HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No S291/2005

RINGROW PTY LTD — APPELLANT

AND

BP AUSTRALIA PTY LTD — RESPONDENT

Matter No S292/2005

ULTIMATE FUEL PTY LIMITED — APPELLANT

AND

BP AUSTRALIA PTY LTD — RESPONDENT

Matter No S293/2005

NADER-ONE PTY LIMITED — APPELLANT

AND

BP AUSTRALIA PTY LTD — RESPONDENT

Ringrow Pty Ltd v BP Australia Pty Ltd
Ultimate Fuel Pty Limited v BP Australia Pty Ltd
Nader-One Pty Limited v BP Australia Pty Ltd
[2005] HCA 71
17 November 2005
S291/2005, S292/2005 and S293/2005

ORDER

Appeals dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

T E F Hughes QC with T D F Hughes for the appellants (instructed by Stojanovic Solicitors)

B W Walker SC with M Walton SC and D R Sibtain for the respondents (instructed by Corrs Chambers Westgarth)

CATCHWORDS

Ringrow Pty Ltd v BP Australia Pty Ltd

Contract – Penalty – Agreement to purchase service station from distributor of fuel – Collateral agreement requiring fuel to be purchased exclusively from distributor – Breach of collateral agreement – Termination of collateral agreement by distributor pursuant to contractual power – Option to buy back service station exercisable by distributor on termination of collateral agreement – Whether option void and unenforceable as a penalty – Whether exercise of option oppressive or extravagant and unconscionable compared with genuine pre-estimate of damage – Relevance of proportionality to penalty questions.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. These appeals concern the effect of contracts by which each of Ringrow Pty Ltd, Ultimate Fuel Pty Ltd and Nader-One Pty Ltd bought service stations from BP Australia Pty Ltd. The identical point arises in each appeal and it is convenient to confine analysis to the first appeal.

The background

2 *The essential facts.* On 27 May 1999, Ringrow Pty Ltd ("the appellant") entered a contract with BP Australia Pty Ltd ("the respondent") to buy a service station known as BP Lansvale ("Contract for Sale of Site"). The appellant, or persons connected with it, had conducted a service station business on that site since 1988 as franchisee. On 28 July 1999, the contract to buy BP Lansvale was completed, and certain related transactions were entered, including an Option Deed dated 28 July 1999 and a BP Branded Privately Owned Sites Agreement ("POSA").

3 At various times in 2002 the appellant purchased fuel from a supplier other than the respondent, and on-sold the fuel to the public. This was a breach of cl A4.2 of the POSA. The respondent gave the appellant Notices of Breach of Condition. These were followed by a Notice of Termination of Contract on 2 December 2002, with effect from 1 January 2003, pursuant to cl A13.2.1(a) of the POSA. On 17 December 2002, the solicitors for the respondent informed the solicitors for the appellant that the respondent intended to exercise its contractual rights under the Option Deed to buy back the BP Lansvale site. Clause 38.1 of the Contract for Sale of Site provided that, in consideration of the respondent agreeing to sell BP Lansvale to the appellant, the appellant "HEREBY GRANTS to the [respondent] an irrevocable option to purchase [BP Lansvale] on the terms set out in the option to purchase", a copy of which was annexed, and which on execution became the Option Deed. Clause 1.2(a) of the Option Deed provided that the option was only exercisable if the POSA "is terminated". Clause 2.1 of the Option Deed provided that the price payable for BP Lansvale by the respondent was its "market valuation ... as an operational service station as determined by an independent valuer". Clause 2.5 provided:

> "The valuer shall be instructed to determine the market valuation of [BP Lansvale] … and in making the determination shall have regard to all factors the valuer considers relevant but shall not include in the determination of the market valuation of [BP Lansvale] any allowance for any goodwill attaching to any business conducted at [BP Lansvale]."

The duration of the option was five years and three months: cl 1.3.

4 Conformably with what its solicitors had said on 17 December 2002, the respondent gave a Notice of Intention to exercise the option over BP Lansvale on 19 June 2003.

5 *Decisions of the Federal Court.* The appellant commenced proceedings in which it made numerous allegations. Only one of these is now pressed: that cl 1.2(a) of the Option Deed was "void and unenforceable" as a penalty.

6 In the Federal Court of Australia, Hely J rejected that contention[1]. He made declarations upholding the validity of the respondent's termination of the POSA and its exercise of the option. He declined to accede to the respondent's application for a decree of specific performance of the contract created by the valid exercise of the option, on the ground that it was premature to do so, since this "might have the unintended effect of preventing the [appellant] from mounting some legitimate challenge to the valuation process, should [it] have one"[2].

7 The Full Court of the Federal Court of Australia unanimously dismissed an appeal by the appellant[3]. Separate reasons for judgment were delivered by Beaumont J and by Conti and Crennan JJ. Their reasoning was similar to that of the trial judge.

8 The performance of the task of the Full Court, and then of this Court, has been facilitated by the skill of Hely J in marshalling the details of the complex form in which the parties set down their legal relationship, and in the clear and precise statement both of the issues presented and the resolution of those issues.

The appellant's arguments in this Court

9 *The law of penalties.* The manner in which the trial was conducted relieved Hely J of the need to determine whether there was any scope for the

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1 *Ringrow Pty Ltd v BP Australia Ltd* (2003) 203 ALR 281.

2 *Ringrow Pty Ltd v BP Australia Ltd* (2003) 203 ALR 281 at 317 [159].

3 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2004) 209 ALR 32.

application of equitable principles respecting relief against forfeiture to the exercise of the option[4]. Rather, the case turned upon the law concerning penalties. In that regard, not every aspect of the arguments put to this Court were advanced at trial or in the Full Court. Nevertheless, the respondent did not oppose all of them being considered.

10 The law of penalties, in its standard application, is attracted where a contract stipulates that on breach the contract-breaker will pay an agreed sum which exceeds what can be regarded as a genuine pre-estimate of the damage likely to be caused by the breach.

11 The starting point for the appellant was the following passage in Lord Dunedin's speech in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[5]:

> "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 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 …

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4 (2003) 203 ALR 281 at 307 [119]-[120].

5 [1915] AC 79 at 86-87.

> (*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'[6]."

12 Neither side in the appeal contested the foregoing statement by Lord Dunedin of the principles governing the identification, proof and consequences of penalties in contractual stipulations. The formulation has endured for ninety years. It has been applied countless times in this and other courts[7]. In these circumstances, the present appeal afforded no occasion for a general reconsideration of Lord Dunedin's tests to determine whether any particular feature of Australian conditions, any change in the nature of penalties or any element in the contemporary market-place[8] suggest the need for a new formulation. It is therefore proper to proceed on the basis that *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* continues to express the law applicable in this country, leaving any more substantial reconsideration than that advanced, to a future case where reconsideration or reformulation is in issue[9].

13 The appellant submitted that there were three "penal factors" in the contractual arrangements to which the respondent was seeking to hold it. These it summarised as "the exclusion of goodwill from the re-sale price", "the cumulative imposition of the option upon the liability to pay liquidated damages if [the respondent] enforces the latter liability before exercising the option", and "the indiscriminate factor".

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6 *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332 at 342 per Lord Watson.

7 eg *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 368, 378, 399, 400; *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514 at 520; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190; *Stern v McArthur* (1988) 165 CLR 489 at 540 and *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131 at 139, 143, 145.

8 See eg *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190.

9 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 400; cf at 392; *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564 at 566, 574.

14 The appellant did not submit either at trial or in this Court that the provisions requiring payment of liquidated damages themselves are void as a penalty[10]. Rather, the appellant submitted that it is the purported imposition upon the appellant by the Option Deed of an obligation, in the events that have happened, to transfer to the respondent the freehold of BP Lansvale, which is void as a penalty.

15 The elements of each of the three "penal factors", as urged by the appellant with respect to the contractual arrangements, can be summarised as follows.

16 *Exclusion of goodwill from the resale price.* Clause 40.4(a) of the Contract for Sale of Site provided:

> "The [respondent] and [appellant] acknowledge and agree that:
>
> (a) the [respondent] is prepared to sell [BP Lansvale] on the basis of continued operation of the business of a retail fuel outlet operating as a going concern at the property under the POSA for a period of 5 years and the Liquidated Damages reflects the expected returns to the [respondent] under the POSA over that 5 year period …"

The "Liquidated Damages" referred to were those stipulated by cl 40.2 of the Contract for Sale of Site and cl SC1.3 of the POSA. They rested on an assumed financial benefit to the respondent of $289,531 over the five year life of the POSA. It was provided that if the POSA were terminated in the first year, the sum of $289,531 would be payable by the appellant; if in the second year, 80 percent of that sum, and so on.

17 The appellant contrasted cl 40.4(a) of the Contract for Sale of Site with cl 2.5 of the Option Deed. It submitted that the price payable by the respondent on exercise of the option "excluded any allowance for … goodwill, even though [the appellant] had paid an entry price expressly calculated as including such goodwill". It submitted that the principles stated by Lord Dunedin were not limited to payments of a "single lump sum" of money, but extended to the transfer of valuable property where the value of that property exceeded the damage suffered by the recipient of it. It contended that the word "terminated" in

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10 (2003) 203 ALR 281 at 319 [173].

cl 1.2(a) of the Option Deed referred only to termination of the POSA for breach. It submitted that, viewed from the time when the POSA was made, it could be seen that it could be terminated on the occurrence of events which might occasion only trifling damage to the respondent. It submitted that par 4(c) of the passage quoted from Lord Dunedin's speech rested on "a concept of proportionality between breach and supposed remedy". The submission continued:

> "One must assess the proportionality (if any) between the interest sought to be vindicated by the stipulation impugned as penal and the means contractually devised for that purpose. If there is a manifest disproportion, the stipulation is presumptively a penalty … The exercise to be undertaken in such a case requires a precise definition of the interest requiring vindication in case of breach."

It submitted that the only legitimate commercial interest which the respondent was entitled to protect by the agreements it entered with the appellant, and in particular the Option Deed, was to preserve BP Lansvale as an outlet for the sale exclusively of BP petroleum products during the five year term of the POSA. A sufficient vindication of the respondent's interest would have been a contractual requirement for the appellant to grant a lease of BP Lansvale to the respondent for the unexpired balance of the term of the POSA after it had been terminated for breach. The appellant submitted that a comparison of the consideration payable to the appellant for the transfer back to the respondent with the real value of BP Lansvale at that time revealed that the option was penal. It also submitted that a want of proportionality was revealed by the fact that if the POSA were terminated for a trivial breach in the first month of its term, thus ending the respondent's obligation to supply petroleum to the appellant, the option would overhang the property for another five years and two months. The appellant "would have to 'sit out' that period with [its] effective use of the site virtually sterilised. Such an outcome would be grossly disproportionate to the breach".

18 *Cumulative imposition of option on the liquidated damages clause.* By reason of cl A16.17 of the POSA certain special conditions were part of it. By cl SC1.1 the appellant acknowledged that it had acquired from the respondent the freehold of BP Lansvale. Clause SC1.3 provided for the payment of liquidated damages on termination of the POSA before the passing of five years in identical fashion to that provided for by cl 40.2 of the Contract for Sale of Site. Clause SC1.2(e) provided:

> "[The respondent] has the right to acquire [BP Lansvale] under [the Option Deed] … If [the POSA] is terminated and [the respondent] has exercised its right to acquire [BP Lansvale] under the [Option Deed], the Liquidated Damages will not be repayable [scil payable] to [the respondent] under clause SC1.3."

The appellant submitted that it followed that if the respondent relied on its right to liquidated damages before it relied on its right to exercise the option, it would be "securing a double 'remedy' for the same breach". The appellant also complained that the Full Court had not dealt with this point.

19 *The indiscriminate factor.* The appellant argued that the right to exercise the option was "unrelated to the extent or gravity of any contractual default relied upon to trigger the entitlement to terminate the POSA". Hence it was said that "[t]he entitlement is indiscriminate as regards the nature or quality of the breach".

20 For the reasons given below, these arguments must be rejected, and the appeal must be dismissed.

An evidentiary difficulty

21 *The argument of non-monetary penalties.* The respondent did not contest the appellant's submission, for which there is authority[11], that Lord Dunedin's statement applies not only to cases where money is payable but also to cases where money's worth (including property) is transferable on a particular event. In that extended application, Lord Dunedin's statement requires a different approach from that employed in typical penalty cases. In typical penalty cases, the court compares what would be recoverable as unliquidated damages with the sum of money stipulated as payable on breach. In cases like the present, on the other hand, assuming (contrary to certain submissions of the respondent) that the doctrine of penalties is capable of application at all, one relevant comparison would be between the price payable by the respondent to the appellant on retransfer of BP Lansvale by the appellant, and the actual value of what is transferred. Applying that approach to this case, assuming (contrary to certain

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11 *Forestry Commission of New South Wales v Stefanetto* (1976) 133 CLR 507 at 519, 524; *Jobson v Johnson* [1989] 1 WLR 1026 at 1034-1035, 1042; [1989] 1 All ER 621 at 628, 634; *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551 at 555.

submissions of the respondent, and subject to various disputes between the parties about the meaning of "goodwill") that the appellant paid the respondent for goodwill on buying BP Lansvale in 1999, but was not to be paid for goodwill in retransferring it once the option was exercised in 2003, a suspicion would arise that what was retransferred might be worth more than the price to be paid for it. But a mere difference is not enough, let alone a suspicion of a difference. The comparison calls for something "extravagant and unconscionable" in the value of what is transferred compared to the price to be received, to use Lord Dunedin's words[12]. It calls for a "degree of disproportion" sufficient to point to oppressiveness, to use the words of Mason and Wilson JJ[13].

22 In assessing extravagance and oppressiveness, it is necessary to be able to compare the price to be paid and the value of what is to be transferred as a result of the option's having been exercised.

23 *The argument about goodwill.* Since the difference alleged by the appellant is the goodwill excluded from the valuer's consideration by the concluding words of cl 2.5 of the Option Deed, it is necessary to value that goodwill. An expert witness identified various potential sources of goodwill in relation to a service station – its location, its pricing strategy, its facilities other than those for the provision of fuel, its branding, the quality of its staff, and the identity of its owner or manager. He concluded that the sources of goodwill other than location either were not a source of any significant goodwill or, so far as they were, did not generate goodwill of significant value. He put no monetary value on these sources of goodwill, and none on the goodwill deriving from location either. The trial judge accepted that witness's evidence and rejected some contrary evidence. He said: "It follows that the [appellant has] failed to establish the existence of valuable goodwill in relation to [BP Lansvale] of which [the appellant] will be deprived without adequate compensation by virtue of the exercise of the option[]."[14]

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

13 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 193.

14 *Ringrow Pty Ltd v BP Australia Ltd* (2003) 203 ALR 281 at 314 [146].

24 The appellant did not attack that conclusion or refer to any other evidence permitting an inference of monetary value to be drawn. It follows that, even if the appellant is right in contending that in 1999 it paid for goodwill and when the retransfer takes place it will receive nothing for goodwill, it is not possible to say what, if any, money sum it has lost. Hence it is not possible to say that there is a penalty on the first basis for which the appellant contended, which rested on a comparison of the consideration payable to the appellant for the transfer back to the respondent with the real value of BP Lansvale.

25 The same reasoning must lead to the rejection of the appellant's argument based on the cumulative imposition of the option on the liquidated damages clause. Since there is no evidence as to the value of any goodwill excluded from the price to be paid by the respondent to the appellant on the retransfer of BP Lansvale after exercise of the option, it cannot be said that the cumulative imposition of the option on the liquidated damages clause, the validity of which was not challenged in this Court, is oppressive, or was extravagant and unconscionable in comparison with the loss which flowed from the breach of the POSA. In any event, such evidence as there was about goodwill tends to contradict the argument of the appellant.

26 *The argument of proportionality*. The next argument advanced by the appellant to be examined is its argument that par 4(c) of the passage from Lord Dunedin's speech rested on a concept of proportionality which the Option Deed contravened in calling for a reconveyance of BP Lansvale after termination of the POSA rather than a lease for the balance of the five year term of the POSA. It must be rejected for three reasons.

27 First, neither *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[15] nor any other authority[16] supports the "proportionality" doctrine which the appellant advocated. The principles of law relating to penalties require only that the money stipulated to be paid on breach or the property stipulated to be transferred on breach will produce for the payee or transferee advantages

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15 [1915] AC 79 at 86-87.

16 The appellant also relied on *Pigram v Attorney-General for the State of New South Wales* (1975) 132 CLR 216 at 227 per Gibbs J and *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 369 per Gibbs CJ, 383 per Wilson J and 399 per Deane J.

significantly greater than the advantages which would flow from a genuine pre-estimate of damage. Among the different words which have been used to describe how extensive the difference must be before the transaction creates a penalty are the words employed by Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin*[17] – a "degree of disproportion" sufficient to point to oppressiveness. But their Honours were not asserting any doctrine of the kind relied on by the appellant, which would rest on a disproportion between the innocent party's commercial interests and the promise extracted to protect them. That type of idea underlies the law relating to contracts in restraint of trade, which recognises certain interests which it is legitimate for a covenantee to seek to protect by a covenant in restraint of the covenantor's trade, so long as the covenant is not wider than is reasonably necessary to protect those interests[18]. Such an idea is not, however, part of the law relating to penalties. Mason and Wilson JJ initially made the point that an agreed sum should only be "characterized as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach"[19]. Later their Honours referred to proportionality as follows[20]:

> "[E]quity 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 test to be applied in drawing that distinction 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. The courts should not, however, be too ready to find the requisite degree of *disproportion* lest they impinge on the parties' freedom to settle

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17 (1986) 162 CLR 170 at 193.

18 See, for example, *Butt v Long* (1953) 88 CLR 476 at 486 per Dixon CJ.

19 (1986) 162 CLR 170 at 190.

20 (1986) 162 CLR 170 at 193-194. The appellant relied on the approval given to this and the preceding passage by Wilson and Toohey JJ in *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131 at 139.

> for themselves the rights and liabilities following a breach of contract." (emphasis added)

Nothing in either passage supports the need to inquire into whether there is proportionality between the impugned provision and the legitimate commercial interests of the party relying on it.

28 The same is true of other judicial uses of the expression "proportion" in the penalty context. Thus in *Lord Elphinstone v Monkland Iron and Coal Co*[21] Lord Herschell LC, in examining the validity of a covenant by which lessees who had been given a right to place slag on the land leased to them covenanted to pay the lessor £100 per acre for all land not levelled and soiled within a particular period, said:

> "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. There is nothing whatever to shew that the compensation is [inordinate] or extravagant in relation to the damage sustained."

This reasoning did not require there to be a strict proportion; it merely relied, as a step towards the conclusion that the compensation was not inordinate or extravagant, on the fact that the compensation bore a strict proportion to the unfulfilled obligation.

29 Secondly, for this Court to take the unusual step of recognising the proportionality doctrine advocated by the appellant notwithstanding its lack of support in authority might, depending on how it was formulated, involve the overruling of cases on the penalty doctrine which have not up to now been doubted. There are likely to be instances in which the courts, applying received principles, would find that no penalty existed, but would decide the case in favour of the contract-breaker if there were a proportionality doctrine.

30 It must be concluded that the proportionality doctrine does not exist in this context and should not be recognised. Although the appellant presented the proportionality doctrine as part of the received law on penalties, in truth its

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21 (1886) 11 App Cas 332 at 345.

closest analogy is with the restraint of trade doctrine. The problem is that the proportionality doctrine contradicts the rules on penalties without satisfying the requirements of the restraint of trade doctrine.

31 Thirdly, consideration of the purpose of the law of penalties shows why this must be so. The law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships. As Mason and Wilson JJ observed in *AMEV-UDC Finance Ltd v Austin*[22]:

> "[T]here is much to be said for the view that the courts should return to … allowing parties to a contract greater latitude in determining what their rights and liabilities will be, so that an agreed sum is only characterized as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach[23]."

32 Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged "extravagant and unconscionable in amount". It is not enough that it should be lacking in proportion. It must be "out of all proportion". It would therefore be a reversal of longstanding authority to substitute a test expressed in terms of mere disproportionality. However helpful that concept may be in considering other legal questions[24], it sits uncomfortably in the present context.

Remaining arguments of the appellant

33 Two arguments of the appellant remain for consideration.

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22 (1986) 162 CLR 170 at 190.

23 *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447-1448; [1966] 3 All ER 128 at 142-143 and United Kingdom, Law Commission, *Penalty Clauses and Forfeiture of Monies Paid*, Working Paper No 61, (1975), pars 33, 42-44.

24 See eg *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300, 324, 339-340, 387-388 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

34 One is the argument that if the POSA were terminated just after it came into operation, the option would continue to hang over the land for over five years and would sterilise it. The difficulty with the argument is that if the POSA were terminated, even though the respondent would cease to supply petroleum products, the appellant could obtain petroleum products from other suppliers – as the appellant did before the POSA was terminated. No evidence was pointed to from which it could be inferred that the continuing existence of the unexercised option after termination of the POSA would be damaging to the appellant, nor that the law relating to penalties was attracted on that ground alone.

35 The final argument of the appellant is that connected with what it called the "indiscriminate factor". The argument rested on the contention that the option could be exercised after termination of the POSA for merely technical breaches. That contention is sound, but it does no more than reveal the existence of a possible precondition to the penalty doctrine. It does not, of itself, demonstrate that the disparity between what the respondent was to receive on retransfer of BP Lansvale and a genuine pre-estimate of damage was so great as to trigger the penalty doctrine.

Controversies not needing to be resolved

36 The appellant's arguments thus fail. It was not suggested that the other appellants were in a different position. Accordingly, their arguments also fail. The appeal can be dismissed without this Court having to decide whether cl 1.2(a) of the Option Deed means that the option could only be exercised if the POSA were terminated for breach under cl A13.2.1 or that the option could be exercised if it were terminated on grounds other than breach under cl A13.2.2; and, in either event, whether the outcome matters. It is not necessary to reach a conclusion on the precise meaning and operation of cl 40.4 of the Contract for Sale of Site or cl 2.5 of the Option Deed, or on the extent to which particular types of goodwill are or are not within those provisions. Nor is it necessary to deal with various contentions of the respondent to the effect that the doctrine of penalties was incapable of applying to the circumstances of this case, for example, on the ground that breach was not the cause but merely the occasion for the option to be triggered. And it is not necessary to consider whether the appellant's construction of cl SC1.2(e) of the POSA (on which its argument about the penal character of the cumulative imposition of the option on the liquidated damages clause rests) is correct.

37 There is, however, one argument advanced by the respondent which should be rejected. As part of an argument that the penalty doctrine did not apply in this case, the respondent contended:

> "The option was part of the consideration for the original conveyance of [BP Lansvale]: see special condition 38 of the [Contract for Sale of Site] … The option encumbered the original conveyance. Had the option not been part of the consideration, the purchase price would have been higher."

38 There is an echo of this argument in the reasoning of the courts below[25]. By itself, that point could not prevent a conclusion that a contractual term was a penalty, for in almost every case the impugned term will be part of the consideration for the innocent party's promises, and it can be said that if it had not been so, the other elements of the consideration required by the innocent party would be more valuable.

Orders

39 The appeals should be dismissed with costs.

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25 *Ringrow Pty Ltd v BP Australia Ltd* (2003) 203 ALR 281 at 303 [103]; *Ringrow Pty Ltd v BP Australia Pty Ltd* (2004) 209 ALR 32 at 44 [30].