**IN THE HIGH COURT OF AUSTRALIA**

**MELBOURNE REGISTRY**

No M220 of 2015

**ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA**

BETWEEN


**LUCIO ROBERT PACIOCCO**
First Appellant

10 **SPEEDY DEVELOPMENT GROUP PTY LTD**
**(ACN 006 835 383)**
Second Appellant

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**
**(ACN 005 357 522)**
Respondent

## APPELLANTS' SUBMISSIONS

20 **PART I: Certification re Internet Publication**

1. These submissions are in a form suitable for publication on the internet.

**PART II: Issues**

2. The question on appeal is whether late payment fees charged by the respondent on the non-payment of money are penalties, which raises for consideration what is the proper test in such circumstances and how it is to be applied.

3. Particular issues requiring resolution are:

   (a) what is the contemporary status of the second so-called *Dunlop* "test" (that an amount will be penal "*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*
30 *paid*") and its relationship to the first "test"?

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(b) what is the relevance of rules of remoteness of damage to whether a sum payable upon a breach of contract comprising the late payment of money is a penalty rather than a genuine pre-estimate of loss?

(c) in inquiring whether a stipulated sum is penal, what is the relevance of the process undertaken by the parties to fix the stipulated sum, and what evidence can be taken into account?

**PART III: Judiciary Act 1903, s 78B**

4. The appellants consider that notice is not required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

**PART IV: Report of Reasons for Judgment**

5. The decision of the Full Court of the Federal Court is reported: (2015) 321 ALR 584; [2015] FCAFC 50. The decision of the primary Judge (Gordon J) is also reported: (2014) 309 ALR 249; [2014] FCA 35.

**PART V: Relevant Facts**

6. The first appellant held two credit card accounts with the respondent: J [53]-[58]; FC [8(2)-(3)], [10]-[11].

7. The terms and conditions of the first appellant's credit card accounts provided:

(a) at all relevant times, that a late payment fee would be charged to the card account if a stipulated amount comprising the "monthly payment" plus any "amount due immediately" shown on the statement was not paid by a certain date, being:

(i) (prior to December 2009) within 28 days of the end of the "statement period" (being a date which was 3, or 14, days after the "due date");

(ii) (after December 2009) the "due date";

(J [54]-[58], [72]-[75]; FC [15(a)], [16(a)])

(b) at all relevant times, that the account holder must make the minimum monthly payment by the due date: J [55], [72];

(c) that the late payment fee was the following amount:

(i) $35, prior to December 2009: J [57]; FC [15(a)];

(ii) $20, after December 2009: J [74]; FC [16(a)];

(d) that interest was charged on amounts outstanding after the due date at 12.24%: J [120], [168], Annexure 2 [5(6)], [11].

8. The contracts were entered into in circumstances where:

(a) they were on the respondent's printed forms and the customer had no opportunity to negotiate their terms: J [122]-[123]; this reflected the strength of bargaining power of the respondent: J [122]-[123], [292], [294]; FC [346];

(b) the respondent determined the quantum of each late payment fee in each contract: J [122]-[123], [125];

(c) the terms were capable of being amended unilaterally from time to time by the respondent: J [122]-[123];

(d) the respondent did not determine the quantum of the late payment fee by reference to a sum that would have been recoverable as unliquidated damages: J [125]; FC [139];

(e) at the time the credit card contracts were entered into:

(i) the first appellant understood the nature of the terms and conditions of the card accounts, and had a real choice as to whether to enter into the contracts (and utilise the credit under them): J [324];

(ii) the respondent did not exert unfair pressure, undue influence, or unfair tactics to cause the first appellant to contract: J [324];

(iii) similar terms and conditions were offered by other banks: J [95(c)], [324(5)].

9. Twenty-six late payment fees were charged to the first appellant's accounts (eight prior to December 2009, and eighteen after that time): J [51], [71], Annex 1 (referred to in [103], [111], [185], [235]-[236]), Items 4-11, 14, 16-18, 23, 27, 28, 31, 34, 36-38, 41, 42, 45-47 and 49.

10. In respect of the twenty-six late payment fees charged to the first appellant, the primary Judge made findings that:

(a) the amount due which was not paid on time varied, but was in a range from $10 to over $750: this can be seen from Annex 1, column entitled "Transaction/Event(s)" referred to at J [111];

(b) the amount of time between the due date and when the first appellant made full payment of the amounts due varied, but was in a range from under 5 to over 30 days: see Annex 1, column entitled "Transaction/Event(s)" referred to at J [111];

(c) the amount of loss actually sustained by the respondent by reason of the first appellant's late payments was capable of being assessed: J [175], [186], [241];

(d) the amount of loss actually sustained by the respondent by reason of the first appellant's late payments was less than the late payment fee, being in a range between $0.50 and $5.50 (after rounding): J [173], [186] and Annex 3 (column entitled "Finding").

10 11. The following table[1] sets out a sample of the twenty-six late payment fees, and the matters referred to in the preceding paragraph in relation to each such fee:

| | No. | Amount Due | Fee | Days Late | Loss |
|---|---|---|---|---|---|
| Card 9522 | 9 | $203 | $35 | 37 | $3.00 |
| | 10 | $426 | $35 | 6 | $0.50 |
| | 38 | $383.44 | $20 | 5 | $0.50 |
| Card 9629 | 14 | $43 | $20 | 27 | $5.50 |
| | 17 | $10 | $20 | 14 | $0.50 |
| | 36 | $135.72 | $20 | 24 | $2.00 |

12. These proceedings are related to the *Andrews* proceeding, which resulted in the Court's decision in *Andrews v Australia and New Zealand Banking Group Ltd.*[2] These proceedings concern the same issues as were pleaded in *Andrews*, including whether late payment fees:[3]

(a) first, amounted to penalties at common law or in equity (**Penalty Claims**) (an issue which is now the subject of this appeal); or

(b) secondly, were charged in contravention of three statutory regimes proscribing
20 "unconscionable conduct", "unjust transactions" or "unfair" contractual terms

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1 Information derived from: J Annex 1 (Items 9, 10, 14, 17, 36, 38); and Annex 3 (Items 9, 10, 17, 30, 36, 38). The reference to Item "30" in Annex 3 is a typographical error; the entry clearly relates to Item 14 in Annex 1.

2 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

3 Other fees were at issue in the proceedings in the Federal Court, but do not remain contentious.

(**Statutory Claims**) (issues which are now the subject of proceeding M219 of 2015 in this Court).

## PART VI: Argument

### *Introduction*

13. This case raises the simplest of factual circumstances, and the penalty issue arises starkly. The first appellant was obliged to pay a sum by a particular date and, if he failed to do so, a late payment fee was charged to his credit card account. In short, upon default in paying by the due date, the appellant was required to pay a larger sum. The sum was necessarily larger because the amount due was increased by the amount of the late payment fee. It was $35 (or $20) larger.

14. In *Andrews*,[4] the Court said that a stipulation prima facie imposes a penalty on a party if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and the collateral stipulation, upon failure of the primary stipulation, imposes upon the first party an additional detriment, to the benefit of the second party. The collateral stipulation is in the nature of a security for and in terrorem of the satisfaction of the primary stipulation.

15. The primary Judge found that the late payment fees were payable upon breach of contract, and that they were payable as a collateral or accessory stipulation, as security for, or in terrorem of, the primary stipulation, being timely repayment according to the terms of credit: J [114]-[116]. The Full Court specifically agreed with this finding: FC [89] (and [371], [398]). These findings used the language used by this Court in *Andrews*.[5] They were findings as to the substantive character of the late payment fees.

16. Although both the primary Judge and the Full Court (it seems) agreed that the late payment fees were prima facie a penalty, they differed in the ultimate outcome. The primary Judge found that the late payment fees were penalties (and ordered the respondent to repay the difference between the late payment fee and the loss she had assessed), whereas the Full Court held that the late payment fees were not penalties, notwithstanding their prima facie penal character.

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4 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 216 [10].

5 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 216 [10].

17. The Full Court (adopting the respondent's submissions) reached this result by asking whether the late payment fee was "extravagant and unconscionable in amount" in comparison with what it described as the "*maximum conceivable loss*" (or, elsewhere, "*possible loss*"): see FC [169], [173]. In the first part of this inquiry, the Full Court applied, with respect inappropriately and uncritically, the language of the so-called "first test" referred to by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[6] without regard to his second "test" which was specifically directed to cases where a larger amount was made payable upon a breach of contract comprised by the non-payment of money. In the second part of this inquiry the Full Court appears to have failed to appreciate the importance of focussing on loss which would be recoverable according to ordinary principles.

18. These matters, and the unnecessarily overcomplicated approach they entail for application of the penalties doctrine to simple cases, are discussed below.

***The significance of Dunlop***

19. Australian penalties cases (including all of the previous decisions in this Court) refer to the seminal speech of Lord Dunedin in *Dunlop* (at 87). In *Ringrow Pty Ltd v BP Australia Pty Ltd*[7] the Court contemplated a future case where reformulation of Lord Dunedin's tests may be required if particular features of the contemporary Australian marketplace suggested the need for a new formulation. The Full Court in the present case misapplied *Dunlop*, but the making of that error suggests there is need for contemporary explanation of the principles.

20. In this regard *Dunlop*, of course, was a reflection of a "promise-based conception of contractual obligation".[8] Contract theorists, examining the modern marketplace, have referred to the fact that the traditional paradigm of a bargain between commercial counterparties is an incomplete and unsatisfactory basis of understanding the contemporary scope of the law of obligations. Many texts and articles[9] – starting with the famous discussion by Friedrich Kessler, who coined the phrase "contracts of

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6 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 87.

7 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at 663 [12].

8 To use a phrase used by Barnett in *Consenting to Form Contracts*, 71 Fordham Law Review 627 (2002).

9 See, e.g., Robertson, *The Limits of Voluntariness in Contract* (2005) 29(1) Melbourne University Law Review 17; Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 405–8; Calamari, *Duty to Read—A Changing Concept*, 43 Fordham Law Review 341 (1974); Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stanford Law Review 211 (1995); Hillman & Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 New York University Law Review 429 (2002).

adhesion"[10] – have referred to the tension between the classical theory of contract (which reached its apotheosis at around the time of *Dunlop*) and the reality of a society increasingly dominated by the standard form or adhesion contract – a development continuing given the volume and scope of contracts entered into by "online" transactions.

21. It is sufficient for present purposes, however, to note that the doctrine of penalties must be easily understood and have straightforward application in the various types of transactions which dominate the contemporary marketplace (including those which have characteristics dissimilar to the classical conception of a bargain between counterparties).

22. The *Dunlop* tests, if properly understood and applied, *are* adequate to deal with the several types of cases in which the doctrine of penalties is involved, including the present. It must be appreciated, however, that there is not simply **one** *Dunlop* test.

23. That was adverted to by Lord Dunedin in prefacing his remarks in the oft-cited passage in *Dunlop* (at 87) by saying there were "*various tests … which if applicable to the case under consideration may prove helpful, or even conclusive*". What he was saying was that there were different tests for different kinds of cases. See too his reference (at 86-7) to the fact that the question was to be judged "*upon the terms and inherent circumstances of each particular contract*".

24. Attention is frequently given – as by the Full Court – to the first "test", namely: "*[i]t 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*". The circumstances, however, may make it more appropriate to have regard to the second "test", namely that "*[i]t 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*".

25. There appears to be fewer decisions in which the application of the second test is discussed. That is understandable. It is a simple test designed for the simple case – and its deterrent effect might be thought powerful enough to ensure little litigation arises from circumstances to which it might be applicable. This second "test" is, however,

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10 *Contracts of Adhesion - Some Thoughts About Freedom of Contract*, 43 Columbia Law Review 629 (1943).

important in the present case: it was applied by the primary Judge, but not by the Full Court, which instead applied the first "test" as though it were exclusive and applicable in all cases.

26. It is submitted that the true position, stated broadly, is that the first *Dunlop* "test" is applicable to situations where the breach of contract upon which the sum is made payable would reasonably be expected to give rise to an unliquidated claim for damages (to which *Hadley v Baxendale* principles apply), whereas the second *Dunlop* "test" is applicable to situations where the breach of contract would reasonably be expected to give rise to a purely liquidated claim.

27. This broad bifurcation remains true, although account must be taken of the development of the law of contractual damages since *Dunlop*, and how those developments bear upon the historical and contemporary relationship between the first and second "tests".

***Consideration of Dunlop in this Court***

28. The Court has not considered any case where the question was the application of the doctrine of penalties in the simple case of amounts payable upon the non-payment of money. Indeed, since *Dunlop* was decided, the penalty doctrine has come before this Court only where the doctrine of penalties was engaged (or said to be engaged) in cases other than those falling within the second class in *Dunlop*. For example:

(a) *O'Dea v Allstates Leasing System (WA) Pty Ltd*[11] concerned a contract for hire of a vehicle which provided that upon breach, the lessor may retake possession and claim from the lessee the rent for the balance of the term, together with any difference between the "appraisal value" and the amount recovered on sale of the vehicle; there was not, however, any dispute there that if the question whether the sum was a penalty or liquidated damages fell for decision, the sum was a penalty (see at 369, 383).

(b) *Acron Pacific Ltd v Offshore Oil NL*[12] concerned a 'moratorium deed' under which creditors covenanted not to enforce a debtor's liabilities subject to termination rights in the event an independent accountant opined that the creditors' interests were at risk in which event the debts (which by the deed were

11 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359.
12 *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514 at 520.

acknowledged to be "now repayable"), became payable forthwith (instead of according to their initial tenor).

(c) *AMEV-UDC Finance Ltd v Austin*[13] was not a case about the application of the doctrine of penalties, although aspects of it were discussed extensively. There was no dispute that the clause in a hire purchase contract which required payment of the residual rent for the whole term in the event of early termination of the hire contract for breach was a penalty based on *O'Dea*,[14] and the question was whether the owner could recover actual loss or only arrears of rental – this turned on what loss flowed from the relevant breach.

(d) *Esanda Finance Corp Ltd v Plessnig*[15] concerned a hire purchase contract pursuant to which the hirer was liable upon non-repudiatory breach to pay the total rent and costs of repossession and selling, less deposit and rentals paid, deducted the present value of the repossessed goods, and a "rebate" which in effect reduced future rental charges to present value. Although the breaches under consideration (like in *O'Dea*) involved the non-payment of money, what the case really concerned was the loss by the owner of its interest in the balance of future rental payments under a contract for a term upon repossession of the hired goods. The difference between *Esanda* (where the clause was held not to be penal) and *O'Dea* (where the clause was held to be penal) was that the latter rendered the hirer liable for the balance of total rent without any discount, whereas the former was: "*a genuine pre-estimate or an amount calculated by a method giving a substantially accurate assessment of the difference between the value of the benefit which would accrue to the owner from the complete performance of the hiring and the value of the benefit (if any) accruing from early termination*".[16]

(e) *Ringrow*[17] concerned a contract for the sale of a business which obliged the purchaser to buy BP fuel for a term, breach of which by the purchaser entitled the vendor to liquidated damages based on the expected profit to the vendor over the course of the contract from the fuel sales (which clause was not alleged to be penal) or to exercise an option to re-purchase the site at market value (less

13 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170.
14 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359.
15 *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131.
16 *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131 at 157-8.
17 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656.

goodwill) which clause was alleged to be penal (the appellant failing because it had not proved the goodwill had any value).

(f) *Andrews*[18] considered the doctrine of penalties at a conceptual level (given the form of the separate questions underlying that proceeding), and expressly eschewed determining whether the fees under consideration were penalties.

29. Although none of these cases called for consideration of the second *Dunlop* "test", none cast doubt upon it. In *Ringrow*[19] the Court noted that it was not in contest that the passage from the speech of Lord Dunedin in *Dunlop* contained "*the principles governing the identification, proof and consequences of penalties in contractual stipulations*". *Ringrow* concerned a contractual obligation non-performance of which could only have given rise to unliquidated claims for damages. It did not concern amounts payable upon the non-payment of money. There was no need to consider the second "test".

30. Where a breach of contract consists in the non-payment of money, neither *Dunlop* nor any later authority establishes that there must be a separate quantitative inquiry as to whether a further amount payable upon non-payment of that amount was extravagant and unconscionable in amount. According to Lord Dunedin, by application of the second "test", the fact that the sum was "*greater than the sum which ought to have been paid*" was enough. It will be extravagant and unconscionable in amount if it has that character. With regard to "late fees", this was the case pleaded and particularised by the first appellant: see paragraph [44] below.

***The Full Court failed to apply the correct Dunlop test***

31. The primary Judge relied upon the second *Dunlop* "test": J [121] (in combination with the other findings set out in [123]) to find that the late payment fees were penalties (subject to being satisfied that they were "greater than the sum that ought to have been paid"). Her Honour found that the late payment fee was in that sense extravagant and unconscionable in amount: J [117]-[169], [183] and correctly appreciated that the fee would have that character if it was greater than the sum which ought to have been paid.

32. Her Honour's approach, it is submitted, was orthodox in circumstances where the effect of the contracts was that the customer, upon default in paying the amount due by

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18 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

19 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at 663 [12].

the due date, was required to pay a larger sum than the amount initially due, the increase being the amount of the late payment fee. The Full Court, by contrast, purported to apply the first *Dunlop* "test", but it did so without regard to the fact that this was a case about the non-payment of money, and without appreciating that the first *Dunlop* "test" was not directed to such a case.

33. Further elucidation of the difference between the circumstances to which the first and second *Dunlop* "tests" are apposite, may be gained from a consideration of the speech of Lord Parmoor in *Dunlop.* Lord Parmoor said there were two instances where the Court interferes when the agreed sum payable upon breach is referable to the breach of a single stipulation, the first being the situation now equated to Lord Dunedin's first "test", the second being "*the case of a covenant for a fixed sum, or for a sum definitely ascertainable ... where a larger sum is inserted by arrangement between the parties, payable as liquidated damages in default of payment*"[20] (that is, Lord Dunedin's second "test"). In respect of that latter case, his Lordship said that "*[s]ince the damage for the breach of covenant is in such cases by English law capable of exact definition, the substitution of a larger sum as liquidated damages is regarded, not as a pre-estimate of damage, but as a penalty in the nature of a penal payment.*". As this passage demonstrates, the important fact, and the reason why the second "test" exists in the simple terms in which it was expressed, is that in such a case the damage for non-payment of money is precisely, or accurately ascertainable. No complex, fact intensive inquiry is needed in those circumstances to determine whether the stipulated sum is a penalty. See too the observation by Lord Parmoor that *Dunlop* belonged to a class in which it was practically impossible to make an accurate pre-estimate of damage "*and there is no question of extortion or of substituting a larger for a smaller sum*".[21]

34. Lord Parmoor's amplification of Lord Dunedin's second "test" is important to understanding the reason why the two "tests" are applicable to different kinds of case. The doctrine of penalties occupies the intersection between two competing policies of the law. On the one hand, the law regards it as generally desirable to allow contracting parties the freedom to agree the amount of damages that will be payable upon breach (thereby converting a prospective unliquidated claim, which may be complex and

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20 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 101-2.

21 See *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 103-4.

uncertain in its assessment, into a liquidated claim). On the other hand, the policy of the law stands against permitting parties to be overcompensated for legal wrongs done to them.

35. The jurisdiction to relieve against penalties exists to prevent one party taking unconscientious advantage of the other in the process of agreeing the measure of loss which will be sustained by reason of a breach of contract (or failure of stipulation), and it fulfils this objective, as *Andrews* recognised,[22] by depriving that party of the benefit of the penal clause to the extent it would result in overcompensation. But the law is realistic, apprehending that while it is appropriate to afford a measure of latitude to the parties in their pre-estimation of loss which will arise from a future wrong which may or may not occur, some cases are more easily pre-estimated than others. Of course, legal wrongs which give rise to unliquidated claims for damages are far more difficult to pre-estimate than legal wrongs which give rise to liquidated claims (whether in debt, or for payment of a price).

36. A reason why the second category of case is different from the first is that in such a case there is little difficulty in assessing damages. The need for the parties to pre-agree damages is greatly reduced, and their latitude in making a pre-estimate is correspondingly reduced. Indeed, as a matter of policy, where the claim which arises upon breach of a contractual stipulation is of its nature already liquidated, there is little need for the law to promote the parties' freedom of contract to agree a liquidated sum, and every reason not to do so because of the danger that any different liquidated sum would result in overcompensation. The fact that the sum stipulated was greater than the sum which ought to have been paid, was sufficient to render it objectionable. In short, the second "test" is a simple rule for simple cases, and one calculated to promote certainty and ease of application by courts at all levels.

37. At the time *Dunlop* was decided, there was no question but that the "*sum which ought to have been paid*" meant the principal sum due for payment, as recoverable in an action in debt, or *indebitatus assumpsit*.[23] The recognised measure of compensation for non-timeous payment included interest at least "*in certain cases*", as Lord Dunedin himself made clear. The cases to which his Lordship was referring were, no doubt, those where the terms of the agreement (as here) provided for interest, and those other

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22 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 216-7 [10]-[11].

23 *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 567.

circumstances in which *Lord Tenterden's Act*[24] applied. Because the source of the right to interest was either contractual or statutory (and either existed or did not), it was always readily apparent that as soon as the contract purported to make more payable than the original principal sum (and interest if payable) this could not be a genuine pre-estimate of loss and was ipso facto a penalty. At this time, of course, no cause of action for unliquidated damages for the non-payment of money was known to the law; accordingly, where the breach of contract comprised the non-payment of money, there was no call to consider the first *Dunlop* "test"; the second "test" was determinative.

38. More recently, the law has come to recognise the ability to sue for unliquidated damages for loss of the use of money. This was first conceptualised in the United Kingdom only as a form of special damages under the second limb in *Hadley v Baxendale*.[25] Subsequently, in *Hungerfords v Walker*,[26] this Court went further holding that damages of that kind might be recovered under either the first or second limbs of *Hadley v Baxendale*. Brennan and Deane JJ said that "*the ordinary principles governing the recovery of common law damages*" should, "*in an appropriate case*", apply.[27] Of course, those ordinary principles necessarily include rules of remoteness (a matter of relevance to Ground 3 of the Notice of Appeal). Although these developments in the law mean that breaches of contract comprised by the non-payment of money can, theoretically, give rise either to liquidated claims or to unliquidated claims, it does not follow that the second *Dunlop* "test" is of no contemporary relevance, or has been subsumed into the first *Dunlop* "test".

39. The basic position, it is submitted, is that the second *Dunlop* "test" continues to apply to the simple case of amounts payable upon a breach of contract comprising the non-payment of money. The availability of unliquidated claims for damages upon the non-payment of money means no more than that it is possible for the first Dunlop "test" now to have some relevance to *some* cases, but not the present.

40. The further questions which then arise are as to which test is applicable, how they may operate harmoniously, and in what circumstances (if any) one ought have precedence

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24 *Page v Newman* (1829) 9 B&C 378 (109 ER 140); *Civil Procedure Act 1833* (UK), s 28; *Chitty's Archbold's Practice* (1866) pp 457-8. See also *London Chatham & Dover Railway Co v South Eastern Railway Co* [1893] AC 429.

25 *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 (obiter); *President of India v La Pintada Compania Navigacion SA* [1985] AC 104.

26 *Hungerfords v Walker* (1989) 171 CLR 125; *Sempra Metals Ltd v Commissioners of Inland Revenue* [2008] 1 AC 561.

27 *Hungerfords v Walker* (1989) 171 CLR 125 at 152; see also per Mason CJ and Wilson J at 149.

over the other. Those questions cannot properly be answered in the abstract. They require attention to the surrounding circumstances at the time of the agreement, as well as to its terms,[28] what the parties were actually seeking to do at the time the impugned amount was fixed, and what measure of loss they were in fact contemplating (or seeking to protect themselves against). The process by which the impugned amount came to be fixed is not irrelevant to whether it is penal.

41. Where (as here) the evidence was that the creditor was contractually entitled to interest in the event of non-payment (or late payment) of money by the due date, but fixed also a collateral sum the primary purpose of which was to secure the timeous payment of the money and did *not* attempt to fix the quantum of that sum by reference to what would be recoverable as unliquidated damages in the event of non-payment,[29] the inference is that the creditor at no relevant time was seeking to pre-estimate its loss on a *Hungerfords* basis. In such a case, it would lead to incoherence to apply the first *Dunlop* "test" to the exclusion of the second. To do so would require accepting the misleading premise that the impugned sum was fixed by reference to the same frame of reference as the type of loss to which it was being compared.

42. It might be otherwise if there was an evidentiary basis for finding the parties were seeking to pre-estimate unliquidated damages which the creditor had a genuine intention to claim in the event that money was not paid (see the citation from *Esanda* in paragraph 28(d) above), but that is not this case.

43. There are sound reasons for retaining the second *Dunlop* "test" in appropriate cases, and in particular where the evidence does not disclose that any *Hungerfords* claim was contemplated at the time that the collateral provision was fixed. It provides a simple answer to the simple case where failure to pay a contracted sum of money on time creates a liability to pay a further sum, in addition to the sum unpaid (and interest thereon). The Full Court's approach (requiring an analysis in all cases of whether the sum was justifiable as compared to a hypothetical *Hungerfords* claim which the creditor never contemplated at the time of contracting), creates unnecessary complication, and is, with respect, erroneous.

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28 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 373 per Gibbs CJ.

29 See Appeal Ground 4(c); these matters were properly regarded by the primary Judge as significant: J [125], [129].

44. It should be added, perhaps, in anticipation of the pleading point foreshadowed by the respondent, that the question whether an amount is a penalty cannot depend upon matters of pleading; while the pleading did, in parts, refer to the language of the first *Dunlop* test, it did not do so exclusively so far as late payment fees were concerned.[30]

***The Full Court misapplied the first Dunlop test***

45. If, contrary to the foregoing, the first *Dunlop* "test" was mandatorily applicable to the present case to the exclusion of the second "test", the Full Court misapplied it.

46. It is, with respect, tolerably clear that the expression used in *Dunlop, "the greatest loss that could conceivably be proved to have followed from the breach"*, speaks of damages recoverable in consequence of a breach of contract, and not to forms of loss which might be conceived of as bearing some relationship to the breach but which are too remote for the law to compensate. This accords with logic and authority. Given it is the availability of compensation that grounds the basis upon which a Court intervenes to relieve against penalties,[31] it would be odd if a clause could be found not to be penal because of the alleged existence of losses of a kind for which the law (or equity) would not itself compensate.

47. In this regard, the primary Judge correctly rejected the respondent's submission that "increase in loss provisions" and "increase in the costs of regulatory capital" were losses or damage incurred as a result of a late payment: J [150], [155]. Her Honour found these matters were too remote to form part of compensable loss and damage, citing the decision of Lord Diplock in *Robophone Facilities Ltd v Blank*,[32] where his Lordship had referred in this connexion to "*damages recoverable under the so-called "first rule" in Hadley v Baxendale*": J [44] (in Section E, cited in [131], which introduced the section of the judgment including [150] and [155]).

48. The Full Court focused on what losses might possibly be conceived of: FC [137], [173], [176]. However, the authorities do not support the proposition that the Court may, in applying its jurisdiction to relieve against penalties, properly consider for this purpose losses which could not be described as "following from"[33] (*Dunlop* at 87),

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30 See Amended Statement of Claim, [43], [47].
31 *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 217 [11].
32 *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447.
33 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 87.

"flowing from",[34] or the "result of"[35] the breach of contract, i.e. meaning causally-related losses which were recoverable at law.

49. The conclusion of the Full Court that it was appropriate to take into account increase in loss provisions (FC [164]) and increases in regulatory capital cost (FC [167]) proceeded upon the misconception that the relevant inquiry was untethered from orthodox notions of remoteness of damage. The primary Judge made no such error. Her Honour excluded alleged "increase in loss provisions" and "increase in the costs of regulatory capital", because:

(a) a provision represents the amount by which an unpaid loan has diminished in value for being wholly or partly irrecoverable, or uncertain as to whether it is recoverable; it is no more than a statement of the value of the loan that remains owing and it would not be possible for the respondent to sue for both the unpaid loan and its diminished value: see J [150]. To permit its recovery would (logically) involve double recovery;

(b) a loss on setting aside regulatory capital followed on from increase in loss provisions, and could not be described as an ordinary loss arising in the usual course of things, such as to be of the character that would be supposed to have been in the contemplation of the parties: J [155].

50. The Full Court did not cite authority for the proposition that losses of these kinds are recoverable by a creditor, according to the ordinary application of the first limb of *Hadley v Baxendale*.

51. The Full Court's approach as to collection costs was also defective. To the extent the Full Court found, contrary to the finding of the primary Judge, that collection costs exceeding the amount of the late payment fee could be (or even reasonably expected to have been) sustained by a late payment, that finding should be set aside. For the reasons given by the primary Judge, the exercise performed by the respondent's expert was of little value in considering what collection costs would, according to ordinary principles, result from a late payment by the first appellant. The Full Court failed to recognise that Mr Inglis' methodology was necessarily skewed by the question he was asked – what was the maximum amount of costs that ANZ could conceivably have

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34 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at 667 [27].

35 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190, citing *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447-8.

incurred as a result of a late payment. Mr Inglis' calculations focused upon outlying statistics,[36] and proceeded upon a misleading and mathematically flawed basis which ignored the fact that most late payments were never referred to collections at all.[37] The appropriate way to express the relevant question was by reference to likely damage.[38] It is not the case that just because a set of circumstances might be hypothesised – however fantastic – that might result in enormous loss being sustained, that a clause can never be penal. Especially is this so when the party which fixed the amount in fact did not undertake any process of pre-estimation at all at the relevant time.

52. This is why evidence of what actually happened can be important, and why the Full Court was in error, in the context of its application of the first *Dunlop* "test", in rejecting, as irrelevant to the inquiry as to whether the late payment fees were penalties, evidence as to the *actual* incremental costs incurred by the respondent by reason of the first appellant's late payments: FC [116], [147], [153]. The evidence of Mr Regan indicated in this respect that the late payment fees of $35 (or $20) were set at a level which was many multiples of the actual recoverable loss referable to collection costs, which was assessed by the primary Judge as between $0.50 and $5.50. If the lower end of that range is considered, the late payment fee was 70 times the loss (or 7,000% of it) when the fee was $35,[39] and 40 times the loss (or 4,000% of it) when the fee was $20.[40] Even if the upper end of the range is considered, the late payment fee was still many multiples of the loss,[41] and the evidence of Mr Inglis is not capable (once the proper test is adopted) of supporting any contrary finding.

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36 The basis of Mr Inglis' opinion was a calculation of a cost per minute (derived from total costs incurred by the respondent's collections team in connexion with late payment and overlimit events), which he then multiplied by average call-times from a very skewed sample – the 95th percentile of late payments which were referred to the collections team (that is, the very upper end of call times). Had a true average been used across the whole of the dataset used by Mr Inglis, the call time would have been 4.84 minutes, and the average cost $10.50 (multiplying 4.84 minutes by $2.17: [8.29]).

37 Mr Inglis' data set was the number of late payment events *referred to collections* even though most late payments were not so referred (see Inglis [8.2], [8.14]), and therefore could not have incurred any collection costs. The appropriate comparator must be the total number of late payment events because late payment fees were imposed regardless of whether a late payment was referred to collections. Had the appropriate comparator been used, the average cost would have been markedly lower again.

38 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190; *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at 662 [10].

39 $35.00 is 70 times $0.50 (this equates to 7,000%: $35.00 divided by $0.50 multiplied by 100).

40 $20.00 is 40 times $0.50 (this equates to 4,000%: $20.00 divided by $0.50 multiplied by 100).

41 In terms of the $35 fee, it is more than 6 times $5.50 (and this equates to 636% ($35.00 divided by $5.50 multiplied by 100)). In terms of the $20 fee, it is more than 3.6 times $5.50 (and this equates to 363% ($20 divided by $5.50 multiplied by 100)).

53. To support its rejection of Mr Regan's evidence, the Full Court cited *Clydebank Engineering*,[42] which preceded *Dunlop*, as well as the unsupported and incorrect proposition that Mr Regan's evidence "*cannot, on the authorities, and from its own terms, be utilised for a purpose different from that for which it was propounded*" (FC [153]). More particularly:

(a) *Clydebank Engineering* turned on its very unusual facts. It may very much be doubted whether it should be regarded as supporting the approach of the Full Court. It is in this respect in any event inconsistent with later decisions of the Privy Council and the English Court of Appeal to the effect that evidence of what actually happened is relevant. Thus, in *Philips Hong Kong Ltd v The Attorney General of Hong-Kong*, Lord Woolf delivering the advice of the Privy Council said:[43] "*The fact that the issue* [of whether a sum is a penalty] *has to be determined objectively, judged at the date the contract was made, does not mean what actually happens subsequently is irrelevant. On the contrary, it can provide valuable evidence as to what could reasonably be expected to be the loss at the time the contract was made*";

(b) as to the evidentiary proposition on which the Full Court relied, it is contrary to ss 55 and 56 of the *Evidence Act 1995* (Cth).[44]

54. In circumstances where it was uncontroversial that the respondent (which had sole power to set the late payment fee in these standard form contracts) had not determined the quantum of the late payment fee by reference to a sum that would have been recoverable as unliquidated damages, that evidence was valuable for the reason expressed by Lord Woolf, and indeed *a fortiori*. A party which does not in fact turn its mind to the relevant question at the time the contract is made is in no position to contradict the inference to be drawn from what in fact happened about what would reasonably have been expected in the event it had turned its mind to that question. The

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42 *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo Y Castaneda* [1905] AC 6.

43 *Philips Hong Kong Ltd v The Attorney General of Hong Kong* [1993] 1 HKLR 269 at 280. See too *Cavendish Square Holdings BV v Makdessi* [2014] 2 All ER (Comm) 125; [2013] EWCA Civ 1539 at [59]. The latter case has been appealed to the Supreme Court of the United Kingdom, and was heard on 21-23 July 2015, together with an appeal from *ParkingEye Ltd v Beavis* [2015] EWCA Civ 402. The essential question was whether the rule against penalties does not (or should not) apply to commercial contracts between sophisticated parties, because clauses are, in such cases, properly to be regarded as part of the price of the bargain struck in the contract, and that the "commercial justification" doctrine ought be accepted as enabling a clause to be rescued when it might otherwise be a penalty.

44 Subject to limitation under s 136 of that Act (of which there were none) evidence adduced is to be used to resolve any fact in issue to the extent it is probative.

fact that there was a complete absence of any reasoning in the fixing by the respondent of the amount of late payment fees was properly regarded by the primary Judge as an important part of the inherent circumstances: J [129].

55. That combination of circumstances properly justified the primary Judge's conclusion that the late payment fees were extravagant and unconscionable in comparison with the greatest (non-remote, recoverable) loss that could be proven to follow from any late payment by the first appellant. Even if it was applicable, proper application of the first *Dunlop* "test" ought to have resulted in a finding that the late payment fees were penalties.

56. Finally, it might be observed that the result of the respondent's contentions concerning the application of the first *Dunlop* test is that a genuine pre-estimate of damage does not have to be "genuine" or a "pre-estimate", or of "damage" (at least recoverable damage) either. If the doctrine of penalties is as insipid as this would suggest, it would be a surprising thing. Indeed, it would be hard to conceive of any circumstances arising from consumer contracts when it would result in relief.

57. The unreality involved in predicating the doctrine on the basis propounded by the Full Court is demonstrated by the fact that on its reasoning even if the late payment fee had been fixed in excess of $7,000,[45] it still would not have exceeded the "*maximum conceivable loss*" and so would not have been penal (notwithstanding that it was more than a thousand times greater than even the highest loss that could actually be proven to have been sustained ($5.50)). If that is to be the result, rather than being rendered functionally redundant in this way, the doctrine of penalties ought simply be expressly abolished by this Court.

## PART VII: Relevant Provisions

58. This appeal does not concern any constitutional provisions, statutes or regulations other than the *Evidence Act 1995* (Cth), ss 55, 56 and 136. See the List of Authorities filed with these Submissions, and attached as an Annexure.

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45 The respondent's expert opined that in the period under consideration the "*[m]aximum costs the Bank could conceivably have incurred as a result of a Late Payment Event*" was $7,799 (provision cost), plus $273 (regulatory capital cost), plus $97-$107 (collections cost): Inglis Late Payment Event Report (16 May 2013) at p 19 (Table 2-3).

## PART VIII: Orders Sought

59. The appellants seek the orders set out in the Notice of Appeal.

## PART IX: Estimate

60. The appellants' estimate is that 5 hours will be required for the presentation of their oral argument in this matter, together with their oral argument in proceeding M219 of 2015 (concerning the Statutory Claims).

Dated: 16 October 2015


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