the amount from any amount certified by the Independent Certifier under Clause 42.1 or from any security even though Practical Completion has not occurred.

If, after the Contractor has paid or the Principal has deducted liquidated damages, the Date for Practical Completion is extended, the Principal must immediately repay to the Contractor any liquidated damages paid or deducted in respect of the period to and including the new date for Practical Completion.

All amounts payable by the Contractor to the Principal under Clause 35.7 represent the Principal's genuine pre-estimate of the damages likely to be suffered by it if the Contractor fails to achieve Practical Completion and amounts paid may not be construed as a penalty.

The Contractor's maximum liability for liquidated damages will not exceed 10% of the Contract Sum."

[14] The amount of the liquidated damages was set out in the following table in the Liquidated Damages Schedule:

Relevant part of the Works	**Liquidated Damages Rate**	**Applies**
Separable Portion 1	$8,500 per day $17,000 per day	1-4 weeks after Date for Practical Completion 5 weeks on
Separable Portion 2	$12,250 per day	1-8 weeks after Date for Practical Completion

	$24,500 per day $49,000 per day	9-16 weeks 17 weeks on
Separable Portion 3	$14,750 per day $29,500 per day $44,250 per day $59,000 per day	1-8 weeks after Date for Practical Completion 9-16 weeks 17-20 weeks 21 weeks on
Separable Portion 4	$8,500 per day $17,000 per day	1-4 weeks after Date for Practical Completion 5 weeks on

[15] That table was followed by the following:

> "Although the rates are not cumulative within a Separable Portion, they are cumulative between Separable Portions except that:
>
> 1) the liquidated damages for Separable Portion 1 and Separable Portion 4 are in the alternative and cannot both be applied for the same time; and
>
> 2) the rates for each Separable Portion will not be applied cumulatively for that part of any period for which liquidated damages for a Separable Portion would otherwise be payable, the Principal is not incurring any damages in respect of such Separable Portion."

[16] The contract recognised that Juniper proposed to sell the residential units. Thus Annexure A Part L included the Proforma Sales Contract, referred to by GCC cl 2.1. GCC cl 3.8 included the following:

> "(1) The Contractor acknowledges that the Principal or a Related Entity of the Principal has or will enter into sales contracts substantially in the form of the Proforma Sale Contract for the dwellings forming part of the Works.
>
> (2) The Contractor must design and construct the Works in a manner to ensure that they will comply with the Proforma Sale Contract so that no purchaser of a dwelling forming part of the Works becomes entitled to:
>
> (a) rescind or terminate a Sales Contract;
>
> (b) claim damages against the Principal or any Related Entity of the Principal, under, for breach of or in connection with a Sales Contract,
>
> as a result of a failure by the Contractor to design and construct the Works in accordance with the Contract."

[17] The Proforma Sales Contract itself included the following:

> "9.8 You must not withhold any part of the purchase price or delay settlement on account of any defect in the lot or the development, even if it is due to defective materials or workmanship.

9.9 We will, at our own cost, rectify within a reasonable time any defect in the lot due to defective materials or workmanship which may appear and be notified in writing by you to us within 90 days after the settlement date. You must allow us access to the lot and the development for that purpose. You agree that you have no rights against us as a result of us carrying out our rights under this clause. However, when exercising those rights, we will use all endeavours reasonably available to us to avoid interfering with your use and enjoyment of the lot. Our obligation under this clause to rectify scratches, chips, dents, stains or marks in any surface, covering or fixture or fitting is limited to defects that you notify us of in writing on or before the settlement date."

[18] It is also relevant to note some provisions of the contract relating to Juniper's possession of the site. Thus cl 27 includes the following:

"**27.1 Access to and possession of the Site**

By the time specified in Annexure Part A, the Principal must give the Contractor access to the Site sufficient to enable the Contractor to commence and carry out the Contractor's Design Obligations in accordance with the Contract. The Principal must notify the Contractor in writing of the date when access will be available.

The Principal must, on or before the expiry of the time specified in Annexure Part A, give the Contractor possession of the Site or sufficient of the Site to enable the Contractor to commence the Early Works.

The Principal must, on or before the expiry of the time specified in Annexure Part A, give the Contractor possession of the Site or sufficient of the Site to enable the Contractor to commence the Main Works.

If the Principal has not given the Contractor possession of the whole Site, the Principal must from time to time give the Contractor possession of any further parts of the Site necessary to enable the Contractor to execute the Work under the Contract in accordance with the requirements of the Contract. The Principal must notify the Contractor in writing of the date upon which the Site or any part of it will be available.

Despite the provisions of this Clause 27.1, if the Contractor is in breach of Clause 22.1, the Principal may refuse to give the Contractor possession of the Site or any part of the Site until the Contractor has complied with the requirements of Clause 22.1.

Access to or possession of the Site confers on the Contractor a right only to the use and control necessary to enable the Contractor to execute the work under Contract.

The Contractor must notify the Principal in writing of the names of each of its consultants, agents or advisers as a condition of those consultants, agents or advisers having access to the Site.

The Contractor acknowledges that the SP4 Works will be carried out on land not owned by the Principal and under a licence granted by the owner of that land.

27.2 Access for the Principal and others

The Contractor acknowledges that the Principal, the Financier and the Project Manager and their respective employees, consultants and agents may at any time have access to any part of the Site for any purpose.

The Principal must ensure that all persons given access to the Site under this clause comply with Contractor's reasonable instructions including site safety and security requirements. The Contractor may request the Principal to remove any such persons who fail to comply with the Contractor's reasonable instructions.

The Contractor must permit the execution of work on the Site by persons engaged by the Principal and co-operate with them and co-ordinate the Contractor's work with their work. If requested by the Contractor, the Principal must give the Contractor the names of the persons so engaged.

The Contractor must at all reasonable times after reasonable notice give the Principal and other persons authorised in writing by the Principal or by the Project Manager access to the Work under the Contract at any place where the work is being carried out or materials are being prepared or stored.

The Principal must use reasonable endeavours to ensure that the Contractor is not impeded in execution of the Contractor's Work by the Project Manager while exercising the right of access given by Clause 23 or by any persons exercising the right of access given to those persons by this Clause 27.2."

[19] Mention should also be made of GCC cl 35.4 which is as follows:

"**35.4 Use of partly completed Works**

If a part of the Works has reached a stage equivalent to that of Practical Completion but another part of the Works has not reached that stage and the parties cannot agree upon the creation of Separable Portions, the Project Manager may determine that the respective parts will be Separable Portions.

In using a Separable Portion that has reached Practical Completion, the Principal must not hinder the Contractor in the performance of the Work under the Contract.

The Contractor acknowledges that occupation of a part of the Works for the purpose of carrying out fitout works or sales and

marketing activities does not constitute Practical Completion of that part of the Works."

[20] The contract also included the following:

"**26.3 Occupational health and safety**

…

(4) The Contractor acknowledges that the Contractor has management and control of the Site for the period commencing from the date the Contractor is provided with possession of the Site and ending at the Date of Practical Completion."

[21] By GCC cl 30.6, Grocon was obliged promptly to remove, demolish, redesign, reconstruct, replace or correct material or work not in accordance with the Contract.

[22] By GCC cl 30.3, if Grocon failed to comply with a direction of the project in relation to defective work or material, and was given required notice, Juniper was entitled to have the direction carried out by another at Grocon's cost. By GCC cl 37.1, if Grocon failed to comply with a direction by the Project Manager in relation to the rectification of a defect or omission within the defects liability period, and was given the required notice, Juniper was entitled to have the work carried out at Grocon's expense.

[23] In view of submissions made by Juniper, some reference should be made to the role of the Independent Certifier under this contract. Cl 23.4 of the contract provided:

"23.4 Independent Certifier

(1) The Independent Certifier is to be engaged at the Principal's cost on the terms of the Deed of Appointment of Independent Certifier.

(2) The Independent Certifier's role is to independently perform those functions provided for in this Contract in accordance with this Contract and the Deed of Appointment of Independent Certifier.

(3) The Independent Certifier is obliged to act independently of the Principal and the Contractor.

(4) The Contractor must provide the Independent Certifier with all information and documents and allow the Independent Certifier access to such premises and the Site, as may be necessary or reasonably required by the Independent Certifier to allow the Independent Certifier to perform its obligations under the Deed of Appointment of Independent Certifier."

[24] Schedule 1 to the Deed of Appointment of Independent Certifier (*DAIC*), (Annexure Part V to the GCC) included the following:

Schedule 1

Independent Certifier Services

Contract functions

The Independent Certifier must discharge the functions, obligations, duties and services which the Contract contemplates will be discharged by the Independent Certifier, including the following:

…

Clause 2.1 (75) definition of "Practical Completion for Separable Portion 2":

> **Paragraph (a)** – Satisfy itself, as a condition precedent to Practical Completion, that remaining Defects do not prevent the Works from being used for their intended purposes, that the Contractor has reasonable grounds for not promptly rectifying those Defects and that rectification of those Defects will not prejudice the safe and convenient use of the Works for their intended purposes;
>
> **Paragraph (c)** – Receive as a condition precedent to Practical Completion all information essential for the use of the Works, including all required warranties, certificates, documents and other information, as a condition precedent to Practical Completion;
>
> **Paragraph (d)** – Receive as a condition precedent to Practical Completion two copies of the documents referred to being the approvals and the Contractor warranty Deed and Subcontractor Warranty Deed;
>
> **Paragraph (e)** – As a condition precedent to Practical Completion, satisfy itself that all rubbish and other materials as are necessary have been removed, except that which the Independent Certifier consents to remain;
>
> **Paragraph (g)** – As a condition precedent to Practical Completion receive 2 sets of keys for the Works;
>
> **Paragraph (h)** – As a condition precedent to Practical Completion receive all maintenance and product manuals;
>
> **Paragraph (i)** – As a condition precedent to Practical Completion receive all fire rating certificates for the Works; and
>
> **Paragraph (j)** – As a condition precedent to Practical Completion ensure all landscaping is complete.

[25] Schedule 1 of the DAIC required the Independent Certifier, in relation to GCC cl 42.3, to "[j]ointly inspect the Works, (to) determine whether Practical Completion has been achieved and issue the Certificate of Practical Completion".

Circumstances admitted to be relevant

[26] Notwithstanding the dispute about the admissibility of some evidence, referred to earlier, Grocon acknowledged that some circumstances are relevant to the determination of the question. It is convenient to record them. It was Juniper's intention to sell the retail part of the project and the residential units. Juniper had entered into finance agreements with external creditors, to carry out the project. Juniper contemplated that it would generate revenue from the project, to repay the external creditors, through the sale of the retail part of the project, and the sale of residential units. Thus Juniper would suffer financial loss if the contemplated revenue stream was postponed by any delay in completion of the contract.

Submissions on behalf of Grocon

[27] Grocon submitted that although it may have completely performed the contract but for some minor defects or omissions, yet the existence of those defects or omissions would result in its liability under the liquidated damages clause for each day on which the failure was not remedied. It gave the following examples of such minor defects or omissions (*minor matters*):

> "(a) a failure to remove all minor rubbish items;
>
> (b) a single kitchen appliance being non-operational;
>
> (c) one of the keys being fitted with a tag that (*sic*) with a non-approved label insert;
>
> (d) a single construction lock not having been replaced with a lock barrel or a lock barrel that had not been adjusted;
>
> (e) a failure to provide a single manual to the Independent Certifier;
>
> (f) a single light globe which had been used by Grocon being defective;
>
> (g) a small area of paint finish being incomplete;
>
> (h) a small area of the Works being not cleaned;
>
> (i) a small area of landscaping which the Independent Certifier reasonably determines should be finished, not being completed;
>
> (j) a single appliance not being tested; and
>
> (k) a single small portion of detailed work remaining incomplete."

[28] It submitted that there is a presumption that a clause is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or of several events, some of which may occasion serious and others but trifling damage.

[29] The obligation of timely achievement of Practical Completion found in cl 35.2 was, for the purposes of the analysis adopted in *Andrews v Australia and New Zealand Banking Group Ltd*[1] (*Andrews*), a primary stipulation; the liquidated damages clause contained a collateral (or accessory) stipulation which imposed upon Grocon an additional or different liability, or detriment, in the event of the failure to satisfy the primary

[1] (2012) 247 CLR 205, especially at [10].

stipulation; and "accordingly" the latter stipulation "must be regarded as in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation" in view of the definitions of Practical Completion; with the consequence that the liquidated damages clause was a penalty[2].

[30] Elsewhere, Grocon identified its position, based on *Andrews*, as being that "a stipulation *prima facie* imposes a penalty on a Contractor if as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a Principal and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party **an additional or different liability**, the penalty, to the benefit of the Principal"[3] (emphasis in original).

[31] Grocon submitted that while some failures to achieve compliance with the requirements of the contract by the Date for Practical Completion might be expected to occasion serious damage, other failures would not[4]. In particular, while a delay of the revenue stream might result in financial loss to Juniper, the effect of the liquidated damages clause was to make damages payable "for failures which could never give rise to the postponement of the revenue stream"[5]. The daily rate of $14,750 (for SP3) was extravagantly out of proportion to the damages that would be suffered for a trivial defect, such as the failure to have an approved tag attached to one set of keys. Notwithstanding that the contract provided stepped rates for liquidated damages, these rates were out of all proportion to the loss that might be suffered as a result of some of these minor defects[6].

[32] Grocon took issue with Juniper's submission that Juniper was not entitled to possession until Practical Completion as defined in the contract was reached, with consequential delays in settling sales contracts[7]. Grocon submitted that, prior to Practical Completion, it had no more than a licence to use the site; and Juniper had the right to possession of it. If Juniper took possession, that would not interfere with its entitlement to have Grocon complete minor omissions or remedy minor defects. Moreover, under GCC cl 35.4, Juniper could have its Project Manager determine that some part of the works had been completed, and declare that the remaining part of the works should be regarded as a Separable Portion. Although the Project Manager was required to act honestly and in good faith, the Project Manager was not required to consider Grocon's interests[8].

[33] Grocon also relied on part of cl 16.1, which provided that after 4.00pm on the Date of Practical Completion, Grocon "remains liable for the care of outstanding work and items to be removed from the Site" by it. Other submissions made by Grocon on this topic have been referred to earlier.

[34] Minor defects and omissions "were not on the critical path for completion" and would not be causative of delay to the income stream to be derived from sales[9]. Grocon

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2 Primary Submission for Grocon dated 8 September 2014 (*1 Grocon*) at [53].
3 Supplementary Submission for Grocon dated 10 September 2014 (*2 Grocon*) at [2].
4 1 Grocon at [56].
5 1 Grocon at [75](d).
6 1 Grocon at [103] – [104].
7 2 Grocon at [18], [23].
8 2 Grocon at [23].
9 2 Grocon at [24] – [27].

submitted it was not implausible to think that the Independent Certifier might refuse to issue a Certificate of Practical Completion in the event that there was some minor omission or defects[10].

[35] Grocon submitted that it was untenable to contend that there would be difficulties in drawing a valid liquidated damages clause for this contract with its detailed set of requirements for the achievement of Practical Completion[11].

[36] Grocon also submitted that it was irrelevant to consider the impact of liquidated damages on Grocon, and Grocon's ability to pass on its liability for such damages to a subcontractor[12].

[37] Notwithstanding Juniper's submissions, Grocon maintained that the presumption stated in para 4(c) of *Dunlop Penumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[13] (*Dunlop)*, that a clause is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage", applied to building contracts. Grocon also took issue with Juniper's submission that the Independent Certifier might issue a Certificate of Practical Completion, notwithstanding the failure to satisfy some elements of the definition, other than paragraph (a)[14].

[38] Like the submissions for the other parties, these submissions were amplified by extensive reference to authorities, many of which are discussed later in these reasons.

Submissions on behalf of Juniper

[39] For Juniper it was submitted that, for the penalty doctrine to apply, the sum payable under the liquidated damages clause must be extravagant or unconscionable in comparison with the greatest conceivable loss flowing from the breach in respect of which the clause made a quantifiable amount payable. Juniper submitted that the approach taken by Grocon to determining whether the liquidated damages clause was a penalty was incorrect, because it focused on the smallest loss which might result from a relevant breach, rather than the greatest loss.

[40] Juniper submitted that it had no right to possession prior to the Date of Practical Completion[15]. A failure to achieve Practical Completion by the contractual date would mean that it could not give vacant possession to a potential purchaser. Accordingly it would suffer loss of revenue because it could not settle its sale contracts until then. Even if it had a right to possession before Practical Completion, the risk that purchasers would be reluctant to settle, and other matters including customer relations, and the reputation of Juniper and the Soul Project, meant that the liquidated damages clause was not a

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[10] 2 Grocon at [28] – [35].
[11] 2 Grocon at [9] – [14].
[12] 2 Grocon at [36] – [40].
[13] [1915] AC 75, at 86 – 87.
[14] Third written submission by Grocon (undated) (*3 Grocon*) at [11].
[15] Written Submissions of the First Defendant dated 8 September 2014 (*1 Juniper*) at [86].

penalty[16]. In any event, it was implausible to think that Practical Completion would be delayed because of trivial defects of the kind relied on by Grocon[17].

[41] Juniper referred to cl 27.1, which set out its obligations to give Grocon "possession" of the site, or of part of the site.[18] Those obligations were qualified by a later provision in that clause, the effect of which was that possession of the site conferred on Grocon "a right only to the use and control necessary to enable (Grocon) to execute the work under the Contract". Juniper also referred to cl 35.2, in particular, that part requiring Grocon, on the Date of Practical Completion, to "give possession of the Site and the Works" to Juniper.[19] It also referred to cl 16.1, under which, until 4.00pm on the Date of Practical Completion, Grocon "will be liable for the care of the Work under the Contract". It then referred to cl 16.2, providing that if loss or damage occurs to the Work while Grocon is liable for its care, Grocon must rectify such loss or damage. Juniper referred to cl 18, which required Grocon to effect insurance until it ceased to be responsible for the care of the Work. It referred to cl 26.2, under which Grocon was taken to be appointed as principal contractor for the purposes of s 184A of the *Workplace Health and Safety Act* (Qld) 1995, until the Date of Practical Completion; and cl 26.3 under which Grocon acknowledged that it had "management and control of the Site" until the Date of Practical Completion, and requiring it to perform all relevant functions and fulfil all relevant duties of an employer and occupier under Workplace Health and Safety Legislation and Regulations.

[42] Juniper also referred to its limited rights in relation to the site under cl 27.2. It was expressly given a right of access to the site. However, it was required to ensure that all persons thus given access to the site comply with Grocon's reasonable instructions. While Juniper was permitted to execute work on the site, it was required on request to give Grocon the name of persons engaged to do such work. Grocon was also required to give Juniper access to the contractual work on reasonable notice; though Juniper was required to use reasonable endeavours to ensure that Grocon was not impeded in the execution of its work under the contract by reason of such access. These provisions were relied upon for the proposition that, until Practical Completion, Grocon's rights in respect of the site were incompatible with the notion that Juniper could give vacant possession to a purchaser.

[43] Juniper's submissions referred to a passage from *Lord Elphinstone v Monkland Iron and Coal Co Ltd*[20] (*Elphinstone*) to the effect that, when a single lump sum is made payable by way of compensation on the occurrence of one or more events, some of which might cause serious and others trifling damage, the presumption is that the obligation to pay is a penalty.[21] Juniper submitted that, properly analysed, this presumption does not apply "to the building contract"[22]. It also submitted that there is a presumption that where such a clause requires the payment of a sum of money by reference to a rate over a period of time, then the provision will not ordinarily be a penalty[23].

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16 1 Juniper at [87]-[91].
17 1 Juniper at [92]-[99].
18 1 Juniper at [86](a).
19 1 Juniper at [86](b).
20 (1886) 11 AC 332, 342.
21 1 Juniper at [48].
22 1 Juniper at [64].
23 1 Juniper at [67].

[44] Juniper submitted that the sophistication of the parties to the contract was a relevant consideration for determining whether the liquidated damages clause was a penalty.[24]

[45] It was submitted that a liquidated damages clause is more likely to be upheld, in cases where there are difficulties in estimating or proving the loss which would flow from the breach which makes the clause operative.[25]

[46] In determining what loss Juniper might suffer if there were delay in completion, the possibility that the market might collapse could be taken into account, which would result in very grave losses[26].

[47] Juniper submitted that the notion that separable portions might be created under cl 35.4 was bizarre. The cost of doing so would outweigh the liquidated damages. Under cl 35.3, liquidated damages would be apportioned to the newly created separable portion, by reference to the value of the work which it comprised.[27]

[48] Juniper submitted that, on Grocon's approach, it would be extremely difficult sensibly to draw a liquidated damages clause[28].

Submissions on behalf of Norton Rose

[49] For Norton Rose it was submitted that the liquidated damages clause came into operation on the failure to comply with a single or unitary obligation[29]. That is so, as the result of the characterisation, as a matter of substance, of the event which triggers the operation of the liquidated damages clause[30].

[50] A liquidated damages clause will be penal if the money stipulated to be paid on breach will produce for the payee advantages significantly greater than the advantages which would flow from a genuine pre-estimate of damage, to the extent that they are "extravagant and unconscionable in amount" or "out of all proportion" to the genuine pre-estimate[31].

[51] A number of matters were submitted to be relevant when determining whether a liquidated damages clause is penal. One was said to be the agreed characterisation of the clause by the parties as a liquidated damages clause rather than a penalty[32]. Another was whether there is real difficulty in predicting the damage that may be suffered on breach of the primary obligation[33]. A third was whether the parties were sophisticated and well-advised, and whether they negotiated the liquidated damages clause at arm's length by

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[24] 1 Juniper at [15] – [20], [39].
[25] 1 Juniper at [34] – [36].
[26] 1 Juniper at [101].
[27] See Juniper's supplementary submission dated 11 September 2014 (*2 Juniper*) at [11], [12].
[28] 1 Juniper at [103].
[29] Submissions on behalf of the Defendant (Norton Rose) dated 8 September 2014 (*Norton Rose*) at [144] – [145].
[30] Norton Rose at [84], [91].
[31] Norton Rose at [60].
[32] Norton Rose at [64] – [65].
[33] Norton Rose at [69].

reference to valid considerations over a period of time[34]. A fourth was whether the liquidated damages clause simply provided payment for a lump sum on breach; or whether it provided a formula to adapt the amount payable to the circumstances[35].

Some relevant principles

[52] The liquidated damages clause in the present case operated in respect of a breach of contract. This case does not raise questions about other circumstances in which the penalty doctrine applies, considered in *Andrews*. Nor was there any suggestion that amounts payable under the clause were the price of some further right or accommodation[36].

[53] It was common ground that the onus fell on Grocon to demonstrate that the liquidated damages clause is a penalty.

[54] The parties accepted the significance of the statement of principles by Lord Dunedin in *Dunlop*[37], which it is convenient to repeat:

> 1. *"*Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.
>
> 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.
>
> 4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
>   (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

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34 Norton Rose at [71] – [73].
35 Norton Rose at [76].
36 See *Andrews* at [79] – [82]; *Paciocco v ANZ* [2015] FCAFC 50 (*Paciocco appeal*) at [199].
37 *Dunlop a*t [86] – [87].

> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. …
>
> (c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".
>
> On the other hand:
>
> (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." (references omitted)

[55] This passage was accepted as authoritative by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd (Ringrow)*[38] and, it would seem, in *Andrews*[39].

[56] It is apparent from Lord Dunedin's statement that it is for the Court to determine whether a liquidated damages clause imposes, in truth, a penalty; rather than being a matter for the agreement of the parties. The application of paragraph 3 gives rise to the dispute about the admissibility of evidence, discussed later.

[57] It was common ground that the question is to be determined "as at the time of the making of the contract".

[58] In my respectful opinion, a critical statement by his Lordship is the statement that the essence of liquidated damages is that they are a genuine covenanted pre-estimate of damage.

[59] I note the view expressed by Cole J in *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd*[40] *(Multiplex)*, based on a statement of Mason and Wilson JJ in *AMEV-UDC Financial Limited v Austin*[41] (*AMEV*) that a clause might "fail as being penally imposed in circumstances rendering enforcement of the clause unconscionable." In view of conclusions I reach elsewhere, it is unnecessary for me to consider the correctness and application of this proposition in the present case.

[60] With reference to paragraph 4(a) of Lord Dunedin's statement, in *Ringrow* the Court said[42]

> "The principles of law relating to penalties require only that the money stipulated to be paid on breach … will produce for the payee … advantages

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38 (2005) 224 CLR 656 at [12].
39 *Andrews* at [15].
40 (1992) 33 NSW LR 504 at 513.
41 (1986) 162 CLR 170 at 193.
42 *Ringrow* at [27].

> significantly greater than the advantages which would flow from a genuine pre-estimate of damage."

[61] Subsequently, the Court said[43]

> "Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties at full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged 'extravagant and unconscionable in amount'. It is not enough that it should be lacking in proportion. It must be 'out of all proportion'."

[62] This passage followed the citation of a statement from the judgment of Mason and Wilson JJ in *AMEV*[44] in support of the view that "an agreed sum is only characterised as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach". What Lord Dunedin expressed as sufficient for a finding that a clause was a penalty is, in the statement from *AMEV*, necessary. The statement was repeated and relied upon by Wilson and Toohey JJ in *Esanda Finance Corporation Ltd v Plessnig*[45] (*Esanda*).

[63] It would therefore appear to be the law in Australia that, unless a party seeking to invoke the penalty doctrine demonstrates that the amount payable is extravagant and unconscionable in comparison with the greatest loss that could have been suffered from the breach, the doctrine will not be applied. Thus a clause will not be penal unless the test in paragraph 4(a) of Lord Dunedin's judgment is satisfied. In *Spiers Earthworks Pty Ltd v Landtech Projects Corporation Pty Ltd (No 2) (Spiers)*[46] McLure P (with whom Newnes JA agreed) said

> "The stipulation will not be a penalty just because it would result in recovery of a sum exceeding the actual loss suffered. The requirement that the stipulated sum be extravagant and unconscionable in amount (that is, out of all proportion) stems from a policy emphasis on freedom of contract … ."[47]

[64] This view finds support in *Paciocco v ANZ*[48]. It also finds support in *Cedar Meats Aust Pty Ltd v Five Star Lamb Pty Ltd*[49]. Further, in *Riggall v Thompson*[50] Fraser JA, with the agreement of Holmes JA and Daubney J, said

> "The High Court has recently emphasised Lord Dunedin's statement that there is no penalty unless the contract confers an entitlement to damages which are extravagant or unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: the recoverable amount must be 'out of all proportion' to the real loss: *Ringrow*

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43 *Ringrow* at [32].
44 *AMEV* at 190.
45 (1989) 166 CLR 131 at 139, 141-142.
46 (2012) 287 ALR 360 at [21].
47 See also the judgment of Dalton J in *GWC Property Group Pty Ltd v Higginson* [2014] QSC 264 at [39].
48 (2014) 309 ALR 249 at [14] and [39]; see also *Paciocco appeal* at [25], [95], [147], [187], per Allsop CJ; and at[400] per Middleton J.
49 [2014] VSCA 32 at [52].
50 [2010] QCA 144 at [31].

> *Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at [21], [27], [31] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ."

[65] In paragraphs 4(a), (b) and (d), Lord Dunedin related the payment to a breach. In paragraph 4(c), he referred to a sum becoming payable on the occurrence of events. It seems likely that this guideline should be taken to at least relate to the occurrence of one or more breaches, with different consequences in terms of damage. The result would be consistent with paragraph 4(a), because the identification of the same sum as payable on different breaches causing damage the significance of which will vary, provides an appropriate basis for the presumption. Paragraph 4(c) was supported by a reference to *Elphinstone*. It would appear that his Lordship was referring to the principle stated in this paragraph when he said[51],

> "I think *Elphinstone's Case*, or rather the dicta in it, do go this length, that if there are various breaches to which one indiscriminate sum to be paid in breach is applied, then the strength of the chain must be taken at its weakest link. If you can clearly see that the loss on one particular breach could never amount to the stipulated sum, then you may come to the conclusion that the sum is penalty. But further than this it does not go…."

Description of penalty in *Andrews*

[66] The submissions for Grocon refer to the following passage from *Andrews*[52]

> "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." (citations omitted)

[67] Grocon submitted that the liquidated damages clause satisfied this description, and was thus (at least *prima facie*) a penalty[53].

[68] Grocon's written submissions also picked up an expression used earlier in *Andrews*[54], namely "an additional or different liability". It seems to me that it is not particularly helpful to attempt to determine whether a particular clause is to be affected by the penalty doctrine, by reference to these expressions. Of a clause which will be enforced because it is a genuine pre-estimate of the likely damage, it can be said that, on the breach of the primary obligation, it imposes an additional or different liability. That is because without such a clause, the party in breach would be liable for damages to be assessed; whereas, if the clause is to be enforced, that party will be liable for a fixed (or calculable) amount of money. Moreover should the amount payable under the liquidated damages clause be the

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51 *Dunlop* at 89.
52 *Andrews* at [10].
53 1 Grocon [53].
54 *Andrews* at [9].

same as the assessed damages, that would be coincidental; the former is the result of a pre-estimate by the parties at the time of the contract, and the latter is the result of an assessment (usually by a court) based on actual breach and loss. However, I do not understand that the Court was using these expressions so broadly; rather, it seems inevitable that the Court was using them to indicate a liability or detriment which would satisfy the tests stated in *Dunlop*.

[69] *Andrews* was concerned with the question whether the penalty doctrine only applies to a clause which imposes an obligation which takes effect on a breach of contract, or had broader application. It seems to me that the passage referred to by Grocon must be understood against that background. It identifies the focus of the Court's attention. In particular, the Court was intending to emphasise the accessory nature of a penalty, being related to a primary stipulation.

[70] It seems to me that the expression "additional detriment" is a reference to a detriment of greater magnitude or significance than the promisor would have suffered but for the penalty clause. So much is apparent from the reference to partial enforcement of the penalty clause which appears later in the quoted paragraph. One of the passages relied upon for the formulation in *Andrews* is from *Acron Pacific Ltd v Offshore Oil NL*[55]. The expression there used is "some additional or different financial obligation *in the nature of a punishment*" (emphasis added). The fact that the obligation was different was not sufficient to constitute a penalty.

[71] If Grocon's submission was simply intended to demonstrate that the liquidated damages clause in its contract with Juniper would operate to create an accessory liability, and was thus potentially subject to the penalty doctrine, it would be directed to a matter not in issue. If it were intended to indicate that once a liability is an accessory liability, then one assumes that it is a penalty until the contrary is demonstrated, that seems to me to be inconsistent with the agreed position about onus. Nor would it truly reflect *Andrews*. Accordingly, I find the submission made by Grocon based on *Andrews* to be of no assistance in the present case.

A single sum for several events?

[72] Grocon submitted that the presumption in Lord Dunedin's paragraph 4(c) applied, with the consequence that the liquidated damages clause is a penalty. In support of that proposition it relied on several authorities.

[73] Considerable reliance was placed on *Ariston SRL v Charly Records Ltd*[56] (*Ariston*). Charly specialised in the production and marketing of re-issues of higher quality popular music. It acquired master tapes, and the metal parts and lacquers used for pressing out the original records. It also obtained negatives, films, art work and labels for the production of record sleeves and the protective inner envelopes. It did not itself manufacture the re-issues, but engaged others, such as Ariston, to do that. Charly entered into an agreement with Ariston for the production of some re-issues, providing to Ariston the metal parts and lacquers, negative films and art work. Their agreement provided that

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55 (1985) 157 CLR 514, at 520.

56 Unreported; Court of Appeal (UK) 13 March 1990.

Artison would return all of these items on Charly's request within ten working days, and failure would result in the payment of £600 per day for late delivery. The clause was held to be a penalty and unenforceable. Beldam LJ (with whom Leggatt and Mustill LJJ agreed) identified the principle as being that[57] "… the sum payable for the breach or breaches for which it is provided should be proportionate to the extent of those breaches". His Lordship accepted that the amount would be a not unreasonable pre-estimate of damages should Ariston fail to return all or a substantial part of the materials to which the clause related, but it was clearly out of proportion to the loss which might be caused from the failure to return a few of some comparatively unimportant items.

[74] It seems to me that the critical distinction between the clause considered in *Ariston*, and the liquidated damages clause in the present case, is the identification of the breach on which a sum of money becomes payable. The clause in *Ariston* made money payable on a failure to deliver items by a time determined under the contract. It could be breached by the failure to deliver on time one, a number, or all of the items. There were, accordingly, a great variety of potential breaches in respect of which the clause would operate.

[75] In the present case, the liquidated damages clause operates when there has been a failure to achieve Practical Completion by a specified time. That is a breach of a single obligation, namely, to achieve a particular stage in the project, by a time to be determined under the contract. That breach may itself be a consequence of other breaches, some of which may be themselves relatively insignificant. Those breaches might themselves give rise to damages, for example, if Juniper were required to engage others to rectify them. But the liquidated damages clause is not directed to the consequence of those breaches. Rather, it operates because of a failure to achieve Practical Completion by the relevant date. It therefore seems to me that *Ariston* does not assist in determining the outcome of the present case. That said, it does not automatically follow that the liquidated damages clause is not a penalty.

[76] Grocon also relied upon a passage from the judgment of Salmon LJ in *J Jarvis & Sons Ltd v Westminster City Council*[58] (*Jarvis*). That case required the Court to determine whether a contractor was entitled to an extension of time if completion was delayed by reason of delay on the part of nominated subcontractors. The Court held that the contractor was entitled to an extension of time. However, in his reasons, Salmon LJ (with whom Karminski LJ agreed) considered the clause which required the contractor to complete the works on or before the date fixed for completion in the contract. His Lordship regarded that obligation as[59] "an obligation to complete the works in the sense in which the words 'practically completed' and 'practical completion'" were used in other clauses of the contract. His Lordship reached that conclusion by reference to clause 22, which provided that the contractor would pay a fixed amount per week as liquidated damages for the period during which the works remained uncompleted after the due date for completion. His Lordship said[60]

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57 *Ariston* Transcript at p 12.
58 [1969] 3 All ER 1025.
59 *Jarvis* at 1031.
60 *Jarvis* at 1031.

> "If completion in cl. 21 meant completion down to the last detail, however trivial and unimportant, then cl. 22 would be a penalty clause and as such unenforceable."

[77] It seems to me that this statement provides support for Grocon's submission. On the other hand, it was only indirectly related to the question being decided in the case. Davies LJ did not find it necessary to rely on it. Notwithstanding the respect to be accorded to the views of Salmon LJ, the passage does not reflect any analysis of authority, and seems to be inconsistent with other, and higher authority.

[78] Juniper and Norton Rose relied on *Law v Local Board of Redditch*[61] (*Law*). *Law* was concerned with a contract for the construction of sewerage works. It provided that "the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889 … and, in default of such completion, the contractor shall forfeit and pay (to the principal) the sum of £ 100 and £ 5 for every seven days during which the works shall be incomplete after the said time …"[62]. This clause was held to provide for liquidated damages, and was not a penalty.

[79] Lord Esher MR identified one case where a clause would be a penalty as being[63],

> "… where the sum agreed to be paid is, with regard to the matter in respect of which it is agreed to be paid, so large as to make the idea that it was intended to be payable by way of liquidated damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid, not as liquidated damages, but as a penalty."

[80] His Lordship identified another case as follows[64]:

> "There are other cases in which the parties to a contract have agreed that the one is to pay and the other to be paid a sum of money in respect of the doing or failure to do any of a number of different things of very different degrees of importance."

[81] His Lordship concluded that there was "only one event on which liability to pay the sums mentioned depends, viz., non-completion of the works by the time specified."[65]

[82] Lopez LJ agreed in the result, adopting a passage from the judgment of Lord Herschell in *Elphinstone*[66] that the payment referred to a single obligation, and the sum to be paid bore a strict proportion to the extent to which the obligation was left unfulfilled[67]. Kay LJ, even on the view that completion required both completion of the works in all respects and a clearing of equipment and rubbish, considered that there was a single event on

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61 [1892] 1 QB 127.
62 *Law* at 127 – 128.
63 *Law at* 130.
64 *Law at* 130.
65 *Law at* 131.
66 *Elphinstone* at 345.
67 *Law at* 133.

which the damages became payable, namely, non-completion by the specified time; and they were accordingly liquidated damages[68]. His Lordship said[69]

> "I cannot agree with the ingenious argument that, because there may be many matters, some very small, which would constitute non-completion, these sums may be regarded as payable on several events. According to that argument, it must be considered to be several different non-completions of the works. There may be different causes of non-completion; but non-completion is only one single event."

[83] Both Juniper and Norton Rose relied upon the decision of the Privy Council in *Philips Hong-Kong Ltd v Attorney-General of Hong Kong*[70] (*Philips*) for the proposition that, in the present case, the liquidated damages clause is payable for delay; and is not penal, consistent with *Law*. Philips had contracted with the Hong Kong Government to provide a computer-based supervisory system for the approach roads and tunnels for a major highway project. The contract with Philips, and with five other contractors on the project, contained programmes in the form of flow charts, identifying Key Dates, where the work of another contractor or contractors would be affected by delay. If Key Dates were not met, the contract specified a liability to pay liquidated damages at a daily rate. Moreover, the whole of the contract work was to be completed within a specified time, and if this was not achieved, then additional liquidated damages were to be paid, also at a daily rate. Philips submitted that the provisions were penal, in terms somewhat similar to the submissions made on behalf of Grocon, by reference to Lord Dunedin's Principle 4(c). With reference to the presumption stated in that principle, Lord Woolf (who delivered the judgment of the Privy Council) said[71]

> "However, a different situation exists here to which the presumption does not apply. In this case the only event giving rise to the liability to pay liquidated damages is delay. Although that delay may be caused by any number of different circumstances, this is not a case of different causes of loss being compensated by the same figure for liquidated damages. As Kay, L.J. said in the *Law v Local Board of Reddich*[72] 'there may be different causes of non-completion; but non-completion is only one single event'."

[84] Grocon submitted with respect to *Law* that the decision was old; it involved a very narrow and literal interpretation of the word "event"; it was decided before *Dunlop*; it did not deal with the substantive operation of the contractual provision under consideration; and it is inconsistent with principle, which requires a consideration of the substantive operation of the relevant clause.[73] Grocon also submitted that the party in that case contending that the damages clause was a penalty accepted that there were two obligations in question. Moreover it was unclear whether precise performance was required.

[85] Grocon submitted that *Philips* is a curious case, referring with approval to *Ariston*, but also with apparent approval to *Law*. It also submitted that it was distinguishable, because

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[68] *Law at* 135, 136.
[69] *Law at* 136.
[70] [1993] 1 HKLR 269.
[71] *Philips* at 282.
[72] *Law* at 136.
[73] 1 Grocon at [68]

none of the work was capable of occupation or use by the Hong Kong Government prior to completion[74]. Completion seemed to have been related to the issue of a "taking-over certificate" which might issue where the works had not been completed "in minor respects that do not affect their use for the purpose which they are intended"[75]; this feature distinguishing it from the present case. In the present case, the liquidated damages clause made liquidated damages payable "(i)f (Grocon) fails to bring the works to the stage of Practical Completion by the Date for Practical Completion". The amount was to be determined by reference to a schedule, fixing rates per day for each of the separable portions, with a lower rate for an initial period (either four weeks or eight weeks, depending on the separable portion); and then a higher rate or rates for subsequent periods. In my view, it is clear from the contract that the amount payable is payable for delay. Consistent with the approach taken in *Philips* and in *Law*, it is payable on a single event.

[86] As I read the judgment in *Philips*, it endorsed and applied the approach taken in *Law*. The only occasion for payment of damages under this clause is delay in achieving Practical Completion. It follows that the presumption associated with the decision in *Elphinstone* does not apply.

[87] This conclusion does not ignore the submission of Grocon that the question is to be determined "as a matter of substance". However the tests formulated by Lord Dunedin in paragraph 4 of the statement of principle make it necessary to identify what it is that attracts the operation of the liquidated damages clause. In the present case, as in *Philips* and in *Law*, it is delay. So much is apparent from the language of that part of the liquidated damages clause, set out a short time ago. It is also apparent from the next sentence in the clause, the effect of which is that the obligation to pay liquidated damages does not relieve Grocon from its other obligation under the contract, including the obligation to complete the work. The contract itself identifies other remedies available to Juniper for breaches by Grocon of some of its contractual obligations, including those relating to the carrying out of the work.

[88] Apart from the fact that Grocon's submissions do not take into account that in *Philips* a "taking-over certificate" could not issue unless the works had passed tests, and the contractor had supplied drawings, manuals and warranties and guarantees, the differences in the contract then under consideration do not affect the proposition adopted by their Lordships which, it seems to me, is of particular relevance. That is, that the only event giving rise to the liability to pay liquidated damages was delay. In my view, the different nature of the work does not make the approach taken in *Philips* irrelevant. Apart from what might be regarded as a broadly-expressed appeal to principle, no other substantial reason was advanced for not following the decision in *Philips*. *Philips* itself recognised[76] that *Ariston* turned on "very special facts".

[89] In my view, Grocon's submissions about the nature of the obligations in *Law* should not be accepted. Counsel for the plaintiff in *Law*, who contended that the clause amounted to a penalty, relied upon a proposition very similar to Lord Dunedin's presumption in

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[74] *Philips* at 273, 275.
[75] See *Philips Hong Kong Ltd v Attorney General* [1991] HKCA 205 (*Philips CA*) at [6].
[76] *Philips* at 280.

paragraph 4(c)[77]. They also relied upon the fact that "a single wheel barrow" left on the site would trigger a liability for liquidated damages[78]. In any event, it is the statement of principle, adopted in *Philips*, which is relevant.

[90] The submissions on behalf of Grocon failed to give weight to the fact that *Law* was endorsed in *Philips*. It was also referred to by Jackson J in *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd*[79]*(McAlpine)*, when setting out the law relating to penalty clauses. It is of some interest to note that his Lordship, consistently, set out a passage from a leading text which recorded that there appear to be no recorded cases in the United Kingdom where periodical liquidated damages for delay in building contracts have been held to constitute a penalty[80].

[91] Grocon's submissions also relied upon the following statement from the judgment of Brennan J in *Esanda*,[81]

> "If the stipulated sum is payable on the occurrence of any breach of the contract, whether serious or trifling in its consequences, there is a presumption that a sum is a penalty".

[92] The liquidated damages clause in the present case does not apply to any breach of the many obligations found in the contract between Grocon and Juniper. It only applies to a breach of the obligation to achieve Practical Completion by the Date for Practical Completion.

[93] Since writing the above, I have had the benefit of reading the judgment of Allsop CJ (with whom Besanko and Middleton JJ agreed) in the *Paciocco* appeal. His Honour regarded the critical factor in *Elphinstone* as being that the clause made damages proportionate to the unrestored acreage, rather than the fact that only one covenant was breached[82]. His Honour also helpfully discussed the judgment of Lord Parker in *Dunlop*, pointing out that a damages clause might relate to an obligation which may be breached more than once, and in more ways than one.[83] Breaches may nevertheless result in damage of the same kind, in which case the damages clause is not penal[84]. Having earlier observed that categorising contracts by reference to their form is unlikely to be helpful[85], his Honour then stated that one stipulation could be broken in countless ways, many (and likely most) trivial in consequence, and some serious[86]. Although the only obligation under consideration was that of timely payment, his Honour considered that the primary judge did not err in considering that the presumption in paragraph 4(c) of Lord Dunedin's statement was applicable[87].

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77 *Law* at 128.
78 *Law* at 129.
79 [2005] EWHC 281 at [39]. See also *Spencer v Geraldton Food Producers Pty Ltd* unreported; WASC; 25 May 1984; BC3491326 at 7.
80 *McAlpine* at [36].
81 *Esanda* at 143.
82 *Paciocco* appeal at [122].
83 *Paciocco* appeal at [128].
84 *Paciocco* appeal at [128].
85 *Paciocco* appeal at [128].
86 *Paciocco* appeal at [129].
87 *Paciocco* appeal at [131].

[94] It seems to me that the present case is different to *Paciocco*. A promise to make in a timely fashion, any payment which may at any time become due, may be breached at many times, and in many ways. Each breach may have different consequences, in terms of the significance of any loss. In those circumstances it is not difficult to see why the presumption in paragraph 4(c) of Lord Dunedin's statement would be applicable. A promise to achieve practical completion of a construction project by a fixed date is only breached in one way, by the failure to do so, although there may be many causes, and the extent of the delay may vary. These differences, it seems to me, point against adopting the approach accepted in the *Paciocco* appeal; and favour following the approach taken in *Philips* and in *Law*.

[95] Accordingly, I conclude that this is not a case affected by the presumption set out in paragraph 4(c) of the statement by Lord Dunedin in *Dunlop*. That conclusion, however, is not sufficient to determine whether or not the liquidated damages clause in the present case is a penalty.

Comparison between contractual damages and anticipated loss

[96] If one takes the test to be, as formulated in *Ringrow* and *Riggall*, that there is no penalty unless the contract confers an entitlement to damages which are extravagant or unconscionable in comparison with the greatest loss that can conceivably be proved to have flowed from the breach, or which is out of all proportion to that loss, it is necessary to identify the relevant breach, and form some view about the greatest loss which the parties might have anticipated as flowing from that breach. It is apparent from the terms of the contract, discussed previously, that the relevant breach is the failure to achieve Practical Completion by the Date for Practical Completion. Grocon conceded that in some cases, such a failure might be expected to occasion serious damage. It did not attempt to submit that the amount payable under the liquidated damages clause would be out of all proportion to the anticipated loss in such cases. It would follow, on this approach, that the liquidated damages clause is effective and unaffected by the penalty doctrine. In my view, in light of the authorities just mentioned, that is the correct conclusion.

[97] Grocon's submission was that it is necessary to go further, and consider what might lie behind the fact that it failed to achieve Practical Completion, including the minor failures referred to in its submissions, and set out earlier in these reasons. It submitted that if Practical Completion were not achieved by the date required by the contract as a consequence of one of these matters, then the amount payable under the liquidated damages clause would be grossly disproportionate to the anticipated loss. Notwithstanding the conclusion I have reached, I propose to consider this submission further.

[98] I do not accept Grocon's characterisation of its rights in relation to the site up to Practical Completion, as merely being a licence, at least as that term is commonly understood. Under the contract, it clearly had control of the site. So much is apparent from the language of cl 27.1; and from the limited rights, including in relation to access, conferred on Juniper under cl 27.2. Although cl 27.1 only conferred on Grocon such right of control as was necessary for the execution of the Works, its obligation under cl 16.1 to care for

the work until the Date of Practical Completion carried with it such right of control as was necessary to enable it to do so. It seems to me that that conclusion is reinforced by its obligations as principal contractor until the Date of Practical Completion, and its management and control of the site until the Date of Practical Completion, under clauses 26.2 and 26.3 respectively. Under the contract, it was Grocon, rather than Juniper, which generally had the right to determine who might enter the site. Juniper's rights in relation to entry were subject to some limitation (in relation to where the work was being carried out or materials were being prepared or stored); and in any event were conditioned.

[99] In my view, that part of cl 16.1 relied upon by Grocon does not assist it. It demonstrates that from 4.00pm on the Date of Practical Completion, Grocon's liability for care was reduced, to the outstanding work and the items to be removed. It no longer remained responsible for the care of the whole of the work. While it may be taken to have had sufficient rights of access to perform its obligations under this clause, its general right to "possession" then ceased, under cl 35.2.

[100] Assuming that the parties are correct in their approach of testing the liquidated damages clause by reference to the ability of Juniper to give a purchaser vacant possession at the Date of Practical Completion, in my view, even in a case where Practical Completion is delayed by reason of a minor matter of the kind identified in Grocon's submissions, Grocon's rights and obligations in respect of the site are inconsistent with the notion that Juniper could at that time give vacant possession of a unit to a purchaser. In particular, prior to Practical Completion, Grocon would remain liable for the care of the Works, including common areas and each unit; and was no doubt entitled to exercise such control as would be necessary to enable it to care for the Works. On the view which I take of the contract, considered objectively, any delay in the Date of Practical Completion, even for a minor matter of the kind relied upon by Grocon, would have been expected by the parties to have prevented Juniper from settling contracts of sale with purchasers of units. Accordingly, on this basis, I would conclude that the liquidated damages clause is not affected by the penalty doctrine.

[101] In view of the conclusions which I have reached, it is unnecessary to give consideration to Juniper's submissions, based on *Philips*[88], that Grocon's submissions amount to an "ingenious argument" which relies on "unlikely illustrations", and should be ignored. Nor is it necessary to consider Juniper's submission as to the role of the Independent Certifier in determining whether Practical Completion has been achieved.

Clause 35.4

[102] The parties' submissions about cl 35.4 were not fully developed. Although the Project Manager was given powers under the contract, it was not itself a party to the contract. No submission was made that it was bound by the contract. No basis was identified for determining how the parties might have anticipated the Project Manager would act in the event of delay by reason of any of the minor matters referred to in Grocon's submissions. That said, it seems to me there is force in one of Juniper's submissions. It seems to me quite unlikely that the parties, when they entered into the contract, would have anticipated that the project manager would determine separable portions in the event that there were

[88] See *Philips* at 276, 280.

minor defects or omissions; with the result that sales of some, or even most, of the units could have proceeded. It is, however, enough to say that Grocon has failed to establish that it was sufficiently likely that the Project Manager would act under this clause in the circumstances relied upon by Grocon, to affect the anticipation of damages which would be suffered by Juniper by reason of delay. Accordingly Grocon has failed to establish that, because of the prospect of action under this clause, the amount payable under the liquidated damages clause is so disproportionate to the anticipated loss that the clause should be found to be a penalty.

Other matters

[103] There has been no suggestion that either Grocon or Juniper is commercially unsophisticated, or was subject to any relevant disadvantage when entering into the contract. Whatever role inequality of bargaining power might apply in determining whether a liquidated damages clause is in fact a penalty, there is no scope in the present case for finding the clause to be penal.

[104] In *Bridge v Campbell Discount Co Ltd*[89] Lord Radcliffe identified some difficulties with an attempt to determine whether a liquidated damages clause is a penalty, by considering whether it is "in the nature of a threat 'to be enforced *in terrorem*'" against the party who might be liable for the damages. It seems to me that there may be some difficulty in attempting to determine the question in this way, without some appreciation of what the parties might have anticipated it would have cost the party who would be liable for the breach, to avoid non-compliance; although I am conscious judgments of high authority have referred to this consideration. In any event, my conclusion that Grocon has failed to establish that the damages payable under the clause are out of all proportion to the likely loss makes it unnecessary to consider this question further. I note however that my conclusion is consistent with the view expressed by his Lordship; and consistent with what was said in *Andrews*[90], that the penalty is in the nature of a punishment for non-observance of a contractual stipulation.

[105] I have not found it necessary to place any weight on the agreed characterisation of the clause by the parties as a liquidated damages clause.

[106] Since the focus of Grocon's submissions was on whether delay by reason of one of the minor matters it relied upon would in truth prevent Juniper from completing contracts of sale of units, and accordingly cause it any loss, it has not been necessary for me to consider whether there were difficulties in estimating what loss might be suffered if Practical Completion were delayed. Indeed for delay of this kind, Grocon accepted that the higher rates were the result of a genuine attempt by the parties to estimate such loss[91]. Some of the matters relied upon in Juniper's submission were not taken into account in this way. I have not found it necessary to consider whether the clause was therefore effective, because of the difficulty in estimating such damage, in accordance with a passage from *Waterside Workers' Federation of Australia v Stewart*[92].

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89 [1962] AC 600, at 622.
90 *Andrews* at [9].
91 1 Juniper at [70] – [72].
92 (1919) 27 CLR 119, at 132.

[107] The manner in which the liquidated damages clause would operate, differentially for each of the separable portions, using a daily rate, and with changes in the daily rate over time, all support the conclusion that the clause is in truth a liquidated damages clause. However, I have reached that conclusion without reliance on this consideration.

Admissibility of extrinsic evidence

[108] Juniper submitted that evidence of the negotiations between the parties, particularly in relation to the liquidated damages clause, as well as the "luxury nature" of the development the subject of the contract, were relevant for the determination of the question whether the liquidated damages clause was a penalty. The submission extended to the fact that both parties had the benefit of legal advice from prominent firms of solicitors. It submitted that relevant matters included the sophistication of the parties, the nature of the relationship between them, the degree of contractual freedom which they should be permitted to exercise, and whether it is unconscionable to enforce the liquidated damages clause; and that it was not a precondition to the admissibility of evidence touching upon these questions, that the evidence was of facts known to both parties when they entered into the contract[93]. It supported that submission by reference to *Paciocco*[94]; *Spiers*[95]; *Multiplex*[96]; and *Philips*, where Lord Woolf discussed the evidence from one party as to how the liquidated damages were calculated[97]. This submission was generally support by Norton Rose, with additional references to *Tasmania v Leighton Contractors Pty Ltd*[98]; *Murray v Leisureplay plc*[99]; and *Zachariadis v Allforks Australia Pty Ltd*[100].

[109] Basing itself on Lord Dunedin's statement in *Dunlop* that the question is "a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract …"[101], Grocon submitted that extrinsic evidence was admissible only to the extent such evidence would be admissible on any other question relating to the construction of a contract. For this submission it relied on *Luu v Sovereign Developments Pty Ltd*[102] *(Luu)* and *Fermiscan Pty Ltd v James*[103] *(Fermiscan).*

[110] In *Luu*[104] Bryson JA (with whom Handley and McColl JJA agreed) said

> "Counsel also observed to the effect that the onus was on the appellant of adducing evidence to show that the first respondent did not make a genuine pre-estimate of its damages. This too is not in my opinion a subject on which evidence was admissible; it should be decided upon the indications (such as

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93 1 Juniper at [83].
94 At [95], [96], [122].
95 *Spiers* at [25] – [26]; see also [27].
96 *Multiplex* at 513; see the discussion at 507-513.
97 *Philips* at 281.
98 (2005) 15 Tas R 243 at [22].
99 [2005] EWCA Civ 963 at [52].
100 (2009) 26 VR 47 at [148] – [150].
101 *Dunlop* at 86 – 87.
102 (2006) 12 BPR 23, 629.
103 (2009) 261 ALR 408 at [133] – [134].
104 *Luu* at [33].

> they are) in the parties' contract. It would be an impossible test that the appellant should have the burden of showing what estimate of damage the first respondent made, and of showing that it was not a genuine pre-estimate. The question is to be decided by reference to the circumstances which existed at the time when the contract was made …"

[111] This provides some support for Grocon's submission. It is not so clear that the same can be said about *Fermiscan*. There a clause was held to be a penalty because it made unconditional an otherwise conditional obligation to pay a large sum of money in the event of a breach, the amount having no apparent relationship to an agreed pre-estimate of damages for such breach[105]. I have not been able to identify any issue about the extent to which extrinsic evidence was admissible (though I note that reliance was placed on extrinsic evidence, including negotiations[106]). Rather, Allsop P said[107]

> "The resolution of this appeal does not require an examination of the limits of the ascertainment of the contractual intention of the parties …"

[112] In *Philips*, there was no suggestion that, at the time of the contract, Philips knew of the explanation of the calculation of liquidated damages, evidence of which was relied upon by their Lordships. The decisions in *Spiers* and in *Multiplex* are consistent with the use of evidence of facts not known to both parties. This would appear to be true also of *Paciocco* (at least in relation to the way in which ANZ unilaterally determined exception fees[108]). It is less clear that *Zachariadis* takes the same approach.

[113] The rules limiting the use of extrinsic evidence for the interpretation of a written agreement have been developed by courts over the years to identify the meaning of the words used by the parties in a document which they have chosen as a record of their agreement. It is not surprising, therefore, that there is a disposition to rely primarily upon the parties' written expression. The doctrine of penalties, however, is not primarily concerned with the identification of that to which the parties agreed; rather it is concerned with the question whether they should be held to their agreement, including in some cases an agreed characterisation of a liquidated damages clause. It seems to me that the equitable origin of the jurisdiction, and its concern with unconscionability suggest the limitations on the use of extrinsic evidence may not be the same as they are when determining the meaning of a written document. Lord Dunedin's characterisation of the question as one of "construction" may have been intended to emphasise that what is required is a conclusion about the effect of the liquidated damages clause, reached by a Court, and not by the parties, by reference to principles which the Courts have developed. There are likely to be cases where the explanation for such a clause will only be known to one party; and that explanation may well demonstrate that the amount payable under it is, or is not, out of all proportion to the likely damages. It is difficult to see how a Court could reach a sound conclusion about the unconscionability of enforcement of the clause, without such evidence. In those circumstances, since it is necessary to choose between authorities which are not consistent, and bearing in mind in particular that *Philips* is a decision of the Privy Council, it seems to me appropriate to accept the submissions made

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[105] *Fermiscan* at [137].
[106] *Fermiscan* at [137].
[107] *Fermiscan* at [133].
[108] *Paciocco* at [95]. See also *Paciocco* appeal at [206], [209] – [212].

by Juniper and Norton Rose. Nevertheless, the general limitations on the use of evidence to construe a document apply if any question of the meaning of the clause arises; including whether it is in truth ancillary to some other obligation or stipulation.

[114] Since writing the above, as previously indicated, the judgment in the *Paciocco* appeal has come to my attention. There, in a passage which seems to me to state better what I have been trying to convey, Allsop CJ[109] described the task of the Court as "one of construction in a wide sense", and continued

> "…this involves the related tasks of ascription of meaning and content to the relevant clause by the process of contractual construction and interpretation, and also any necessary *characterisation* of the clause with that legal meaning *in its full context*." (emphasis added)

[115] Allsop CJ later made the following statement[110]:

> "If, however, the clause properly construed provides for a payment upon breach or pursuant to a stipulation that is collateral or accessory to a primary stipulation in the relevant sense, all the circumstances and evidence tending to illuminate all the circumstances will be admissible to assist with the process of characterisation as to whether the clause is penal or is a genuine pre-estimate of damage in the relevant sense."

[116] In my view, therefore, on the question whether a clause, whose meaning has been determined, nevertheless is penal, extrinsic evidence may be used, even where the evidence would not be admissible for determining the meaning of the clause.

Effect of evidence

[117] The general nature of the evidence has been referred to previously. It demonstrates that the liquidated damages clause was the result of lengthy negotiations by sophisticated parties, with some reduction for initial periods, of what was ultimately agreed to be the loss associated with delay. It is clear that, in those negotiations, Grocon was provided with information about the finance and other costs to which Juniper would be subject if completion of the project, and the settlement of sales, were delayed[111].

[118] In my view, the evidence supports the conclusion that the liquidated damages clause was the result of a genuine attempt by the parties to pre-estimate the loss which Juniper might suffer if Practical Completion were delayed.

[119] In its reply, Grocon pleaded that the negotiations proceeded, not on the basis of the (expansive) definition of Practical Completion found in the contract, but on the basis of a delay in Practical Completion where Practical Completion simply meant completion of

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[109] *Paciocco appeal* at [95].
[110] *Paciocco appeal* at [212].
[111] See 1 Grocon at [83].

such matters as would permit Juniper to generate revenue, no doubt from the sale of units within the Soul Development[112].

[120] Grocon submitted that it was a compelling inference that the pre-estimations focused entirely on delay in completion which might cause a delay in Juniper's ability to generate revenue from sales[113]. The extrinsic evidence does not suggest that the calculations were prepared on the basis of a failure to achieve Practical Completion by reason of one of the minor failures relied upon by Grocon, previously referred to[114]. Consequently, the clause should be construed as a penalty.

[121] Grocon's submissions depend upon a conclusion about the effect of delay in Practical Completion which differs from that set out earlier in these reasons. Accordingly, I do not accept Grocon's submissions. In any event, the parties had agreed on the definition of Practical Completion before they negotiated the schedule which sets out the rates of liquidated damages[115]. There is no reason to conclude the negotiations proceeded without an awareness by both parties of the effect of the definition of Practical Completion which ultimately appeared in the contract; and accordingly without an appreciation of the range of defects or omissions which might delay Practical Completion.

Conclusion

[122] In my view, Grocon has not demonstrated the liquidated damages clause in its contract with Juniper is affected by the penalty doctrine. Moreover, it should be regarded as a genuine pre-estimate by the parties to that contract of the damages likely to be suffered by Juniper should there be a delay in Practical Completion.

[123] I propose to hear submissions from the parties about any order to be made as a consequence of these reasons.

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[112] See Reply para 12.
[113] 1 Grocon at [84].
[114] 1 Grocon at [85].
[115] 1 Grocon at [81].