SUPREME COURT OF QUEENSLAND

CITATION:	*Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd* [2015] QCA 291
PARTIES:	**GROCON CONSTRUCTORS (QLD) PTY LTD** ACN 120 476 495 (appellant) **v** **JUNIPER DEVELOPER NO 2 PTY LTD** ACN 123 200 699 (respondent) **RIDER LEVETT BUCKNALL (QLD) PTY LTD** ACN 125 873 252 (not a party to the appeal)
FILE NO/S:	Appeal No 5015 of 2015 SC No 9291 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 102
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2015
JUDGES:	Holmes CJ and Atkinson and McMeekin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The appellant to pay the respondent's costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – DISTINCTION BETWEEN PENALTY AND LIQUIDATED DAMAGES – where the respondent contracted the appellant to design and construct a development – where the appellant was required to bring the development to a stage of Practical Completion – where a liquidated damages clause made liquidated damages payable if the appellant failed to achieve Practical Completion by the Date for Practical Completion – where the contract contemplated the respondent's sale of residential units – whether the penalty doctrine was applicable to the liquidated damages clause making it unenforceable – whether Practical Completion was defined such that it might not be achieved if

minor contractual obligations were not fulfilled – whether the amount required to pay under the liquidated damages clause was extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved – whether the liquidated damages clause operated upon a breach of a single obligation – whether the contract had the effect that even if practical completion was delayed by reason of a minor matter that nonetheless meant, and the parties contemplated so at the time of contract, that the respondent would be unable to settle the contracts of sale

Alfred McAlpine Capital Projects Limited v Tilebox Limited [2005] EWHC 281, cited
AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170; [1986] HCA 63, cited
Astley v Weldon (1801) 2 Bos & P 346; [1801] EngR 108, cited
Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda [1905] AC 6; [1904] UKHL 3, cited
Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79; [1914] UKHL 1, cited
Elsey v JG Collins Insurance Agencies Limited [1978] 2 SCR 916; (1978) 83 DLR (3d) 1, cited
Esanda Finance Corporation v Plessnig (1989) 166 CLR 131; [1989] HCA 7, cited
Geraldton Food Distributors Pty Ltd v Spencer [1985] WAR 261, cited
Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (In liq) (2007) 18 VR 528; [2007] VSCA 223, cited
J Jarvis & Sons Ltd v Westminster Corporation [1969] 1 WLR 1448; [1969] 3 All ER 1025, cited
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235; [1973] UKHL 2, cited
Law v Local Board of Redditch [1892] 1 QB 127, cited
Lord Elphinstone v Monkland Iron and Coal Co (1886) 11 App Cas 332, cited
Makdessi v Cavendish Square Holdings BV [2013] 1 All ER (Comm) 787; [2013] EWCA Civ 1539, cited
Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504, cited
Murphy Corp Ltd v Acumen Design & Development (Qld) Pty Ltd & Hooper (1995) 11 BCL 274, cited
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 321 ALR 584; [2015] FCAFC 50, cited
Philips Hong-Kong Ltd v Attorney-General of Hong Kong [1993] 1 HKLR 269, cited
Rigall & Anor v Thompson [2010] QCA 144, cited
Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; [2005] HCA 71, cited
Robophone Facilities Ltd v Blank [1966] 1 WLR 1428; [1966] 3 All ER 128, cited
Spencer v Geraldton Food Distributors Pty Ltd (unreported) 1601/78; 25 May 1984 BC 8491326, cited

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

COUNSEL:	A Archibald QC, with M Hindman and R Craig for the appellant P Dunning QC, with P Franco QC and M Martinez for the respondent
SOLICITORS:	Minter Ellison for the appellant Holding Redlich for the respondent

[1] **HOLMES CJ:** I agree with the reasons of McMeekin J and the order he proposes.

[2] **ATKINSON J:** I agree with the reasons for judgment of McMeekin J and the order proposed by his Honour.

[3] **McMEEKIN J:** The issue on this appeal is whether a liquidated damages clause in a construction contract, triggered by a failure to achieve practical completion of a building project, is penal rather than compensatory and so void. The primary judge (Peter Lyons J) held the liquidated damages clause to be valid.

[4] The critical issue is whether the definition of "Practical Completion" set out in the contract had the effect of attracting the operation of proposition 4(c) articulated by Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited v New Garage & Motor Company Limited*:[1]

> "(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'."

[5] No case was cited in which the proposition has been applied to a practical completion clause in a building contract. Further, no decided case has been found in which the penalty doctrine has been applied in this context and to such a failure.[2]

Background

[6] Grocon Constructors (Qld) Pty Ltd ("Grocon") entered into a contract with the respondent Juniper Developer No 2 Pty Ltd ("Juniper") concerning the construction of a substantial development at Surfers Paradise.

[7] Juniper was the developer and the "Principal" under the contract. Grocon was the "Contractor". Grocon took responsibility for the design and construction of the project. The parties agreed on a liquidated damages clause (cl 35.7).[3]

[8] The parties referred to the development 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. It was a very substantial project worth many millions of dollars.

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1 [1915] AC 79.

2 See *Alfred McAlpine Capital Projects Limited v Tilebox Limited* [2005] EWHC 281 at [47] where Jackson LJ quoted *Hudson's Building and Engineering Contracts* (11th edition) at paragraph 10-021 that "there would appear in fact to be virtually no reported cases in the United Kingdom where periodical liquidated damages for delay in building contracts have been held excessive so as to constitute a penalty." Counsel's researches have not brought any such case to light.

3 Unless otherwise specified the references are to the General Conditions of Contract ("GCC").

[9] A dispute arose. Grocon 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 counterclaimed for liquidated damages in a sum of $33.6 million, or alternatively for $28.5 million for damages for delay; and has made other claims. Juniper is now in liquidation.

[10] Grocon sought a determination of a separate question to be determined in advance of trial: "Is clause 35.7 of the contract pleaded in paragraph 4 of the statement of claim void on the grounds that it imposes a penalty." As mentioned, Peter Lyons J held the clause to be valid. Grocon now appeals.

[11] There was an argument before the primary judge as to the admissibility of certain extrinsic evidence. For present purposes it was common ground that certain circumstances extraneous to the contract are relevant to the determination of the question. The primary judge recorded the circumstances as follows:

> "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."[4]

[12] Both Grocon and Juniper were commercially sophisticated and in receipt of legal advice from prominent firms of solicitors at the time of contracting.

A Summary of the Contractual Terms

[13] For present purpose it is not necessary to set out the terms of the contract in any great detail. Under the contract, the work was divided into four separable portions. While the precise terms of the contract applicable to each separable portion were not the same the differences are not material for present purposes.

[14] Grocon was obliged to "bring the Works to the stage of Practical Completion" (cl 3.1) and to achieve that "by the Date for Practical Completion" as defined (cl 35.2). The contract provided that "[o]n the Date of Practical Completion", as defined, Grocon "must give possession of the Site and the Works to [Juniper]" (cl 35.2). The "Date of Practical Completion" was defined to include "the date certified by the Independent Certifier in a Certificate of Practical Completion to be the date upon which Practical Completion was reached."

[15] The liquidated damages clause was, so far as relevant, in these 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.

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4 At [26].

…

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.

…

All amounts payable by the Contractor to the Principal under this 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."

[16] Of crucial importance is the definition of "Practical Completion". The definition varied depending on the separable portion in issue. The parties were content to use the definition referrable to Separable Portion 2, as did the primary judge, as it is illustrative of the point in issue. That definition provides:

> "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."

[17] The liquidated damages payable depended on the separable portion in issue and the extent of the delay. 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 $24,500 per day $49,000 per day	1-8 weeks after Date for Practical Completion 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

[18] The damages were therefore substantial – from $8,500 per day to $59,000 per day. Following that table appeared this clause:

> "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."

[19] I will mention other contractual provisions to the extent they are relevant to the particular arguments advanced, as I perceive the need.

Relevant Principles

[20] It is not in issue here that the penalties doctrine applies. A necessary element at law, but not in equity, is that the stipulation is payable on breach of a term of the contract.

For present purposes there is no relevant distinction between equity and contract. The agreed premise here is that Grocon breached the contract triggering the liquidated damages clause.

[21] The onus is on the party alleging that the penalties doctrine is applicable.

[22] Whether a provision is a penalty at law is a question of construction that must be determined as a matter of substance viewing the contract as a whole. That question of construction however "is one of construction in a wide sense, falling to be decided by the meaning and content of the words and on the inherent circumstances of each particular contract, judged at the time of its making": *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 per Allsop CJ at [95].[5]

[23] The provision will not be a penalty unless it is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved." This is the "essential element (at law or in equity)" that the sum be "extravagant, exorbitant and unconscionable": *Dunlop Pneumatic Tyre Company Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1; [1915] AC 79 at 86-87; *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71; 224 CLR 656 at 669 [31]-[32]; *Clydebank Engineering and Shipbuilding Company v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 10 and 17; *AMEV-UDC Finance Ltd v Austin* [1986] HCA 63 ; 162 CLR 170 at 197 and 201.[6]

[24] The question is to be assessed as at the time of entry into the contract. It is not a mechanical task.[7]

[25] The need for some element of oppression was emphasised by Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin*.[8] To the same effect is the later judgment of Wilson and Toohey JJ in *Esanda Finance Corporation v Plessnig*[9] and in that regard their Honours quoted from a Canadian decision of *Elsey v JG Collins Insurance Agencies Limited*:

> "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression."[10]

[26] Commercial contacts enjoy no immunity from the doctrine: *Makdessi v Cavendish Square Holdings BV*.[11]

[27] In determining the question of construction the four propositions distilled by Lord Dunedin in *Dunlop Pneumatic Tyre Company Ltd v New Garage & Motor Co Ltd*[12] are helpful. The propositions were accepted as authoritative by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd*.[13] They are as follows:

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5 Citing *Dunlop* at 86-87 and *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170. To similar effect see *Paciocco* on appeal at [401] per Middleton J.

6 This collection of authorities was usefully summarised at *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [39]. To the same effect see *Rigall v Thompson* [2010] QCA 144 at [31].

7 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [21].

8 (1986) 162 CLR 170 at pp193-194.

9 (1989) 166 CLR 131, 140.

10 (1978) 83 DLR (3d) I at 15.

11 [2013] EWCA Civ 1539 at [75](v) per Clarke LJ.

12 [1915] AC 79 at 86-87.

13 (2005) 224 CLR 656 at [12].

> "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.
>
> (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)

[28] Paragraph 4(c) above was supported by Lord Dunedin with a reference to *Lord Elphinstone's Case* and in respect of this proposition his Lordship added the following, on which Grocon relies:

> "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…."[14]

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14 [1915] AC 79 at 89, referring to *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332.

The Primary Judge's Approach

[29] His Honour commenced with the four propositions formulated by Lord Dunedin in *Dunlop*. As to proposition 4(c) on which Grocon placed reliance the primary judge held that the "single lump sum" in this contract is made payable by way of compensation on the occurrence of only one event not several events. As a matter of construction his Honour held that there was a single obligation imposed on Grocon, breach of which exposed Grocon to the agreed damages. The operation of the liquidated damages clause here was triggered only by delay – that being a failure to achieve practical completion by a particular date.

[30] Secondly, his Honour held, after a review of authority, that the law in Australia required that a party seeking to invoke the penalty doctrine had to demonstrate that the amount payable is "extravagant and unconscionable" in comparison with the greatest loss that could have been suffered from the breach.

[31] Thirdly, his Honour rejected the proposition that merely because Grocon's liability under the disputed clause was collateral or accessory to its primary liability under the contract that he was required to assume that the clause operates as a penalty until the contrary is demonstrated.

[32] Fourthly, his Honour distinguished the instant case from the situation in *Paciocco*. His Honour contrasted the promise in *Paciocco* "to make in a timely fashion any payment which may at any time became due" with the promise here to achieve practical completion by a fixed date. In the former case the promise might be breached "at many times and in many ways". Each breach may have different consequences in terms of the significance of any loss. In the latter case the promise can be breached only in one way, although there may be many causes for it. In the former case the presumption in proposition 4(c) of Lord Dunedin's statement in *Dunlop* has application but not in the latter.

[33] Fifthly, noting Grocon's concession that in some cases breach by it of the practical completion clause may be expected to occasion Juniper serious damage, Grocon could not show that the damages payable under the liquidated damages clause is "extravagant and unconscionable" or "out of all proportion" to the anticipated loss. That being so the liquidated damages clause was unaffected by the penalties doctrine.

[34] Sixthly, if he was wrong in that last conclusion, his Honour considered that considered objectively the contract had the effect that even if practical completion was delayed by reason of a minor matter, as Grocon argued, that nonetheless meant, and the parties contemplated so at the time of contract, that Juniper would be unable to provide vacant possession to an incoming purchaser of the residential units and so would be unable to settle the contracts of sale. Hence Juniper would be exposed to potentially substantial losses.

[35] Finally, his Honour concluded that extrinsic evidence was admissible not for determining the meaning of the disputed clause but for assisting in determining whether 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 was delayed. His Honour held that the evidence supported his conclusion previously arrived at that the clause was a genuine pre-estimate and not a penalty.

Grocon's Submissions

[36] Grocon argued that under the standard form of contract an obligation such as that imposed on it here that Grocon "must perform the Work under the contract … so as

to achieve Practical Completion by the Date of Practical Completion" (cl 3.7) would be satisfied *despite* the omission of minor items of work or minor defects that do not prevent the building being used. By reason of the definition of Practical Completion in this contract Grocon argues that it was required to complete *all* the matters listed in the definition to achieve Practical Completion. The effect of the Practical Completion definition, Grocon submitted, is that the most minor of defects in the work triggers the liquidated damages clause.

[37] Grocon submitted, by way of example, that the clause was triggered if one of the keys supplied for a door of an apartment was fitted with a tag with a non-approved label (see the definition in paragraph [16] above at (h)); or if a single light globe that had been used by Grocon was defective (*ibid* at (g)); or if a single appliance was not tested (*ibid* at (k)(i)). Several other examples were given. Such a failure exposed Grocon to a liquidated damages claim commencing at least at $8,500 per day. The loss occasioned to Juniper from a wrong tag, a missing globe, or a defective appliance, could not possibly be at such a level, so it was said.

[38] Grocon submitted that there is a presumption that a clause is a penalty when a single and very substantial lump sum is made payable by way of compensation on the occurrence of one or more several events, some of which may occasion serious and others but trifling damage, citing proposition 4(c) from the judgment of Lord Dunedin in *Dunlop*[15] and his Lordship's observation in that case that dicta in *Elphinstone's Case* "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."

[39] Grocon submitted that the primary judge erred in four critical ways. His Honour, it is said:

(a) should not have characterised the liquidated damages clause as operating upon a breach of a single obligation;

(b) should not have rejected the Dunlop paragraph 4(c) presumption as applicable;

(c) erred in his finding that, considered objectively, the contract had the effect that even if practical completion was delayed by reason of a minor matter that nonetheless meant, and the parties contemplated so at the time of contract, that Juniper would be unable to settle the contracts of sale;

(d) concluded by reference to supposition rather than evidence that the rate of liquidated damages was agreed by the parties with an appreciation of the wide range of defects or omissions which might delay Practical Completion, and the consequences of minor defects or omissions being within that range.

Juniper's Submissions

[40] Juniper argued that Grocon misstated the true test. For the penalty doctrine to apply, Juniper submitted, the sum payable under the liquidated damages clause must be "extravagant or unconscionable" in comparison with the "greatest conceivable loss flowing from the breach". The sum payable must be "out of all proportion" to the greatest loss. The onus lay on Grocon to demonstrate that proposition. It had not attempted to do so.

[41] Juniper submitted that there was only one relevant obligation imposed on Grocon under the contract – to achieve "the stage of practical completion". How that was

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15 [1915] AC 79 at 87.

defined was not relevant to the issue. The liquidated damages were payable only on delay in achieving that stage. The dicta in *Elphinstone's Case* was not relevant to this (or perhaps any) building contract.

[42] In any case, Juniper submitted that properly construed the contract did not permit the independent certifier responsible for issuing the certificate of practical completion to refuse to issue the certificate for such a trivial matter as a missing light bulb. Minor defects and omissions would not result in a delay that would trigger the liquidated damages clause. Judging the matter from the point of view of the parties at the time of contract it was not in either side's contemplation that such trivialities would result in the application of the liquidated damages clause.

[43] Further Juniper submitted that the concentration on minor or trivial defects concealed the real problem. Until the stage of practical completion was achieved Grocon retained possession of the site. Juniper's ability to sell the units was in the meantime at least impeded if not prevented entirely. Such a delay had serious consequences for Juniper, or potentially so. The possible consequences in contemplation at the time of contract included:

(a) Loss of value of money through delayed settlements;
(b) Loss of capital value in the project if the market fell;
(c) The potential to incur significant legal costs in enforcing or attempting to enforce contracts either prior to practical completion or despite the existence of defects that some purchaser's might consider to be of significance and not minor;
(d) Reputational damage if the project was delayed or if the quality of finish was less than optimal.

[44] Finally, Juniper argued that where a liquidated damages clause, as here, provides for the payment of a sum of money by reference to a rate over a period of time then the provision would not ordinarily be a penalty.

[45] As will be seen I consider that these submissions should be accepted.

Practical Completion Clauses in Building Contracts

[46] Before turning to the question of the construction of the terms of the contract I observe that the approach to the contract that the primary judge took was in accordance with the consistent interpretation by the Courts of such clauses in building contracts for over 120 years: see *Law v Local Board of Redditch*;[16] *Philips Hong-Kong Ltd v Attorney-General of Hong Kong*.[17] The characterisation of the obligation that Grocon urges was advanced and rejected in those cases.

[47] The obligation in *Law* was 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 stated damages to be paid. Like here, the argument was put that trifling failures involving no conceivable loss of significance to the Board – one example given being the leaving of a wheelbarrow on site – would trigger the payment. To this Kay LJ said:

> "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.

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16 [1892] 1 QB 127.
17 [1993] 1 HKLR 269.

> 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."[18]

[48] The approach was followed in *Spencer v Geraldton Food Distributors Pty Ltd* (unreported) 1601/78; 25 May 1984 BC 8491326 per Commr Heenan cited with apparent approval on appeal: [1985] WAR 261 per Burt CJ at p 267. So far as my researches show this is the only Australian decision in which the approach in *Law* has been referred to.

[49] The judgment of Kay LJ in *Law* was expressly considered and approved by Lord Woolf in giving judgment in *Philips Hong-Kong Ltd v Attorney-General of Hong Kong*,[19] a decision of the Privy Council. That too was a case involving a building and engineering contract. There too the argument was put on the basis of proposition 4(c) from *Dunlop* and Lord Watson's dictum in *Lord Elphinstone's Case* that there is a penalty where "a single lump sum is made payable …on the occurrence of one or more or all of several events…". The several events there concerned a failure to "complete the Works" or carry out certain of the works by key dates. Lord Woolf responded to the argument, citing the judgment of Kay LJ:

> "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 of liquidated damages."[20]

[50] It is not irrelevant to note, in this context of the attempted reliance on Lord Dunedin's proposition 4(c) in *Dunlop*, the reasoning of Lord Atkinson in that case. It is plain that his Lordship would not have accepted such a categorisation as Grocon attempts here:

> "In many cases a person may contract to do or abstain from doing an act which is a composite act, the product or result of almost numberless other acts. For instance, if one should contract with a builder to build a house of the best materials and with the most skilled workmanship, and to hand over possession of the same completed on a certain day for £1000, £500 to be paid if the agreement was not performed; every fire grate set which on completion would be found to be of bad material, every door which would be found to have been defectively hung, every cubic foot of masonry which would be found to have been badly and improperly built, would involve a breach of the agreement, *but it would be quite illegitimate to thus disintegrate the obligation to do what the parties regarded as a single whole into a number of obligations to do a number of things of varying importance, and treat the £500 as prima facie a penalty, because these individual breaches of the agreement did not cause, in many instances, any injury commensurate with that sum.* This is the very ground, or one of the grounds, upon which Lord Herschell rests his judgment in *Lord Elphinstone v. Monkland Iron and Coal Co*."[21]

[51] It could hardly be supposed that Lord Dunedin would let go unchallenged such an analysis if he thought that, properly understood, Lord Atkinson's hypothesis fell

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18 [1892] 1 QB 127 at p 136. Lord Esher to the same effect at p131-132.

19 [1993] 1 HKLR 269 at p 282.

20 *Ibid.*

21 At p 93 – my emphasis.

within his proposition 4(c) and its "several events" requirement. Yet the approach that Lord Atkinson decried is the very argument Grocon puts here.

[52] I turn to Grocon's criticisms of the primary judge's reasons.

A Single Obligation?

[53] Grocon submits that it is wrong to describe the obligation imposed on it as singular as the primary judge did. It argues that the obligation properly understood involves multiple obligations of differing levels of seriousness. It was submitted that modifications adopted by the parties to the standard form of General Conditions of Contract[22] justified this departure from a very long standing approach. Grocon submits that the particular definition adopted here of Practical Completion takes this case out of the class of building contracts just mentioned, and previously considered as involving a single obligation, and therefore legitimises its attempt to "*disintegrate the obligation to do what the parties regarded as a single whole into a number of obligations to do a number of things of varying importance*" to adopt Lord Atkinson's phrase. I cannot agree.

[54] If Grocon is correct then two things follow. First, there is a presumption in its favour that the clause is penalty. Secondly, the test to be applied is that the disconformity between the stipulated damages payable and the loss likely to be suffered is to be judged according to the "weakest link". There is no doubt that if the obligation that triggers the payment of the liquidated damages amount was as trifling as a missing light bulb or a small area of missing landscaping then the disconformity would be marked and there would be a strong argument that the clause was penal. But is that what the parties meant in forming their contract? In my view to reach that view would be to ascribe an absurd meaning to the contract, and one not intended by the parties.

[55] Grocon is critical of the primary judge's approach. The submission made is that his Honour looked to form not substance; that it was apparent that the liquidated damages clause was capable of being invoked upon the failure of any one of a widely varying range of events or occurrences. I disagree. Rather it is Grocon who unduly narrows the enquiry and in doing so ignores the substance of the obligation and indeed the wider context of the contract.

[56] It will be recalled that clause 35.7 provided in its opening paragraph:

> "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."[23]

[57] The approach that the primary judge adopted was to give meaning to the precise words chosen by the parties. The phrase "to the stage of Practical Completion" invokes a concept different in kind to the many things that needed to be done to bring that stage about. The complaint made by Grocon that delay was not the *only* integer for the imposition of liquidated damages, as his Honour found, but that performance of work of various kinds by that time was an integer as well, is a distinction without a difference.

[58] Several observations may be made about the relevant clauses in the subject contract.

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22 AS 4300-1995.

23 My emphasis.

[59] The first is that the definition in question is of the term "Practical Completion". The word "Practical" must be given some weight. In normal parlance the words convey the meaning of "completed for all practical purposes": *J Jarvis & Sons Ltd v Westminster City Council* [1969] 3 All ER 1025 at 1031 per Salmon LJ. I take that to be the meaning of these ordinary English words. Grocon submitted[24] that this was the meaning "at common law" citing *Murphy Corp Ltd v Acumen Design & Development (Qld) Pty Ltd & Hooper* (1995) 11 BCL 274 at 294 per GN Williams J (as his Honour then was) and *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (In liq)* (2007) 18 VR 528 at 548. The judgments in those cases approached the phrase as I have. In the former case Williams J said that "completed for all practical purposes" was the meaning of "practical completion" "in broad terms" albeit subject to the definition in the contract. In the latter case Ashley JA, after quoting Salmon LJ in *Jarvis*, held that "practical" meant more than "substantial" completion: see [123]-[124]. Objectively, the parties could hardly have supposed that a "Certificate of Practical Completion" would be denied in a multi-million dollar building contract because of a missing light bulb. That is not to say that the parties could not by their express words choose some different meaning. But, as Lord Reid said in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251:

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

[60] Secondly, the better construction it seems to me is that the discretion given to the certifier in paragraph (a) of the definition of Practical Completion is intended to be read distributively across paragraphs (b) to (k) that follow. It will be recalled that paragraph (a) read:

> "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;
> …"

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24 See footnote 15 of Grocon's submissions.

[61] The word "Works" is defined in the contract to mean: "the whole of the work to be executed in accordance with the Contract…"[25]

[62] Each of the matters mentioned in paragraphs (b) to (k) that follow therefore forms part of "the Works" referred to in paragraph (a). On Grocon's construction the discretion in paragraph (a) is to be read as if qualified by a phrase such as "save for the matters set out in paragraphs (b) to (k) below". The absence of any such qualifying phrase in paragraph (a) combined with the failure to expressly take away the discretion plainly given in (a) and said to relate to the entire "Works" in any of the paragraphs that follow leads strongly to the conclusion that no such meaning was intended. That is particularly so where to adopt Grocon's preferred construction would result in the absurdity of a multi-million dollar construction not being certifiable as practically completed because of trivialities.

[63] The argument against this is that the remaining subparagraphs (b) to (k) have no work to do. In my view those paragraphs serve to identify matters that the parties acknowledged would need to be carefully considered in reaching a decision.

[64] It was argued that the cumulative effect of the three conditions in paragraphs (i) to (iii) leaves Grocon in the same position of being subject to a requirement to meet trivial defects. That submission tends to downplay the independent role of the Certifier and gives little regard to the moderating influence that the conditions impose on the exercise of the discretion.

[65] As to the first point, the 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": cl 23.4(2). According to the Deed the certifier warranted that in performing the services the Certifier would "comply with all Law and with the degree of professional care, knowledge, experience, skill and diligence which would be reasonably expected of an expert professional providing services similar to the Services within the construction industry generally and the construction of major building works in particular".[26]

[66] As to the second point, if the "Works" were not suitable "for their Stated Purpose" and Grocon had no "reasonable grounds" to justify that situation it would seem entirely reasonable that the discretion be exercised against Grocon. In this context one would not expect minor or trivial matters would result in the "Works" not being suitable for their "Stated Purpose".

[67] The absence of any reference to "omissions" in subparagraphs (i) to (iii) is of note. One possible construction is that in the case of omissions there was no constraint and the Certifier had an "absolute discretion". Another is that "defects" in subparagraphs (i) to (iii) is to be taken as shorthand for the earlier phrase used of "omissions and defects". The opening words "such defects" in subparagraph (i) suggests as much. I do not think it matters greatly. Whether absolute or not the sub-paragraphs (i) to (iii) give to the Certifier a good guide as to how he should exercise his discretion. And the Certifier is governed by the over-riding consideration that it is a "Certificate of *Practical* Completion" that he is required to issue.

[68] Thirdly, various references in paragraphs (b) to (k) suggest that a shorthand has been used. For example the requirement in paragraph (h), mentioned in the course of

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25 Cl 2.1(134).

26 Cl 2.2(2).

argument, that "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" is plainly a reference to 2 sets of keys to each of hundreds of units. The obligation is said to be "for the Works" not "for each unit". From Juniper's perspective a failure to properly categorise hundreds of sets of keys would be no trivial matter. Similarly the requirement in paragraph (g) is, inter alia, for the provision of "lighting" not "a light bulb". The implication is that it is the impact on the Works as a whole that is the focus not on trivial minutiae.

[69] Fourthly, there is a discrepancy between the definition clause and the agreed Deed governing the exercise of the independent certifier's functions. The Deed provided that some matters were a "condition precedent" to the Certifier issuing the Certificate of Practical Completion. Grocon argued that the Deed supported its interpretation of the contract. I do not agree. While the Deed governing the Certifier's duties cannot alter the meaning of the contractual terms the parties have fixed on, what is of interest is that clearly some thought was given to what the parties thought were those "conditions precedent" and what they did not. To the extent that some matters that appear in the definition of "Practical Completion" are not listed as "conditions precedent" to the issuing of the Certificate in the Deed suggests that the absent matters were indeed intended to be left, as one might expect, to the good sense of the Certifier.

[70] To understand the point it is necessary to look more closely at some of the terms of the 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."

[71] Schedule 1 of the Deed mentioned in cl 23.4 required the Independent Certifier, to "[j]ointly inspect the Works, (to) determine whether Practical Completion has been achieved and issue the Certificate of Practical Completion". Schedule 1[27] 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:

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27 Annexure Part V to the General Conditions of Contract.

…

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 (e) 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 (f) 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 (h) As a condition precedent to Practical Completion receive 2 sets of keys for the Works;

Paragraph (i) As a condition precedent to Practical Completion receive all maintenance and product manuals;

Paragraph (j) As a condition precedent to Practical Completion receive all fire rating certificates for the Works; and

Paragraph (k) As a condition precedent to Practical Completion ensure all landscaping is complete."

[72] Generally speaking there is no reason to think that the various matters that the parties considered essential to Practical Completion as contemplated in the Deed were not of importance. They were very likely to be of importance to someone buying a residential unit. The particularity suggests that Juniper expected close attention to detail. However most of Grocon's allegedly "minor breaches" find no place in these "conditions precedent" that were plainly intended to guide the Certifier. Indeed the only minor breach left from the list in Grocon's Outline[28] that I can see is the complaint that a failure to provide a single manual may result in a refusal to achieve Practical Completion (see (i) above). I am not prepared to hold that any different effect is brought about by that one example. As Lord Woolf said in *Philips* "the use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages."[29] As well, the point made by Clarke LJ in *Makdessi* is relevant: "…the fact that a breach may give rise to trifling … damage may not be determinative if the parties can be regarded as having regarded the trifling as unlikely."[30] I think it highly unlikely that the parties considered that a failure to attend to a trivial matter would lead to any delay.

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28 Paragraph 11.

29 [1993] 1 HKLR 269 at p 280.

30 *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539 at [75](iv).

[73] Thus the comparison of the Deed to the Definition adds support to Juniper's submission that, properly construed, the discretion plainly given to the certifier in paragraph (a) of the definition of Practical Completion is intended to be read distributively across paragraphs (b) to (k) that follow.

[74] That analysis is sufficient to dispose of Grocon's reliance on the statement of Salmon LJ in *J Jarvis & Sons Ltd v Westminster City Council*[31], in the context of a practical completion clause there under consideration:

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

[75] In any case, as the primary judge observed, the comment was obiter and not supported by analysis or authority.

[76] Against this analysis and the authorities mentioned Grocon urges that the obligations imposed here are akin to those under consideration in *Ariston SRL v Charly Records Ltd* (1990) Unreported; Court of Appeal (UK) 13 March 1990. There a clause that required Ariston to pay £600 per day for late delivery of certain items of differing importance and value which were the property of Charly and had been previously delivered by Charly to Ariston was held to be a penalty. While it was held that the amount stipulated 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, it was held that the sum was clearly out of proportion to the loss which might be caused from the failure to return a few only of some comparatively unimportant items. No distinction was drawn between the substantial breach and the minor breach yet the one figure was provided by way of compensation. Lord Dunedin's proposition 4(c) was invoked.

[77] In my view the nature of the obligation in *Ariston* was quite dissimilar to that here. The Court there was not prepared to hold that the parties had intended the clause to apply only to a substantial failure.[32] A failure to return some minor item to Charly could not conceivably result in harm to the extent of £600 per day. A failure by Grocon to achieve Practical Completion by the due date carried with it potential consequences for Juniper that were potentially serious. As the primary judge held it is the identification of the breach on which the stipulated sum becomes payable that is the key.[33]

[78] Counsel for Juniper submitted that *Ariston* had not been followed in the 25 years since it was decided, had therefore never been applied to a building and construction case, and pointed out that Lord Woolf had suggested in *Philips* that it had been decided "on very special facts" and that it was described in *Alfred McAlpine Capital Projects Limited v Tilebox Limited*[34] as an "extreme" case. Those considerations suggest that it is unlikely to assist in the determining of the validity of a liquidated damages clause in a building contract, a clause that is neither "extreme" nor one involving "very special facts" but rather an everyday feature of building contracts triggered as it was by delay. I agree with the primary judge that the decision provides no assistance here.

[79] The primary judge's approach to the construction point was consistent with a very long line of authority extending into modern times. Its most recent expression can be

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31 [1969] 3 All ER 1025 at 1031.
32 Cf. the approach in *Webster v Bosanquet* [1912] AC 394.
33 At [74].
34 [2005] EWHC 281 at [46] per Jackson J.

found in *Makdessi v Cavendish Square Holdings BV*[35] a decision of the Court of Appeal. So far as I can see this approach has never been doubted. The particular definition of Practical Completion in this contract does not lead to any different result. In my view there is no error shown.

[80] I turn to the second alleged error.

***Dunlop* Proposition 4(c)**

[81] The issue here is whether Lord Dunedin's proposition 4(c) is applicable to this contract. Grocon argues that to categorise the obligation as I have done, and as the primary judge did, does not conclude the argument against it.

[82] Grocon's response to the approach exemplified in *Law* and *Philips* is to argue that concentration on the question of whether the breach is of a single obligation or many is to ask the wrong question. Grocon's fundamental argument is that the true issue is not whether the obligation can be described as singular or otherwise but rather whether the amounts stipulated are excessive compared to the obligation called up by the terms of the contract, the "foundational consideration" being "proportionality".

[83] Grocon relies on the analysis by Allsop CJ in *Paciocco*[36] of various authorities, but particularly *Lord Elphinstone's Case*. His Honour pointed out, after quoting the relevant passages from the speeches of both Lord Watson and Lord Herschell there:

> "It can be seen from both these passages that the critical factor in the payments under the articles not being penal was the making proportionate of the payment to the acreage. (See *Ringrow* at [28].) The distinction was not whether there was one covenant or more than one. In fact, there were a number of provisions in the earlier agreement, similarly worded, and picked up and extended by the relevant article of the agreement in question."[37]

[84] While not doubting that a critical factor in *Lord Elphinstone's Case* was "the making proportionate of the payment to the acreage" the fact that the obligation was seen to be singular was plainly of relevance to the approach of the various judges and was fundamental to the engagement of Lord Dunedin's proposition 4(c). Allsop CJ did not assert otherwise. As will be seen, and as Allsop CJ recognised, Lord Herschell expressly said so in *Lord Elphinstone's Case*. And the relevance of the singularity of obligation was a refrain in the various judgments in *Dunlop* itself, again a matter expressly recognised by Allsop CJ.[38]

[85] If the point merely is to state that a singularity of obligation does not preclude the possibility of a penalty then so much can be accepted. That is what I perceive Allsop CJ meant when he said that the task was not a "mechanical" one.[39] But, where there is that singularity of obligation, proposition 4(c) from *Dunlop* does not apply – there is no rebuttable presumption favouring a penalty, as Grocon argues for here. Indeed that is the conclusion that Allsop CJ reached, after his review of the authorities:

> "There is force in the submission of the ANZ Bank that the breach of the single covenant being the late payment fee stipulation did not engage the third rule of construction in Lord Dunedin's para 4(c) in *Dunlop*."[40]

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35 [2013] EWCA Civ 1539 at [63] per Clarke LJ.

36 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50.

37 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [122].

38 See *Paciocco* on appeal at [128].

39 See *Paciocco* on appeal at [128].

40 See *Paciocco* on appeal at [129].

[86] While Allsop CJ decries the reliance on "form", and with good reason particularly where the contract under discussion is novel in its subject or approach, it is self-evident that Lord Dunedin's proposition 4(c) depends on a categorisation of the obligations imposed by the contract under discussion. At the time Lord Dunedin proffered his rules of construction a contract in the form here – with its singular obligation – was not the form of obligation that his Lordship had in mind in suggesting proposition 4(c) as offering guidance. So much is clear from the decisions that pre-dated *Dunlop* and the judgments in *Dunlop* itself.

[87] At the time of the decision in *Law* in 1892 it was considered that there was an accepted "canon of construction …according to which, if the sum is payable on the happening or non-happening of one event, it is to be regarded as liquidated damages; but if, on the other hand, it is payable on the happening of several events, some of which would entail very trifling damage, then it is to be regarded as a penalty."[41] This "general rule of construction", Lord Esher MR said "has been recognised in all the cases from the time of the judgment of Heath J in *Astley v Weldon*[42] down to what Lord Herschell said in *Lord Elphinstone v Monkland Iron and Coal Co.*[43]"[44]

[88] Lord Herschell's statement in *Lord Elphinstone's Case* was this:

> "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. *It has reference to a single obligation*, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. … I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding."[45]

[89] The "single obligation" referred to by Lord Herschell was an obligation to level and cover with soil certain slag hills. Failing such restoration the obligee was required to pay £100 per acre. Allsop CJ pointed out in the passage quoted above that the obligations under consideration in *Lord Elphinstone's Case* were contained in a number of covenants, and so were not "singular" in terms. But they were all to the same effect – to level and cover with soil slag hills deposited on the subject land. That the land affected might differ in quality or the slag heaps differ in size was not mentioned as relevant, albeit one would think both factors would be very relevant to the true measure of loss. As Lord Dunedin pointed out in *Dunlop*:

> "The character of the agricultural land which was ruined by slag heaps in *Elphinstone's Case* was not all the same, but no objection was raised by Lord Watson to applying an overhead rate per acre, the sum not being in itself unconscionable."[46]

[90] The justification, no doubt, was that an attempt had been made at proportionality based on a unifying concept against a background of necessary imprecision in the measure of the likely loss.

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41 [1892] 1 QB 127, per Lopes LJ at 132.
42 (1801) 2 Bos & P 346.
43 (1886) 11 App Cas 332.
44 At 130.
45 (1886) 11 App Cas 332 at p 345 – my emphasis.
46 At p 89.

[91] Thus by the time *Dunlop* came to be decided there was firmly in place a long standing rule that where the true effect of the contract was to impose but a single obligation it was to that obligation that the courts looked in assessing proportionality. Lord Atkinson expressly said so in relation to his building contract hypothesis that I have quoted above.

[92] Lord Parker's speech in *Dunlop* is to the same effect. His Lordship said:

> "The really difficult cases are those in which the Court has to consider what presumptions or inferences arise from the number or nature of the stipulations on breach of which the sum in question is agreed to be paid. In the case of a single stipulation, which, if broken at all, can be broken once only, and in one way only, such as a covenant not to reveal a trade secret to a rival trader, there can be no inference or presumption that the sum payable on breach is not in the nature of agreed damages, and if the parties have referred to it as agreed or liquidated damages, no reason why the Court should not treat it as such."[47]

[93] It could hardly be supposed that in formulating his propositions Lord Dunedin was not acutely conscious of the statement of Lord Esher MR in *Law* of the guiding "general rule of construction" and, if he disapproved, that he would not say so. This is particularly so given that Lord Atkinson, in his judgment in *Dunlop,* clearly based his reasoning, at least in part, on Lord Herschell's judgment in *Lord Elphinstone's Case* to which Lord Esher referred. That long standing rule necessarily informed Lord Dunedin's approach.

[94] Thus the building contract has long been considered the archetypical "single obligation" contract using that term in contradistinction to the category of contract that fell within Lord Dunedin's proposition 4(c).

[95] In my view there was no error in the primary judge's approach in rejecting proposition 4(c) as being either determinative or offering guidance here. And conversely the "general rule of construction" favours the view, but does not determine the issue, that the clause is not a penalty.

"Extravagant or Unconscionable"

[96] It is not in dispute that if a failure by Grocon to achieve the stage of Practical Completion caused a delay or postponement of the revenue stream (eg if its ability to on sell residential units was delayed) then that may be expected to occasion Juniper serious damage. It was conceded that at least in those circumstances the amounts payable under the liquidated damages clause were not out of proportion to the potential losses to Juniper. That concession goes a very long way to satisfying the relevant test – that the stipulated sum is not "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved."

[97] Juniper points out that the damages payable under the clause are moderated for the initial periods of delay – 25 per cent for the more significant separable portions – and capped at 10 per cent of the contract sum. Nor are the damages cumulative between separate portions unless Juniper suffers actual loss. Juniper submitted that this was "a pragmatic balance among the wide range of losses that were possible."[48] I agree.

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47 At p 97.

48 Para 30 of Juniper's submissions.

[98] Grocon's submissions concentrated on two features of the contract. First, Grocon submitted that by reason of certain terms to which I will come failure to reach Practical Completion did not mean that there was any necessary delay caused to Juniper in selling the units. Secondly, Grocon pointed to the marked increase in the amount of the liquidated damages stipulated from one week to the next – for Separable Portion 2 a doubling from week 8 to week 9 and a doubling again, more or less, from week 16 to week 17. It was argued that in reality there could not be a doubling of the potential damage to Juniper from one week to the next.

[99] Before turning to the arguments I make the following general observations.

[100] The damages set out in the liquidated damages schedule are proportioned to the prospective loss by reference to the extent of the delay in achieving Practical Completion. The underlying assumption is that the greater the delay in Practical Completion the greater the potential harm caused to Juniper and so the greater the damages provided for. In the absence of circumstances indicating to the contrary, a provision of that nature will ordinarily not, prima facie, be a penalty: *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)* (2012) 287 ALR 360 at p 377 [93] per Murphy JA (in dissent but as a generalisation this point was not doubted). No attempt was made to disprove that general proposition. The inevitable holding costs, the ever increasing prospect of litigation with disgruntled third party purchasers with longer delays and the potential damage to reputation are all factors and each would justify a legitimate prospective concern at the time of contract about the impact on Juniper. As well, the difficulty in proving the amount of the loss, looked at prospectively, provides strong reason to make such a provision. Precise estimation was virtually an impossibility.

[101] The commercial interests that Juniper sought to protect are clear. There was a market that Juniper hoped to attract for the sale of the various elements that went to make up the constructed building. To achieve those sales Grocon was to complete the works to a certain standard of finish and by a certain date. Grocon's apparent capacity to achieve that standard of finish by that date was no doubt integral to it being chosen to be the contractor at the contract price it offered and on the terms that it negotiated as opposed to some other company at some other price and on some other terms.

[102] It was very much in Juniper's interests to avoid disputes with third party purchasers and its creditors. It was very much in Juniper's interests to acquire or maintain a reputation for offering a product of a certain finish. Juniper had no wish to be involved in disputes about its performance of the contracts it expected to enter into because of Grocon's failure to meet its contractual obligations to Juniper. The complex interplay of rights and obligations turned on one principal thing – completion to the required standard, on time. From Juniper's perspective it was the central obligation. Delay beyond the agreed date was the key point.

[103] Juniper argues, and Grocon disputes, that from that time of achieving Practical Completion a significant change was effected to the rights of each. Juniper argues that in broad terms it is clear that upon achieving Practical Completion Grocon's license to control the site ended and Juniper's rights were correspondingly restored. Juniper could give to third party purchasers possession of the property purchased. Juniper would become entitled to payment from those purchasers. Juniper could in turn pay its creditors.

[104] Fundamental to that view of Juniper's commercial interests is the notion that Juniper were constrained in their ability to sell until Practical Completion was achieved. Grocon argues that is not right. Grocon claims that it had no right to fetter the delivery of vacant possession to intending purchasers. Grocon says that under the contract it was never in possession of the site but held only a license and that was limited.

[105] The same argument was put to the primary judge and rejected. I agree with his Honour's view. To understand the point it is necessary to look more closely at the terms of the contract.

[106] Clause 27.1 provides, so far as is relevant, and with my emphasis:

> "**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."

[107] Each of the passages that I have emphasised in cl 27.1 were relied on as showing that Grocon's right to occupy the site was limited – only to "use and control" and always constrained by the need to relate the extent of the occupation to the need to execute the work. It was submitted that the provisions of cl 27.2 made clear too that Juniper retained significant rights of access inconsistent with a handing over of possession. Clause 27.2 provided so far as relevant:

"**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.[49]

[108] Combined with this limited right of possession Grocon points to the terms of the Proforma Contract that Juniper was to use in its dealing with prospective purchasers. Included in the contract between Juniper and Grocon was cl 3.8 as follows:

"(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."

[109] The "Proforma Sales Contract" itself then provided:

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[49] My emphasis.

> "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."

[110] Grocon argues that the primary judge overlooked the effect of clauses 9.8 and 9.9 of the Proforma sales contract. The provision in cl 9.8 that the prospective purchaser "must not withhold any part of the purchase price or delay settlement on account of *any defect* in the lot or the development" and in cl 9.9 that the purchaser "must allow [Juniper] access to the lot and the development" to rectify defective materials or workmanship meant that purchasers were effectively required to settle their contracts even if Practical Completion had not been reached, so it was said.

Discussion

[111] The premise between the parties was that Grocon would ensure that there were no such defects: see cl 3.8(2) above.[50] That is reinforced by the requirement in the definition of Practical Completion at paragraph (d) being "that stage in the execution of the Work under the Contract as identified in the Separable Portion Schedule when:

> (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…"[51]

the "relevant Prototype" being the unit or lot used for display purposes.

[112] It is an unattractive argument that the touchstone for the application of the liquidated damages clause, a clause intended to protect Juniper, is that despite defects for which Grocon is responsible, Juniper could pursue, through litigation if necessary, prospective purchasers and force settlement on them. As Juniper points out in its submissions its interests lie in satisfying its customers not litigating with them.

[113] Putting that aspect to one side there are, in my view, compelling textual reasons for rejecting Grocon's arguments.

[114] The first is that such limits that there were on Grocon's possession of the site were not of significance. There was no practical distinction demonstrated between the concept of "use and control necessary to enable the Contractor to execute the work under Contract" and possession of the site until Practical Completion. The primary judge drew attention to the relevant terms of the contract:

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50 See [108].

51 See paragraph [16] above. The definition used is in relation to Separable Portion 2. Paragraph (d) in that form does not appear in the definitions for all separable portions.

> "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."[52]

[115] Clause 16.1 provides in part:

> "From and including the earlier of the date of commencement of Work under the Contract and the date on which the Contractor is given possession of the Site to 4 p.m. on the Date of Practical Completion of the Works, the Contractor will be liable for the care of the Work under the Contract..."

[116] Under cl 26.2 Grocon was taken to be appointed as principal contractor for the purposes of s 184A of the *Workplace Health and Safety Act* 1995 (Qld) until the Date of Practical Completion. Clause 26.3 particularly exemplifies the practical fact of the control Grocon exercised:

> "**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."

[117] Consistently with that view Juniper's rights to access the site were constrained. For example cl 27.2 allowed only certain persons to have access ("the Principal, the Financier and the Project Manager and their respective employees, consultants and agents" as well as "persons engaged by the Principal"[53]) but then provided: "The Principal must ensure that all persons given access to the Site under this clause comply with Contractor's reasonable instructions". And Juniper was obliged to ensure that Grocon was not impeded in execution of "the Contractor's Work" by those obtaining access to the site through Juniper: again see cl 27.2.

[118] Thus these provisions have the effect that there was an absence of any right even to permit third party purchasers to access the site, let alone have possession of it, while Grocon had the "use and control" of the site which it had until the Date of Practical Completion.

[119] Secondly, the express provision dealing with the reinstatement of Juniper's rights upon achieving Practical Completion was said to involve giving "possession" of the site to Juniper. Clause 35.2 provided:

> "**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.

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52 At [98].

53 See [107] above - cl 27.2 first paragraph.

> *On the Date of Practical Completion the Contractor must give possession of the Site and the Works to the Principal*."[54]

[120] The timing of the restoration of Juniper's rights is of significance. Juniper was obliged to give vacant possession of the residential units to third party purchasers on the settlement date: cl 8.51 of the Proforma sales contract. Grocon's argument effectively is that Juniper was entitled to give vacant possession to a third party of a site when, according to the express terms of its own contract with Grocon, it was yet to be given possession of the Site itself. To say that all Grocon ever had was a license and so Juniper always enjoyed possession of the Site is to ignore both the express words the parties used and the reality of the situation.

[121] In my view the express obligation on Grocon to give possession of the Site on the Date of Practical Completion and the obligation on Juniper, of which both parties were aware, to provide vacant possession to third party purchasers on settlement indicates Juniper's capacity to settle its contracts with such purchasers was enlivened at Practical Completion and not before, as the primary judge found.

[122] In summary it is not accurate to say that Juniper could insist on completion despite defects in workmanship. If the defects were such as to amount to failure to achieve Practical Completion then they were sufficient to prevent possession being given, a fundamental requirement of the sale contracts.

[123] That one can conceive of a situation where the continuing occupation of the site by Grocon involved only some minimal presence and no real interference with Juniper's interests – a "de minimis use and control" as it was put – does not assist Grocon. In the real world that would be promptly fixed. That was the evident expectation of the parties.

[124] Finally it is relevant to note that the parties had provided for the possibility that Grocon may have satisfied its obligations to achieve Practical Completion for some part but not another of the one Separable Portion. Clause 35.4 provides:

> "**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."

[125] For present purposes the relevance of the clause is that the Project Manager might exercise the discretion given to certify Practical Completion for some part of the Works and so allow Juniper possession of that separable portion and so allow it to access its revenue stream earlier than otherwise might have been the case. There was a complete

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54 My emphasis.

lack of evidence as to how that discretion might be exercised. The primary judge was plainly right to conclude 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."[55]

[126] In my view, looked at prospectively from the time of the contract, a delay in achieving Practical Completion had the probable consequence that Juniper's capacity to sell the units and so obtain access to its revenue stream was very likely to be delayed with adverse, and potentially significant, financial consequences. That was the effect of the primary judge's findings.

[127] Grocon's second point was that the marked increase in the amount of the liquidated damages stipulated from one week to the next – for Separable Portion 2 a doubling from week 8 to week 9 and a doubling again, more or less, from week 16 to week 17 – could not be justified as a genuine pre-estimate of damage. It was argued that in reality there could not be a doubling of the potential damage to Juniper from one week to the next.

[128] There are two fallacies to the argument. The first is that it assumes without proof that the loss provided for in the last week of the period in question is no more than is reasonable. That ignores the possibility that the loss provided for in that period might substantially understate the true loss. The doubling might be unfairly delayed from Juniper's perspective. In fact the finding made by the primary judge on the basis of the evidence led and not now challenged was to that effect. His Honour said:

> "…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."[56]

[129] The second problem is that the argument ignores the test that applies. As I have said I take that test to be that the provision will not be a penalty unless it is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved." Grocon did not discharge that burden. Plainly enough the losses that might actually be incurred would be in a range difficult, if not impossible, to quantify. The fact that the loss might be excessive one week, or in each of the transition weeks, comes nowhere near satisfying the test.

The Fourth Ground

[130] In the view I take, save for what follows, it is not necessary to consider Grocon's fourth ground of complaint nor Juniper's Notice of Contention.

[131] That fourth ground of complaint was that the primary judge speculated as to Grocon's knowledge of the terms of the contract when it agreed to the schedule of damages. The complaint ignores the onus that lay on Grocon.

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55 At [102].

56 Paragraph [117] – my emphasis.

[132] There is no contention that the evidence led was not admissible for the purpose of determining whether 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. As Allsop CJ said in *Paciocco*:

> "The views of the parties may well not conclude the enquiry, but, as in *Clydebank*, with the correspondence between the parties, as in *Multiplex*, with the pre-contractual discussion of the parties, and as in *Dunlop*, with Mr Beasley's evidence of the purpose of the clause, the approach and purposes of the parties may be of some assistance in understanding both what was intended and whether it has a legitimate commercial justification."[57]

[133] Grocon expressly agreed that the clause here was Juniper's genuine pre-estimate of damages: see cl 35.7. Lord Dunedin's first proposition[58] was that such an agreement was not conclusive, not that it was irrelevant. As usual, parties can be supposed to mean what they say. Here the primary judge reached his view without the assistance of that evidence but determined that it supported those views. The onus lay on Grocon to show otherwise and the evidence went nowhere near discharging that burden.

Conclusion

[134] I turn to the fundamental question of whether the clause in question is penal in character.

[135] The judgment of Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin*[59] is instructive and gives guidance to the proper approach here. The effect of that judgment was usefully summarised by Gordon J in *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35:

> "How then does equity and the common law distinguish between provisions that are penal rather than compensatory? In *AMEV*, after acknowledging that equity and the common law have long maintained a supervisory jurisdiction not to rewrite contracts imprudently made but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory, the High Court stated that the test to be applied in drawing that distinction (at 193):
>
> > '…is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term.'
>
> That test was subject to an important qualification that '[t]he courts should not, however, be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract': at 193-194."[60]

[136] As to the first point the proportioning of the prospective loss to the extent of the delay is entirely typical of such contracts and defensible. Like the provision in *Lord*

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57 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [225].
58 See [29] above.
59 (1986) 162 CLR 170.
60 At [43].

Elphinstone's Case where the stipulated sum was proportioned to the acreage affected the liquidated damages here are proportioned to the unifying concept of a daily delay. The four potential sources of damage to Juniper[61] were each arguably aggravated the longer the delay. There was necessary imprecision in predicting the potential loss, a feature which Lord Dunedin suggested in his proposition 4(d) makes it "probable that pre-estimated damage was the true bargain between the parties".[62]

[137] As to the second point, it is undoubtedly right to say, as Clarke LJ did in the Court of Appeal in *Makdessi*,[63] that "the fact that the clause has been agreed between parties of equal bargaining power who have competent advice" is not determinative but it is plain that where there is such equality and advice the courts should be slow indeed to interfere. As Lord Woolf pointed out in *Philips* "the fact that two parties who should be well capable of protecting their respective commercial interests agreed the allegedly penal provision suggests that the formula for calculating liquidated damages is unlikely to be oppressive."[64]

[138] The comments of Cole J in *Multiplex Constructions v Abgarus Pty Ltd*[65] are relevant here too:

> "There is, in my view, a qualitative difference of which the law is able to take account between a clause freely negotiated between major commercial organisations, in respect of a substantial contract, where the major commercial organisations have available and receive competent legal advice regarding the meaning, purpose and likely consequence of the clause, from a clause attacked as a penalty in a contract of adhesion between a major organisation and an individual or small company who has, in reality, no opportunity to negotiate the contract. … The degree of contractual freedom afforded to parties to determine a measure of damages departing from strict compensation will, in my view, be affected by those matters constituting aspects of the relationship between the parties, in particular in relation to the relevant clause, to which I have referred. That seems to me to be implicit in the passage in the judgment of Mason J and Wilson J in *AMEV-UDC* where their Honours said (at 193) "and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term".

[139] I agree with those remarks. Grocon describes itself as "Australia's largest private construction company".[66] It is a major commercial organisation. Cole J's comments are applicable.

[140] Finally, I note the observation of Lord Woolf in *Philips* where he pointed out the importance to both sides of a building and engineering contract that the liabilities on breach be pre-determined by a liquidated damages clause. From the contractor's perspective there were "substantial advantages … in being able to quantify accurately the amount of his liability if matters do not go according to plan" particularly where

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61 See [43] above.

62 See [27] above. See also *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142 per Diplock LJ; *AMEV-UDC* (1986) 162 CLR 170 at p 190 per Mason and Wilson JJ; at p 215 per Dawson J.

63 *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539 at [75](v) per Clarke LJ.

64 At p 280.

65 (1992) 33 NSWLR 504 at 513.

66 AB 734.

the amount of the loss may be difficult to quantify. In determining a price for the contract the contractor can take account of that possible liability.[67] That consideration is relevant here. Grocon seeks to keep its price but avoid its obligation. And at a more general level interference with clauses of this type in building contracts, clauses which are common place, will introduce uncertainty to the disadvantage of all in the industry.

[141] In summary: all relevant factors are against Grocon's attempt to characterise the clause as penal. The caution that the High Court said should be exercised is apposite. It has not been demonstrated that the liquidated damages provided for in the schedule involves such a degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff as to amount to oppressiveness. To reach the contrary view requires a very unrealistic reading of the contract. And the nature of the relationship between the parties does not suggest that Juniper's seeking to enforce the term agreed involves any unconscionability. Each was sophisticated, each was in receipt of expert advice, and the bargaining power was equal.

[142] In my view the primary judge was correct to conclude that the clause in question was not a penalty.

[143] The appeal should be dismissed with costs.

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67 [1993] 1 HKLR 269 at pp276-277. See also *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142 per Diplock LJ.