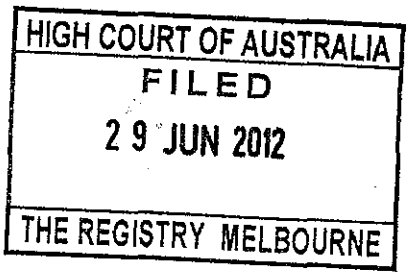
IN THE HIGH COURT
OF AUSTRALIA
MELBOURNE REGISTRY

No. M48 of 2012

BETWEEN:



JOHN ANDREWS
First Applicant

ANGELO JULIAN SALIBA
Second Applicant

GEOFFREY ALLEN FIELD
Third Applicant

and

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

RESPONDENT'S SUBMISSIONS

Part I – Certification for Internet Publication

1. The respondent (**ANZ**) certifies that these submissions are suitable for publication on the internet.

Part II – Statement of Issues

2. This matter is an application for leave to appeal under s24(1A) of the *Federal Court of Australia Act* 1976 (Cth) (**FCA Act**). Upon the assumption that leave to appeal is granted, the following issues arise on the appeal.

3. First (ground 1 of the Amended Draft Notice of Appeal), whether the learned trial judge erred in concluding that the law of penalties, when applied to a payment required by contract (not being a payment required upon the termination of a contract), is confined to payments for breach of contract.

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4. Secondly (grounds 2 and 3 of the Amended Draft Notice of Appeal), whether there remains a separate jurisdiction in equity for relief in respect of penalties in the circumstances alleged by the applicants in paragraphs 55 to 57 of the Amended Fast Track Statement.

5. Thirdly (ground 4 of the Amended Draft Notice of Appeal), whether the learned trial judge erred in finding, as a matter of fact, that none of the honour, dishonour, non-payment and overlimit fees was payable upon the occurrence or default of occurrence of events which, as a matter of substance, were treated by ANZ and the customer who incurred the fee as lying within the area of obligation of that customer in the sense that it was the customer's responsibility to see that the event did or did not occur.

6. The applicants' appeal on grounds 1 to 3 has no utility unless the applicants succeed on ground 4. Accordingly, the dismissal of appeal ground 4 will dispose of the appeal in full.

Part III – Section 78B Certification

7. ANZ considers that notice pursuant to s78B of the *Judiciary Act* 1903 (Cth) is not necessary.

Part IV – Facts that are contested

8. The applicants' statement of facts is incomplete.

9. The proceeding in the Federal Court concerns honour, dishonour and non-payment fees charged by ANZ in respect of various retail deposit accounts[1] and various business deposit accounts[2] and overlimit and late payment fees charged by ANZ in respect of various consumer credit card accounts[3] and a commercial credit card account.[4] In the Amended Fast Track Statement, the fees are colloquially called "exception fees". The application to this Court concerns the honour, dishonour and non-payment fees in respect of deposit accounts and the overlimit fee in respect of credit card account, but not the late payment fee. On the hearing of the separate questions, the learned trial judge found that the late payment fee was payable upon breach of contract and therefore was capable of being characterised as a penalty. ANZ has not applied for leave to appeal against that interlocutory decision.

10. ANZ levied a range of fees and charges in respect of the foregoing banking accounts. In respect of retail deposit accounts, the fees included monthly account service fees, withdrawal fees, ATM and EFTPOS transaction fees, various fees in connection with cheques (cashing cheques, re-presentation and special clearance), statement fees and

[1] Referred to in the AFTS as Saving Accounts
[2] Referred to in the AFTS as Business Accounts
[3] Referred to in the AFTS as Card Accounts
[4] Called the ANZ Business One Facility and referred to in the AFTS as the Commercial Card Account

money transfer fees as well as the honour, dishonour and non-payment fees.[5] A similar range of fees applied to business deposit accounts.[6] In respect of the consumer credit card accounts, the fees included annual account fees, annual rewards fees, cash advance fees and ATM transaction fees as well as the overlimit and late payment fees.[7] A similar range of fees applied to commercial card accounts.[8]

11. The learned trial judge made the following findings:

(a) A payment instruction given by a customer that would have the effect of overdrawing the customer's account or exceeding the account credit limit is to be construed as a request from the customer for an advance or loan from ANZ. ANZ may approve or decline the request in its discretion.[9]

(b) The overdrawing of a customer account (whether a deposit account or a credit card account) was not a unilateral action by the customer, but was an action that required the consensual conduct of ANZ and the customer. For the transaction to proceed, ANZ must agree to and approve or authorise the transaction.[10]

(c) Accordingly, overdrawing the account could not constitute a breach by the customer of a contractual obligation. Such transactions fell within the express provisions of the applicable contractual terms which stated that ANZ may allow or authorise such transactions or were outside the contractual terms because ANZ approved the transaction.[11] Nor was there an "obligation" of the kind described by Brereton J in *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd*[12] upon the customer not to overdraw the account.[13]

(d) Nor was it a breach of contract for ANZ's customers to give a payment instruction to ANZ that would have the effect, if honoured, of overdrawing the customer's account or exceeding the account credit limit. The relevant provisions of the customer contracts did not impose a contractual obligation not to give such an instruction; indeed, the relevant contractual provisions

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[5] Trial Judgment at [188] referring to the ANZ Personal Banking Account Fees and Charges booklet dated January 2006

[6] See the ANZ Business Banking Transaction Account Fees and Charges booklet dated July 2005 referred to at Trial Judgment [316] and [322]

[7] See the ANZ Personal Banking Account Fees and Charges booklet dated October 2003 referred to at Trial Judgment [226] and [236]

[8] See the ANZ Commercial Cards Fees and Charges booklet dated May 2007 referred to at Trial Judgment [298] and[303]

[9] Trial Judgment at [82], [177], [279], [306] and [323]

[10] Trial Judgment at [182], [280], [291], [307] and [323]

[11] Trial Judgment at [182], [280], [291], [307] and [323]. The relevant terms for the retail deposit accounts are set out at Trial Judgment [153], [161] and [202]; the relevant terms for the consumer credit card accounts are set out at Trial Judgment [228], [273] and [287]; the relevant terms for the commercial credit card accounts are set out at Trial Judgment [299]; the relevant terms for the business deposit accounts are set out at Trial Judgment [320] and [344]

[12] [2007] NSWSC 406 at [78]

[13] Trial Judgment at [191]

stated expressly that ANZ may allow or authorise such a transaction.[14] Nor was there an "obligation" (of the kind described by Brereton J in *Integral*) upon the customer not to attempt to overdraw the account.[15]

(e) The honour and overlimit fees were charged by ANZ as a consequence of a customer issuing a payment instruction to ANZ that would have the effect, if honoured, of overdrawing the customer's account or exceeding the account credit limit and ANZ approving or authorising the instruction. The fees were charged in respect of ANZ's decision concerning the request for additional borrowing.[16] It followed that the honour and overlimit fees were not charged by ANZ upon a breach of contract by the customer. Nor were the fees charged by ANZ upon the occurrence of an event (overdrawing the account or attempting to overdraw the account) that the customer had an obligation or responsibility to avoid.[17] Further, the honour fee in respect of retail deposit accounts was charged once per day, regardless of how many transactions occurred on that day that overdrew the account;[18] the overlimit fee in respect of consumer credit card accounts was charged once per month, at the end of a statement period, if the balance of the account exceeded the credit limit during the statement period;[19] the overlimit fee in respect of commercial credit card accounts was also charged once per month, at the end of a statement period, if the balance of the account at the end of the statement period exceeded the credit limit by $100 or more.[20]

(f) The dishonour and non-payment fees were charged by ANZ as a consequence of a customer issuing a payment instruction to ANZ that would have the effect, if honoured, of overdrawing the customer's account or exceeding the account credit limit and ANZ not approving or authorising the instruction.[21] It followed that the dishonour and non-payment fees were not charged by ANZ upon a breach of contract by the customer. Nor were the fees charged by ANZ upon the occurrence of an event (attempting to overdraw the account) that the customer had an obligation or responsibility to avoid.[22]

12. In the proceeding, ANZ has admitted that it did not determine the quantum of the honour, dishonour, non-payment and overlimit fees by reference to a sum that would

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[14] Trial Judgment at [185], [186], [208], [214], [328] and [331]
[15] Trial Judgment at [82], [177], [185], [186], [191] and [207]
[16] Trial Judgment at [182], [183], [187], [279], [280], [291], [306], [307] and [328]
[17] Trial Judgment at [193], [281], [293], [308] and [324]
[18] Trial Judgment at [187]
[19] Trial Judgment at [277]
[20] Trial Judgment at [304], [306] and [307]
[21] Trial Judgment at [207], [208], [214], [328] and [331]
[22] Trial Judgment at [209], [215], [328] and [331]

have been recoverable as unliquidated damages.[23] The admission follows from the nature and character of the fees as described above.

Part V – Statutes

13. The applicants' statement as to relevant statutes is accepted.

Part VI – ANZ's argument

14. The applicants' arguments are not supported by authority or principle. Furthermore, the applicants have not sought to demonstrate that their formulation of the equitable jurisdiction can have any application to the exception fees that are the subject of this application. Their excursion is ultimately futile.

Appeal grounds 1 to 3

15. The proceeding concerns the question whether various contractual fees, being fees that were payable during the term of the contract and not upon termination, are capable of being penalties at law. In respect of that question, the learned trial judge concluded correctly that the law of penalties is confined to payments for breach of contract.[24] In determining whether a contractual payment is a penalty, the court looks to the substance, not the form, of the provisions subject to challenge.[25] As observed by her Honour, "*...the exercise involves an inquiry into the substance and the reality of the thing and the real nature of the transaction to determine the object of the obligee in stipulating for the sum*".[26] ANZ relies on the reasons given by the learned trial judge for that conclusion.

History, authority and principle

16. The learned trial judge's conclusion with respect to the scope of the law of penalties is historically accurate and consistent with authority and principle.[27]

17. An examination of the authorities over the centuries reveals that the underpinning principle upon which the law (both equity and later common law) has granted relief against penalties has not altered, although the precise formulation of the principle has been refined over time. The original principle, reflected in the early cases, is that the law relieved a person from an obligation to make a payment in circumstances where the payment obligation arose as a consequence of that person's failure to perform another obligation (whether to pay money or to do or refrain from doing an act) and the payment was excessive in comparison to the damage caused by that failure. As observed by the trial judge, a condition of the grant of relief was that the person

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[23] Fast Track Response at paragraph 55(a)(ii). That admission is not precisely the same as the trial judge's comment that ANZ has admitted that "*the exception fees did not constitute a genuine pre-estimate of damage ANZ might suffer as a consequence of overdrawing an account*" (Trial Judgment at [3] and [243]) upon which the applicants place reliance (Applicants' submissions at [10(c)])

[24] Trial Judgment at [78]

[25] Trial Judgment at [190]

[26] Trial Judgment at [44]

[27] Contrary to the applicants' submissions at [15]

obliged to make the payment would pay due compensation for the failure to perform the primary obligation (whether that be payment of a debt owing plus interest and costs or payment of damages).[28]

18. Although the early cases in the 17th and 18th centuries concerned the then widely used conditional bonds, the jurisdiction was exercised in circumstances that are equivalent to the present day jurisdiction involving contracts: the relief was granted in respect of a payment that was due by reason of the failure to perform a collateral obligation, which was regarded as the obligation secured by the payment, and where the payment exceeded the quantum of damage suffered or likely to be suffered as a consequence of the failure to perform the obligation secured.[29] Equity would not grant relief unless the non-performance of the obligation secured by the bond gave an entitlement to damages. *Fry v Porter*[30] concerned a legacy given to the plaintiff on condition she did not marry without the consent of certain persons. The condition was breached by the plaintiff and a bill was presented for relief on the condition and the breach. Chief Baron Hale reasoned:

> *"[A]nd this being a good Condition, it cannot in Law be defeated; and there being a full breach of the Condition, as ~~the~~ Law will not, Equity cannot help. And as to the objection, If there may <u>not</u> be Relief against Breach of Conditions in Equity, there will be a great Shatter in Decrees already made: This Case is not like the Case of a Mortgage, where the Condition is for ~~the~~ Payment of Money, because there if the Money be not paid at the Day, there may be a Compensation made by Payment at another Day with Damages."*[31]

19. As observed by the learned trial judge,[32] a significant change to the common law jurisdiction at the end of the 17th century and the beginning of the 18th century was the enactment of the two penalty statutes: the Statute of William III[33] and the Statute of Anne.[34] The equitable jurisdiction to grant relief against a penalty in a bond was to a great extent superseded by those statutes because commensurate relief was available at law pursuant to the statutes.[35] The language of the statutes reflected the equitable jurisdiction to relieve against penalties that existed at the time of their enactment: the jurisdiction was exercised in respect of bonds to secure the performance of a covenant

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[28] Trial Judgment at [12] and [13]
[29] See Trial Judgment at [12], [15], [16], [29], [32] and [33] and *Tall v Ryland* (1670) 22 ER 753, *Sloman v Walter* (1783) 1 Bro. C. C 419; 28 ER 1213 and *Hardy v Martin* (1783) 1 Cox 26
[30] (1670) 1 Mod 300
[31] <u>The cited passage is from *Cases argued and decreed in the High Court of chancery* (1697) at p.142. Compare the passage in (1670) 1 Mod 300 at 308 and 309</u>. See also the opinion of Lord Somers in *Bertie and Falkland* (1670) 3 Chan Cases 129, cited by counsel in argument in *Marks v Marks* (1718) Prec. Ch 486 at 488
[32] Trial Judgment at [18]
[33] (1696) 8 & 9 Will 3 c 11
[34] (1705) 4 & 5 Anne c 16
[35] Trial Judgment at [18]

or agreement or an obligation to pay a specified sum on a specified day.[36] The equitable jurisdiction applied to sums payable upon breach of the collateral obligation.

20. The 18th and 19th century cases confirm that the equitable jurisdiction to relieve against a penalty was directed to amounts payable in consequence of a breach of a primary obligation that was compensable in damages.[37] In *Kemble v Farren*, Tindal CJ stated:

> "*But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement*" (emphasis added).[38]

21. Since the early 19th century, the law of penalties has primarily been applied in the context of contractual obligations, reflecting the rise of contract as the primary instrument by which private parties express and enforce obligations mutually agreed between them. The principle that underlies the law of penalties today remains consistent with its equitable origins, but has been refined to reflect competing policy considerations.[39] The law will not enforce an obligation that (i) arises upon the breach of a contractual obligation and (ii) is punitive, rather than compensatory, in nature. The test for what is punitive is tempered by competing policy considerations: to allow parties the freedom to determine the terms of their private agreements and to promote contractual certainty.[40]

22. As Lord Roskill stated in *Export Credits Guarantee Department v Universal Oil Products Co*:

> "*...one purpose, perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a*

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[36] The text of the statutes is reproduced in the annexure to the Applicants' submissions

[37] With respect to the 18th century, see Trial Judgment at [29]ff and *Peachy v The Duke of Somerset* (1720) 1 Strange 447, *Collins v Collins* (1759) 2 Burr 820, *Sloman v Walter* (1783) 1 Bro CC 418 and *Hardy v Martin* (1783) 1 Cox 26. With respect to the 19th century, see Trial Judgment at [36] and *Kemble v Farren* (1829) 6 Bing 141, *Reynolds v Bridge* (1856) 6 EL & BL 528; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592 and *Wallis v Smith* (1882) 21 Ch D 243

[38] (1829) 6 Bing 141 at 148, [1824-34] All ER Rep 641 at 642

[39] As Rossiter states in *Penalties and Forfeiture at p33: "[t]he Dunlop rule is a product of centuries of equity jurisprudence. No new rules or principles were promulgated in that decision."*

[40] Many Australian authorities have acknowledged freedom of contract as a desirable objective that is relevant to the formulation of legal principle in diverse areas including the law of penalties, restraint of trade and restitution: *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at 669; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 351 per Kirby J; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 205 per Kirby J and at 215 per Callinan J; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 374; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190 per Mason and Wilson JJ; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 323 per Stephen J (see also Gibbs J at 316-7); *Queensland Co-Operative Milling Association Ltd v Pamag Pty Ltd* (1973) 133 CLR 260 at 276 per Stephen J

breach of contract which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."[41]

23. As the learned trial judge observed,[42] the primary remedy for a breach of contract is an award of damages by the court.[43] The object of an award of damages is to compensate for the loss and damage occasioned by the breach;[44] it is not to punish the party in breach.[45] Consistent with those principles, parties to a contract are entitled to agree, in the contract, an amount that will be payable by one to the other in the event of breach.[46] Such "agreed damages" clauses[47] are generally enforceable and obviate the need to prove in court the amount of loss and damage suffered as a result of the breach. The courts have recognised that agreed damages clauses are mutually beneficial to the parties, providing certainty with regard to their rights and liabilities in the event of breach and avoiding (or minimising) costly litigation.[48]

24. The law of penalties, as applied to contractual obligations, requires the court to determine whether the payment for non-observance of the contract is payable *in terrorem* - that is, as a punishment to deter breach of the contractual obligation.[49] As stated by Mason and Deane JJ in *Legione v Hateley*:

> *"A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation..."* (emphasis added).[50]

25. The High Court described the law of penalties in similar terms in *Ringrow Pty Ltd v BP Australia*:

> *"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*

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[41] [1983] 2 All ER 205 at 224 (Lords Diplock, Elwyn-Jones, Keith of Kinkel and Brightman agreeing)
[42] Trial Judgment at [47]ff
[43] *News Limited v ARL* (1996) 64 FCR 410 at 517
[44] *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 98 per Brennan J and 116 per Deane J
[45] *Ruxley Electronics Ltd v Forsyth* [1996] AC 344 at 353 per Lord Bridge and at 365 per Lord Lloyd (with whom Lords Keith and Mustill agreed); *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 77 FCR 456 at 471
[46] *Dunlop Pneumatic Tyre Company Limited v New Garage and Motors Company Limited* [1915] AC 79 at 97 per Lord Parker and at 100-102 per Lord Parmoor
[47] Adopting the nomenclature used by Professor Carter in his work Carter on Contract (at [43–070])
[48] *AMEV-UDC Finance Limited v Austin* (1986) 162 CLR 170 at 193 per Mason and Wilson JJ; *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1447 per Diplock LJ
[49] See *Clydebank Engineering and Ship Building Company v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 9 and 10 per Earl of Halsbury LC; *Dunlop Pneumatic Tyre Company Limited v New Garage and Motors Company Limited* [1915] AC 79 at 86 per Lord Dunedin
[50] (1983) 152 CLR 406 at 445

exceeds what can be regarded as a genuine pre-estimate of the damage likely to be caused by the breach" (emphasis added).[51]

26. As observed by the learned trial judge,[52] the context of judicial statements that breach of an obligation is not an essential element of the law of penalties has been confined to provisions of lease and hire purchase agreements governing the consequences of termination of the agreements.[53] One question raised in those cases is whether the law of penalties has any application to contractual provisions that operate upon termination of the agreement, where the right to terminate the agreement is exercisable on the occurrence of a number of events, some of which constitute breaches of contract and some of which do not. While the cases that have considered this question help define the boundaries of the law of penalties and its intersection with the law of forfeiture, they have no direct application to the separate questions in this proceeding. It is not alleged by the applicants, and it is not the fact, that any of the exception fees were payable upon termination of the relevant customer contracts.

27. The tension between contractual freedom and contractual certainty on the one hand, and the law's antipathy towards a payment upon breach that is punitive on the other hand, is reconciled by conferring on contracting parties considerable latitude in the determination of an agreed damages clause. As Mason and Wilson JJ observed in *AMEV-UDC Finance Ltd v Austin*:

> "[T]*here is much to be said for the view that the courts should return to the Clydebank and Dunlop concept, thereby 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* [citations omitted]."[54]

28. The importance of freedom of contract was emphasised by the High Court in *Ringrow Pty Ltd v BP Australia* where the Court said:

> *"The law of contract normally upholds the freedom of parties, with no relevant disability, to agree upon the terms of their future relationships ...*
>
> *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*

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[51] (2005) 224 CLR 656 at 662
[52] Trial Judgment [62]
[53] The primary cases in this context are: *Associated Distributors v Hall* [1938] 2 KB 83; *Cooden Engineering v Stanford* [1953] 1 QB 86; *Campbell Discount Co Ltd v Bridge* [1962] AC 600; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54; *IAC (Leasing) Limited v Humphrey* (1972) 126 CLR 131; *O'Dea v All States Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; *AMEV-UDC Finance Limited v Austin* (1986) 162 CLR 170; *Esanda Finance Corporation v Plessnig* (1989) 166 CLR 131; and *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292
[54] (1986) 162 CLR 170 at 190

language. It explains why the propounded penalty must be judged 'extravagant and unconscionable in amount'. It is not enough that it be lacking proportion. It must be 'out of all proportion'."[55]

29. In addition to England, the law of penalties as stated in *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd*[56] represents the law in at least the following jurisdictions: Scotland,[57] British Columbia;[58] New Zealand;[59] and Hong Kong.[60]

30. Since at least 1822, the United States Supreme Court has also adopted the criterion of breach in defining the ambit of the Court's power to relieve against contractual penalties.[61] In *Tayloe v Sandford* 20 U.S. 13, Chief Justice Marshall stated:

10 *"In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered a penalty, the legal operation of which is, to cover the damages which the party, in whose favour the stipulation is made, may have sustained from the breach of contract by the opposite party."*

31. The Applicants have placed some reliance on the subsequent decision in *Priebe & Sons v United States* 332 U.S. 407 (1947).[62] That decision affords no support to the Applicants' contentions. It was an orthodox application of the law of penalties in circumstances where the *breach* was held to have been incapable of occasioning loss and damage.[63]

The applicants' formulation of the equitable jurisdiction

20 32. The applicants contend that the equitable "*jurisdiction is capable of application in any transaction where, viewed as a matter of substance, an obligation is imposed on one party to pay a sum of money or transfer property to the other in order to secure the performance or enjoyment of the principal object of the transaction, such principal*

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[55] 224 CLR 656 at [31] and [31]
[56] [1915] AC 79
[57] *EFT Commercial Ltd v Security Change Ltd* (1992) SC 414 at 429-430
[58] *Gunning-v-Thorne Riddell* [1990] B.C.J No.36 (B.C.C.A) *and Doman Forest Products Ltd v GMAC Commercial Credit Corp* [2007] 29 BLR (4th) 1.CA at [122]. See also, in Ontario (*Macleod v Viacom Entertainment Canada Inc & Ors* 2003 CanLII 47211 (ON SC) at [11] and [13]) and Nova Scotia (*Lappin v Homburg L.P. Management Incorporated* 2009 NSSC 346 at [13] and [15])
[59] *Camatos Holdings Ltd v Neil Civil Engineering (1992) Ltd* [1998] 3 NZLR 596 at 607 and *Amaltal Corporation Limited –v-Maruha (NZ) Corporation Ltd* [2004] NZCA 17 at [58]. See also, the application of *Export Credits* in *Marac Financial Services Ltd v Stewart* [1993] 1 NZLR 86 at 94-96
[60] *Phillips Hong Kong Limited v the Attorney General of Hong Kong* [1993] 1 HKLR 269 at 279; *Re Mandarin Container & Ors* [2004] 3 HKLRD 554 at 558. See also, the application of *Export Credits* in *Liem Tjong Sium & Ors v Law Chi Hung & Anor* [1996] HKCFI 382
[61] *Tayloe v Sandford* 20. U.S. 13 (1822). See subsequently: *Sun Printing & Publishing Association v Moore* 22 S.Ct.240 at 248, 252 and 258 (1901); *Kirby v United States, for and on behalf of the Crow Tribe of Indians* 260 U.S. 423 at 427 (1922); *Priebe & Sons v United States* 332 U.S. 407 (1947) at 411 and 413 (per Douglas J, delivering the opinion of the Court) and 417 (per Frankfurter J, with whom Vinson CJ agreed, dissenting). See also, Pomeroy, *A Treatise on Equity Jurisprudence Volume II* (1941) at p206, p207, p231 and p. 264
[62] Oral submission of the Applicants at the application for removal (T13:516) and Applicants' submissions at footnote 58
[63] *Priebe & Sons v United States* 332 U.S. 407 (1947) at 411 and 413 (per Douglas J, delivering the opinion of the Court) and 417 (per Frankfurter J, with whom Vinson CJ agreed, dissenting)

object usually being framed as an express condition of the transaction, giving particular weight to the statements of principle by Story, and Deane J in AMEV-UDC".[64]

33. There are numerous problems with the applicants' contention.

34. First, in so far as the formulation is based on statements of Deane J in *AMEV-UDC*, the statements were made in a dissenting judgment with regard to a factual context that is entirely different from the present case, being payments due under a hiring agreement by reason of the termination of the agreement. As noted earlier, payments upon termination of a contract give rise to special considerations arising from the application of the law of damages in the circumstances of contract termination. Further, his Honour observed that "*...it is plain that the equitable and common law rules relating to penalties do not apply to every obligation to make a payment of money on the occurrence, or default of occurrence, of a specified event*".[65] His Honour's formulation of the equitable jurisdiction also emphasised the necessity for the penal obligation to arise upon non-performance of a primary obligation (*to pay or forfeit an amount or amounts either on or in default of the occurrence of an event which can be seen, as a matter of substance, to have been treated by the parties as lying within the area of obligation of the party liable to make the payment in the sense that it is his or her responsibility to ensure that the specified event does or does not occur*) and for damage to be sustained as a consequence of the default (*where the stipulated payment contains an element of compensation for the economic loss or damage which might be sustained by the other party by reason of the particular occurrence or default*).[66]

35. Secondly, in so far as the applicants' formulation is based on the statements in Story's *Commentaries on Equity Jurisprudence as Administered in England and America* (13th ed., Little, Brain & Company, 1886), those statements do not support the breadth of the jurisdiction for which the applicants contend. As the passage cited by the learned trial judge shows, Story considered that the jurisdiction was applicable to a payment that secured the payment of another sum or the performance of a collateral undertaking which, if breached, gave rise to an entitlement to damages.[67]

36. Thirdly, the applicants fail to explain, in respect of obligations between parties that are governed (as in this case) by contract and which do not arise upon termination of the contract, what the practical difference is (if any) between a payment due upon breach of a contractual obligation (the standard formulation of the law in a contractual context) and a payment due "*on or in default of the occurrence of an event which can be seen, as a matter of substance, to have been treated by the parties as lying within the area of obligation of the party liable to make the payment in the sense that it is his*

[64] Applicants' submissions at [35(c)]
[65] 162 CLR 170 at [199]
[66] 162 CLR 170 at [199]-[200]
[67] Trial Judgment at [35]

or her responsibility to ensure that the specified event does or does not occur" (to adopt the language of Deane J). As observed earlier, the law of penalties looks to the substance, not the form, of the provisions subject to challenge. If the court concludes that the event which triggers the putative penal payment is in substance the breach of a contractual promise or obligation, the law of penalties will apply. Conversely, at no time has the law (whether in equity or at common law) considered a payment to be a penalty if it is due upon the occurrence of an event that does not constitute a breach or failure to perform a primary obligation of the person liable to make the payment (save for canvassing of such a concept in the context of payments upon termination of hire and lease agreements, as discussed above). In the present case, the learned trial judge found that the circumstances that gave rise to the imposition of the exception fees did not involve a breach of contract or obligation by the customer. The exception fees were part of the range of fees charged by ANZ to its customers in respect of the servicing of their bank accounts.

37. Fourthly, the applicants' formulation requires contracting parties to comprehend what might "be in substance" within their "area of obligation". The law, if so expanded, would undermine contractual certainty.

The applicants' 8 reasons in support of their formulation of the law

38. The 8 reasons given by the applicants in support of their formulation of the equitable jurisdiction involve generalities and fail to recognise the true principle upon which the jurisdiction was exercised. The premise upon which many of the applicants' arguments are based is that the equitable jurisdiction to relieve against penalties was historically broader than the common law jurisdiction. For the reasons explained above, that premise is historically wrong. Nor do the applicants' arguments provide any basis for a conclusion that an equitable jurisdiction to relieve against penalties would afford a remedy to the applicants in respect of the exception fees the subject of this application.

39. With regard to the first reason (the continuing need for equity),[68] the common law doctrine of penalties does not lend itself to avoidance through clever drafting.[69] As stated and applied by the learned trial judge, the law looks to the substance, not the form, of the provisions subject to challenge.

40. With regard to the second reason (equity not obsolete),[70] it may be accepted that there is no doctrine of obsolescence in equity; the trial judge did not conclude to the contrary.

41. With regard to the third reason (withered on the vine),[71] the applicants have not identified any error in the historical analysis undertaken by Mason and Wilson JJ in *AMEV-UDC* which led their Honours to conclude that *"the equitable jurisdiction to*

[68] Applicants' submissions at [16]ff
[69] Cf Applicants' submissions at [16]
[70] Applicants' submissions at [17]ff
[71] Applicants' submissions at [20]ff

relieve against penalties withered on the vine for the simple reason that, except perhaps in very unusual circumstances, it offered no prospect of relief which was not ordinarily available in proceedings to recover a stipulated sum or, alternatively, damages."[72] The applicants refer only to *The Protector Endowment Loan and Annuity Company v Grice*[73] as an invocation of the equitable jurisdiction to relieve against penalties in England after the *Judicature Act* 1873. The statements of principle in that case are wholly within the confines of and consistent with the common law jurisdiction. It has been observed that at the heart of that case "was the notion that for it to be a penalty a sum must be exigible in consequence of breach and to be payable in performance of a contractual obligation pre-dating breach."[74] This exemplifies the circumstance that in its application to contractual penalties equity fastened on breach as the discrimen of its grant of relief, identically with the common law criterion.

42. With regard to the fourth reason (freedom of contract),[75] the learned trial judge's references to the competing policy consideration of freedom of contract are consistent with this Court's views as stated in *Ringrow*, set out above. Her Honour did not suggest that the law of penalties is confined to payments upon breach of contract in order to protect freedom of contract. The careful historical analysis of the law undertaken by the trial judge demonstrated that the circumstances in which equity originally granted relief against penalties, breach or non-performance of a collateral obligation, has not altered and has been adopted by the common law. As discussed earlier, recognition by the courts of the desirable objective of freedom of contract has had a constraining influence on the circumstances in which a payment will be regarded as penal (it must be extravagant or unconscionable in amount in comparison to the maximum loss that may be suffered by breach). The applicants' observation that their contracts with ANZ were in standard form[76] has no bearing on the question raised by the separate questions and this appeal: whether the fees were capable of being characterised as penalties.[77] The applicants' additional contention that the contracts between ANZ and the applicants are "*really an accounting relationship with conditions attached to the creation of mutual debts overlaid by certain statutory requirements*"[78] is irrelevant, not open to the applicants to put and wrong in law. The contention is contrary to the allegations made by the applicants in their Amended Fast Track Statement.[79] The

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[72] 162 CLR 170 at 191
[73] (1880) 5 QBD 592
[74] Meagher, Gummow & Lehane, Equity Doctrines & Remedies 4th ed. [18-085]
[75] Applicants' submissions at [21]ff
[76] Applicants' submissions at [22(b)]
[77] Furthermore, the fact that a contract is in standard form, or that one of the contracting parties had greater negotiating power when the contract was made, has no logical bearing on the question whether a sum payable upon breach is extravagant or unconscionable in amount in comparison to the maximum damage that may be suffered as a consequence of the breach: *Esanda Finance Corporation v Plessnig* (1989) 166 CLR 131 at 141-2
[78] Applicants' submissions at [22(b)]
[79] AFTS at [14], [21], [28] and [35]

applicants gain no support for the contention from *Foley v Hill*[80] in which the House of Lords characterised the relationship between banker and customer as based in contract.

43. With regard to the fifth reason (equity's jurisdiction is not confined to breach of contract),[81] whether the equitable jurisdiction is or is not confined to breach of contract, and may be applied, if the circumstance ever arose in the future, to penal bonds or analogous instruments, does not need to be determined in this proceeding which concerns contractual obligations. In such instances, the availability of equitable relief depends upon the existence of a breach of the relevant contract as exemplified in the discussion in paragraph 41 above. The applicants criticise the observation of Mason and Wilson JJ in *AMEV-UDC*[82] and of the learned trial judge[83] that, in the early cases involving penal bonds, the equitable jurisdiction was premised on the failure to perform an obligation which, while not express, was readily able to be implied. For the reasons explained above, the criticism is unjustified.

44. With respect to the sixth reason (history of the common law),[84] the applicants seek to present the statement of the law of penalties by all leading authorities during the 19th and 20th centuries as merely a sub-set of the jurisdiction. There is no support in those authorities for that contention. Aside from the judgments of Lord Denning in *Campbell Discount v Bridge*[85] and Deane J in *AMEV-UDC*, both of which concerned payments upon termination of lease or hire purchase agreements, there has been no support in the authorities for the applicants' formulation of the law of penalties.[86]

45. With respect to the seventh reason (*Export Credits* should not be followed),[87] *Export Credits* did not bring about a "*very large change in the law*".[88] It confirmed the law as stated and applied for several centuries, including through important cases such as *Wallis v Smith*,[89] *Clydebank Engineering and Ship Building Co. v Don Jose Ramos Yzquierdo y Castaneda*[90] and *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd.*[91]

46. With respect to the eighth reason (the claim of extensive and longstanding authority),[92] the learned trial judge was correct to state that there is extensive and long-standing authority in Australia and the United Kingdom that the law of penalties has no

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[80] (1848) 2 HL Cas 28 (9 ER 1002)
[81] Applicants' submissions at [23]ff
[82] 162 CLR 170 at [190]
[83] Trial Judgment at [28], [36] and [55]
[84] Applicants' submissions at [25]ff
[85] [1962] AC 600 at 629-631
[86] Deane J's formulation of the law was subsequently adopted by Brereton J at first instance in *Integral Home Loans Pty Ltd v Interstar Wholesale Finance* [2007] NSWSC 406
[87] Applicants' submissions at [30]ff
[88] Cf Applicants' submissions at [30]
[89] (1882) 21 Ch D 243
[90] [1905] AC 6
[91] [1915] AC 79
[92] Applicants' submissions at [31]ff

application to a contractual provision requiring a payment on the happening of an event that does not constitute a breach of contract.[93]

Appeal ground 4

47. By appeal ground 4, the applicants contend that the learned trial judge ought to have found that each of the exception fees was capable of being characterised as a penalty because the obligation to pay the fee was imposed to secure the performance or enjoyment of a principal object of the transaction, namely that the customer ought at all times ensure that the account was operated in such a manner that it remained either in credit or within any pre-arranged overdraft or credit limit.

10 48. The applicants have not addressed appeal ground 4 in their written submissions. The learned trial judge's rejection of the applicants' arguments at the hearing was plainly correct.

49. First, there was no evidence adduced by the applicants to support a finding that a principal object of the contractual relationship between ANZ and the applicants was that the applicants ought at all times ensure that their accounts were operated in such a manner that they remained either in credit or within any pre-arranged overdraft or credit limit.

50. Further, any such finding would have been directly inconsistent with the relevant provisions of the contracts with the applicants. By way of illustration, clause 2.12 of
20 the ANZ Saving & Transaction Products - Product Disclosure Statement dated March 2005 that formed part of the contract with Mr Saliba governing his Access Advantage Account (a retail deposit account) as at February 2006 stated, under the heading "Provision of Credit", that: "*If you request a withdrawal or payment from your account which would overdraw your account, ANZ may, in its discretion, allow the withdrawal or payment to be made on the following terms...*".[94] The findings of the learned trial judge to the effect that there was no "obligation" (of the kind described by Brereton J in *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd*[95]) upon the customer not to overdraw the account or attempt to overdraw the account are plainly correct.

30 51. Secondly, there was no evidence adduced by the applicants to support a finding that the fees were imposed to "secure the performance" of the obligation alleged by the applicants. As found by the trial judge, ANZ had the discretion and power to allow the transaction that would overdraw the account to proceed or to disallow the transaction from proceeding. If ANZ wished to secure the outcome that the account was not overdrawn, it had the discretion and power to do so. There was no need for ANZ to charge a fee to secure such a result.

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[93] Trial Judgment at [59]

[94] Trial Judgment at [153]. Similar illustrations in respect of the bank accounts held by the applicants are at Trial Judgment [161], [228], [287], [299], [320] and [344]

[95] [2007] NSWSC 406 at [78]

52. Further, any such finding would have been directly inconsistent with the relevant provisions of the contracts with the applicants. Thus, as found by the trial judge, the fees were charged in respect of ANZ's decision concerning the request for additional borrowing.[96] By way of illustration, the ANZ Personal Banking Account Fees and Charges booklet dated January 2006 that formed part of the contract with Mr Saliba governing his Access Advantage Account (a retail deposit account) as at February 2006 stated that an honour fee was charged "*on each occasion that ANZ honours a drawing where sufficient cleared funds are not available in the account or when the credit limit on your account is exceeded*" (emphasis added) and that the dishonour fee was charged "*when any payment on your account (cheque or direct debit) is dishonoured due to lack of cleared funds in your account*" (emphasis added).[97] Further, as found by the trial judge, the overlimit fee on consumer credit card accounts was not charged in respect of each transaction that caused the account credit limit to be exceeded; the overlimit fee was charged once per month, at the end of a statement period, if the balance of the account exceeded the credit limit during the statement period.[98] The ANZ Personal Banking Account Fees and Charges booklet dated August 2006 that formed part of the contract with Mr Andrews governing his First Low Interest Visa Account (a consumer credit card account) as at November 2006 stated that the overlimit fee was "*Charged at the end of the 'Statement Period' shown on the statement of account if the balance of the account exceeds the 'Credit Limit' during that statement period... .*"[99]

53. For those reasons, this Court should dismiss appeal ground 4. As noted earlier, the appeal in respect of grounds 1 to 3 has no utility unless the applicants succeed on appeal ground 4. Accordingly, the dismissal of appeal ground 4 will dispose of the appeal in full.

Should leave to appeal be granted?

54. Applying the principles in *Décor Corporation v Dart Industries,*[100] and having regard to the foregoing submissions, it is open to the Court to refuse leave to appeal on the basis that the decision at first instance is not attended by sufficient doubt to warrant it being reconsidered. However, as the application for leave to appeal has been removed to this Court, ANZ does not oppose the grant of leave in respect of grounds 1 to 4 of the draft notice of appeal to enable those grounds of appeal to be determined.

Orders

55. ANZ does not oppose orders 1 and 2 sought by the applicants in respect of the grant of leave to appeal.

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[96] Trial Judgment at [182], [183], [187], [279], [280], [291], [306], [307] and [328]
[97] Trial Judgment at [166]
[98] Trial Judgment at [277]
[99] Trial Judgment at [265]. Similar illustrations in respect of the bank accounts held by the applicants are at Trial Judgment [288], [304], [306], [307], [322] and [346]
[100] (1991) 33 FCR 397

56. ANZ opposes the remaining orders sought by the applicants and seeks an order that the appeal in respect of grounds 1 to 4 be dismissed with costs.

57. If leave to appeal is granted and the Court determines that the learned trial judge erred in any respect, it will be necessary to consider whether it is appropriate to remit the matter to the learned trial judge for further hearing and determination pursuant to s28(1)(c) of the Federal Court Act.[101]

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[101] On remitter, a question may arise as to whether the evidence ruled inadmissible by the learned trial judge (see Trial Judgment at [142]) may be relevant to the remitted issues