Foreword

Justice James Edelman

An apocryphal story is told that Sydney Smith was once walking down the street with a companion when he noticed two people arguing loudly with each other from opposite apartments above the street. "They will never agree", he exclaimed. "They are arguing from different premises".

At the heart of *Contractual Penalties in Australia and the United Kingdom* lies a conflict between Australian and English law about the rules of contractual penalties. Dr Tiverios explains that in 2012, Australian law took one approach, aligning the law of contractual penalties with a conception that is concerned with rights that are in the nature of security for the performance of non-promissory conditions by the other party.[1] In 2015, English law took another approach, aligning the law of contractual penalties in England with a conception that is concerned with the ability of the parties to agree remedies for breach that differ in nature from those that could be awarded by a court.[2] One of the many merits of this outstanding book is that it demonstrates that these two jurisdictions approach the issue from different premises. With different premises it is not unsurprising that each jurisdiction adopts different rules, most notably the lack of a requirement for a breach of contract to enliven the doctrine in Australia, and the "scaled down" effect that Australian courts are willing to give to a clause to the extent to which it is not penal. Nevertheless, as Dr Tiverios also demonstrates, there are commonalities between the jurisdictions. Those commonalities may be the consequence of a common premise concerning antipathy to civil punishment that exists at a higher level of generality.

Although the roots of criminal law and civil law are intermingled, there has long been controversy about the role of penalties in civil law. Punitive damages were described by Lord Reid as "highly anomalous".[3] Others have suggested that "civil penalties" may be an oxymoron.[4] Nearly 150 years ago, the Supreme Court of New Hampshire remarked:[5]

> How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.

1 *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205.
2 *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172.
3 *Broome v Cassell & Co Ltd* [1972] AC 1027, 1086.
4 R White "'Civil penalties': Oxymoron, Chimera and Stealth Sanction" (2010) 126 *Law Quarterly Review* 593.
5 *Fay v Parker* 53 NH 342 (SCNH 1873) 382.

Much may depend upon what we mean by punishment and penalties. On one view, the standard case of punishment, as set out by H L A Hart, is underdetermined.[6] On another view, it may be better to treat as a "sliding scale"[7] the traditional distinctions between criminal law and civil law or between those purposes that are collectively sufficient for punishment and those purposes that are not. Amidst these vague boundaries, the rule against penalties in contract law can sometimes require the sharp identification of a point beyond which the legal effect of a clause becomes inoperative (on the Australian approach) or at which the entire clause becomes void (on the English approach). As Dr Tiverios shows, that point is now to be ascertained primarily by the blunt tool of whether the party for whose benefit the clause exists has no "legitimate interest" that is protected by the alleged penalty clause. The scope of a legitimate interest might, itself, depend upon a conception of the slippery notion of punishment. For instance, it has been held in England that where the contracting parties are in a fiduciary relationship, or something closely akin to it, then there will be a legitimate interest in requiring the principal to account for and disgorge profits made from breaches that concern loyalty.[8] Yet, an account and disgorgement of profits are usually awarded for reasons of deterrence or prophylaxis,[9] which is separated from punishment by a fine line. The distinction is important but to some it might appear as a "barren piece of conceptualism".[10]

The detailed doctrinal and philosophical analysis in *Contractual Penalties in Australia and the United Kingdom* makes it a book for scholars who want to understand the historical, conceptual, and moral foundations of the prohibition against contractual penalties. But its clear and concise style and its chapters and sections concerning the practical application of a doctrine based upon slippery foundations also make it essential reading for all commercial lawyers in Australia and England.

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6 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 4-5.

7 *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 WLR 344, 394 [148].

8 *Attorney General v Blake* [2001] 1 AC 268, 285 (legitimate interest); 287, 292 (fiduciary relationship).

9 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43; 92 ALJR 918, 923-924 [9]; 360 ALR 1, 6-7.

10 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) at 166-167.