IN THE HIGH COURT OF AUSTRALIA

MELBOURNE OFFICE OF THE REGISTRY

No M48 of 2012

BETWEEN

JOHN ANDREWS
First Applicant

ANGELO JULIAN SALIBA
Second Applicant

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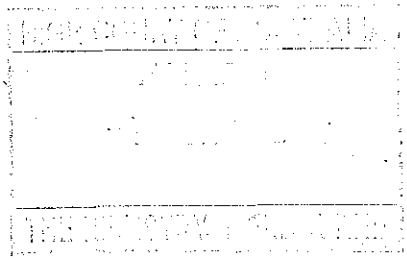
GEOFFREY ALLAN FIELD
Third Applicant

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

APPLICANTS' SUBMISSIONS



6 June 2012
Filed on behalf of the applicants

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Part I – Certification

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

Part II – Issues

2. Whether the law in Australia governing relief against penalties is as stated in *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399; [1983] 2 All ER 205 at 223*f*, namely, that a clause in a contract providing for payment can never be a penalty if "it provide[s] for payment of money on the happening of a specified event other than a breach of a contractual duty owed by the contemplated payer to the contemplated payee."

10 3. Whether there remains a separate jurisdiction in equity for relief in respect of penalties, or whether the equitable doctrine 'withered on the vine', is 'fused' with law, or is otherwise 'confined to' a common law doctrine as expressed in *Export Credits*.

4. Depending on the answer to the previous two questions, whether the Exception Fees the subject of the proceedings (being fees deducted by the respondent bank (**ANZ**) from the customers' accounts in the case of either honouring an instruction that would overdraw an account, or for dishonouring the same instruction) are capable of being relieved against as penalties.

Part III – Notice of a Constitutional Matter

5. The applicants have considered whether any notice should be given pursuant to s 78B of
20 the *Judiciary Act* 1903 (Cth). A notice is not necessary.

Part IV – Reasons for Judgment Below

6. The reasons for judgment of the primary judge Justice Gordon on the separate questions[1] have been published as *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 86 ACSR 292; the neutral citation is [2011] FCA 1376 (5 December 2011) ("**J**"). There is no intermediate judgment. Pursuant to s 24(1A) of the *Federal Court of Australia Act* 1976 (Cth) the applicants applied in the Federal Court for leave to appeal against the interlocutory orders made by her Honour. By orders of this Court of 11 May 2012 and pursuant to s 40(2) of the *Judiciary Act* 1903 (Cth) part of that cause, namely, so much of the cause as concerns the question of the scope of the equitable jurisdiction
30 to relieve against penalties and the question of whether a person can only be relieved against a penalty if it becomes payable for a breach of contract, has been removed into this Court (being grounds 1-4 of the proposed Federal Court appeal) (CRB___).[2]

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[1] Orders were made on 5 May 2011 following reasons in *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113; [2011] FCA 388 (19 April 2011) for a separate determination of questions pursuant to each or any of s 33Z(1), s 33ZF(1) and s 37P(2) of the *Federal Court of Australia Act* 1976 (Cth), and O 29 r 2 of the then *Federal Court Rules* (CRB___).

[2] The remaining grounds concern the proper construction of the relevant documents, in particular in terms of breach. That part of the cause therefore remains, subject to the outcome of the proceedings in this Court, at the

Part V – Facts

7. The material facts are not in dispute. The applicants were customers of ANZ. ANZ charged its customers a variety of fees for overdrawn and over-limit facilities and accounts, dishonouring instructions, and late payments on credit card accounts, called 'Exception Fees': J [1], [5] (CRB___). A representative proceeding was commenced on 22 September 2010 pursuant to Part IVA of the *Federal Court of Australia Act* 1976 (Cth). There are approximately 38,000 group members who were in these 'contracts' with ANZ.[3]

8. Before the trial judge there were seventeen identified Exception Fees in issue: J p123, Sch B (CRB___).[4] Although the Exception Fees were divided into more categories at trial, there are relevantly two classes of fees, arising on receipt by ANZ of an instruction that would cause an account to be overdrawn or exceed its limits, being: (*a*) *Honour Fees*, charged by ANZ for choosing to honour the instruction (which, for the purposes of this argument, includes over-limit fees on credit card accounts); and (*b*) *Dishonour Fees*, charged by ANZ in the same circumstances, but for declining to allow the account to be overdrawn.[5]

9. The primary judge noted that the "banker-customer relationships or contracts" were subject to a complex regulatory framework: J [87]-[140] (CRB___). Within the regulatory regime (and at various times) ANZ produced a variety of 'terms and conditions', variously described, as well as 'fees and charges' notices. For the Retail Deposit Account, the fees set out at J [166] (CRB___) were:

Account	Event (Term or Condition)	Amount
Saving (see Exception Fee 3)	Dishonour Fee charged to the account when any payment is dishonoured due to lack of cleared funds	$45.00
	Honour Fee payable on each occasion ANZ honours a drawing where sufficient cleared funds are not available	$29.50
	Non payment fee for periodical instruction	$45.00

10. ANZ has admitted in the proceedings that:

    (a) in the usual case ANZ and the persons who entered into a Saving Contract with ANZ did not negotiate the terms and conditions contained in the PDS or Fees Document: Fast Track Response, [22(a)] (CRB___);

Full Federal Court stage.

[3] There are also six other cases in the Federal Court raising the same or similar issues in respect of penalties against other banks (Commonwealth Bank of Australia, National Australia Bank, Citibank, Westpac Banking Corporation, St George Bank and its division BankSA, and Bankwest): Affidavit of Mr Steven Mark Foale, 4 May 2012, para [3] (CRB___).

[4] The fees concerning late payment fees on credit cards (Fees Nos 7, 8, 9 & 11) are not part of the cause removed.

[5] The Exception Fees are set out in Schedule B to the Judgment: J p123 (CRB___). A summary of the Exception Fees in issue is included as Schedule C to the Judgment: J p125 (CRB___).

(b) it, ANZ, had a contractual right to vary unilaterally the terms and conditions of a Saving Contract: Fast Track Response, [22(b)] (CRB___);

(c) the Exception Fees did not constitute a genuine pre-estimate of damage ANZ might suffer as a consequence of overdrawing an account: J [3] (CRB___),

and foreshadowed a case that the fees instead constituted a fee for service.[6]

11. Questions for separate determination were ordered by the trial judge, which questions asked in effect whether the Exception Fees were capable in law or equity of amounting to a penalty: J p121, Sch A (CRB___). Consideration of whether the Exception Fees were out of all proportion to the likely damage suffered by ANZ has been deferred to a later hearing: J [3] (CRB___).

12. The trial judge conducted the most detailed analysis by reference to a Retail Deposit Account (Saving Account, Honour Fee) (Exception Fee No 3): J [144]-[193] (CRB___). In particular, clause 2.12 of the PDS of March 2005 stated:

> "*ANZ does not agree to provide any credit in respect of your account without prior written agreement*, which (depending on your account type) can be through an ANZ Equity Manager Facility, an Overdraft Facility or an ANZ Assured Facility. *It is a condition of all ANZ accounts that you must not overdraw your account without prior arrangements being made and agreed with ANZ.*
>
> 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:
>
> - interest will be charged on the overdrawn amount at the ANZ Retail Index Rate plus a margin (refer to 'ANZ Personal Banking Account Fees and Charges' booklet for details);
> - an Honour Fee may be charged for ANZ agreeing to honour the transaction which resulted in the overdrawn amount (refer to 'ANZ Personal Banking Account Fees and Charges' booklet for details);
> - the overdrawn amount, any interest on that amount and the Honour Fee will be debited to your account; and
> - you must repay the overdrawn amount and pay any accrued interest on that amount and the Honour Fee within seven days of the overdrawn amount being debited to your account.": J [153] (CRB___) (emph added)

13. The trial judge identified the other material provisions of the contract for Exception Fee 3 at J [172]-[174] (CRB___), including an ability to cancel any card or electronic access to accounts without notice: J [157], [174] (CRB___, ___). Her Honour concluded that the overdrawing of an account did not constitute a breach of contract, and therefore the fees were incapable of constituting a penalty: J [59], [78], [140], [193] (CRB___). Her Honour rejected any broader jurisdiction to relieve against penalties: J [36], [45]-[80]

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[6] See Fast Track Response, [55(c)(i)] (CRB___).

(CRB___).[7] Her Honour reached the same conclusion in respect of the other terms and conditions imposing Honour and Dishonour Fees in issue here.

Part VI – Argument

14. In 1983, in *Export Credits*, the House of Lords imposed an apparently general restriction on the availability of relief against penalties, namely, that a clause in a contract providing for payment is not a penalty if "it provide[s] for payment of money on the happening of a specified event other than a breach of a contractual duty owed by the contemplated payer to the contemplated payee": at 223*f*. The speech in *Export Credits* is unsatisfactory. The proposition was stated without any analysis of the history of the law of penalties, without reason to disregard the authorities inconsistent with that formulation, without explanation of why the doctrine should be confined (as it has been taken to mean) to the cause of action of "breach of contract", and without any regard to the position in equity. In 2008, in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292; [2008] NSWCA 310, Allsop P concluded that *Export Credits* stated the law for Australia: at [134], and that "The modern rule against penalties is a rule of law, not equity": at [99]. In these proceedings, her Honour by a different route reached the same result: "[e]quity... continues to play a role in the law of penalties, a law which is confined to payments for breach of contract": J [4] (CRB___).

15. The applicants contend that the conclusion that the fees extracted by ANZ were incapable of constituting a penalty is, at least in equity, a-historical, contrary to the manifold authorities in which the penalty jurisdiction has been exercised, and in principle wrong. The applicants contend that the limitation that there must be a "breach of contract" has introduced new and substantial injustice in cases where formerly relief might be had and, if that is now the common law approach, a new response from equity is required today. That is so for eight main reasons.

The continuing need for equity

16. Firstly, it is still meaningful in the second decade of the twenty-first century to address legal issues by reference to a separate or distinct doctrine of equity. This case is an example of one reason *why* there is a continuing need for equity, which reason is the original one: *The Earl of Oxford's Case* (1615) Mich 13 Jac 1; 1 Rep Ch 1 (21 ER 485).[8] See also (in respect of penalties specifically) *Bridge v Campbell Discount Co Ltd* [1962] AC 600 (HL) at 629 (quoting Story),[9] per Lord Denning. Equity exists to address the

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[7] In her analysis of the particular fees, her Honour referred to her preferred construction of the arrangement, concluding that "This is not, and cannot be, conduct constituting a breach of some contractual obligation.": J [208], [280], [291], [307], etc. (CRB___).

[8] Per Lord Ellesmere LC: "The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."

[9] Story, *Commentaries on Equity Jurisprudence* (1839) Vol II, p 508 ("It seems to me that such a case comes within the very first principles on which equity intervenes to grant relief. The whole system of equity jurisprudence proceeds upon the ground that a party, having a legal right, shall not be permitted to avail himself of it for the purpose of injustice, or fraud, or oppression, or harsh and vindictive injury.")

restrictive consequences of a common law rule as stated in *Export Credits* that Courts must (as her Honour did here) look *first* at the question whether the relationship is contractual (it must be), *secondly*, at the question whether on a common law construction of the contract, the payments were made for breach of that contract (they must be) and only then, *thirdly*, at whether as a matter of substance the payments were in fact extracted as a penalty. Absent equity, the third question, which should really be the first one, will hardly ever be reached: just as, following *Dunlop Pneumatic,*[10] only the most naïve contract lawyer would draft a contract mentioning the word 'penalty', following *Export Credits* any drafter will strive not to link explicitly the penalty to 'breach'. Instead, they will draft for 'defaults', or in terms of 'conditions', or any one of a myriad of similar techniques to make sure the obligation to make payment arises 'other than in contract', or 'other than for a breach of contract'. That is this case. Taking Exception Fee 3, the 'contract' provided that: "It is a condition of all ANZ accounts that you must not overdraw your account without prior arrangements being made and agreed with ANZ" (emph added). Although the customers did not comply with the condition, the trial judge found it was not a *breach* of the *contract* (and her Honour reached the same conclusion in respect of the other formulations of account terms & conditions, for the same reason). Thus, the fees extracted were not capable of giving rise to a penalty, and the question whether fees smacking of penalty could be subject to any scrutiny as to the true intent and substance was never reached.

Equity not obsolete

17. Secondly, there is no doctrine of obsolescence in equity. There is very weighty authority against the proposition that equity can lose a jurisdiction just because the common law assumes one: *Kemp v Pryor*;[11] and Story, *Commentaries on Equity Jurisprudence* (1839) Vol I, pp 69-70.[12] In *Sloman v Walter*[13] Lord Thurlow LC said that:

> "The rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed, and the penalty only as accessional, and, therefore, only to secure the damage really incurred, is too strongly established in equity to be shaken."

18. No attention was paid to the position in equity in *Export Credits* at all. If the case is to be taken (as it was by Allsop P) as also extinguishing the equity, or to be taken (as it was by her Honour) as defining the outer limits of the doctrine in equity, then a very vast number of cases involving instruments other than contracts, and applying in circumstances other than breach of contract, have somehow been lost.

19. The further proposition here is that a Court would exercise great care, and clearly pronounce the authority it was applying, as well as the reasons why it was applying it, before it determined on behalf of the next generation that they will no longer be entitled

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[10] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.
[11] (1802) 7 Ves Jun 237 at 249 (32 ER 96) per Eldon LC.
[12] 13th ed, (Bigelow ed, Little Brown & Co), 1886.
[13] (1783) 1 Bro CC 418 (28 ER 1213).

to the benefits of the bifurcated system, or that some means for relief which once existed should no longer be available to them.

Concepts of 'fusion', or 'withered on the vine', should be rejected

20. Thirdly, accordingly, the proposition that "The modern rule against penalties is a rule of law, not equity..."[14] should be rejected:

(a) the authority cited by Allsop P in *Interstar* is a reference to the observations of Mason & Wilson JJ in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 191. Those observations were, as Gibbs CJ and Deane J pointed out, strictly *obiter dicta*,[15] and were not adopted by any of the other judges constituting the Court;

10 (b) what Mason & Wilson JJ said was that: 'the Judicature system... hastened the demise of equity's separate jurisdiction'; that because of it, 'there was no need to invoke the equitable jurisdiction'; and that 'the equitable jurisdiction... withered on the vine for the simple reason that, except perhaps in very unusual circumstances, it offered no prospect of relief...'. The only correct way to understand these statements is that the Judicature Acts in the UK permitted a single court to administer together doctrines of common law and equity, giving preference to equity where there was a true conflict.[16] The equitable doctrine remained, and in appropriate cases the form of remedy would be equitable. The present is an example: the remedy sought is an equitable accounting in which 20 ANZ's acts of self-help in deducting the penalties from the running account will be reversed;

(c) the further proposition from which their Honours drew comfort, that 'counsel have not drawn to our attention any instance of the equitable jurisdiction to relieve against penalties having been invoked in England since the *Judicature Act 1873* (UK)' is not safe. Both the cases (see eg *The Protector Endowment Loan and Annuity Company v Grice*),[17] and the academic commentary after the *Judicature Acts*, including Story,[18] continued to speak in terms of the equitable jurisdiction;

(d) of the two dissenting judges in *AMEV-UDC*, Dawson J approved *Export Credits,* yet did not rule out a separate and continuing equity jurisdiction;[19] and the

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[14] *Interstar* at [99] per Allsop P.

[15] See Gibbs CJ at 174. See also Deane J at 196 ("By reason of the conditions upon which special leave to appeal was granted, it is not now in dispute that... the contractual obligation to make each of the impugned payments upon termination for breach pursuant to cl 7 constituted a penalty and was unenforceable at common law.")

[16] *Turner v NSW Mont de Piete Deposit & Investment Co Ltd* (1910) 10 CLR 539 at 550 per O'Connor J.

[17] (1880) 5 QBD 592.

[18] Both the English and US editions spoke entirely in terms of the equity jurisdiction: J Story, *Commentaries on Equity Jurisprudence* (1st English Ed, WE Grigsby, 1884) (Republished LawBook Exchange Co, NJ, 2006) at 906. The 13th US edition (1886) cited at J [35] (CRB___). See also Thomson, *A Compendium of Modern Equity* (Clowes & Sons Ltd, London, 1899) at 258 ("The equitable doctrine has been severely animadverted upon by some of the Judges from time to time; but it has remained in force since the Judicature Acts, and is now recognised by all the Courts and Divisions.").

[19] "It is unnecessary to examine whether, in reliance upon equitable doctrines, relief against a penalty may be granted upon terms"; and that it was also unnecessary to consider "whether, because of the development of the

preferable analysis is that of Deane J on the question of precedent, authority, the consequences of abandoning equity, and history: at 195-203.[20]

Freedom of contract is not a complete answer to the argument

21. Fourthly, the trial judge's approach to the question of whether the Exceptions Fees were capable of constituting a penalty was summarised at J [4] of the Reasons (CRB___). Her Honour said:

> "The law of penalties is a narrow exception to the general rule that the law seeks to preserve freedom of contract, allowing parties the widest freedom, consistent with other policy considerations, to agree upon the terms of their contract.[21] Equity, however, continues to play a role in the law of penalties, a law which is confined to payments for breach of contract."

22. It would be wrong to take the law's proper recognition of 'freedom of contract' as one of a number of fundamental values as leading to the conclusion that relief against penalties is available only where there is (*a*) a contract; and (*b*) a breach of that contract:

(a) one area of tension between penalties and this freedom arose in cases where parties to negotiated, arms-length contracts had expressly stipulated for "liquidated damages", and often expressly that "those damages are not by way of penalty". These were the circumstances of, and the tension with the freedom reconciled by, *Dunlop Pneumatic*. Even in this type of case, the parties' expressed bargain has to yield to the law's concern to prevent extravagant and unconscientious results;

(b) the authorities referred to in, and leading to, *Export Credits* were essentially cases in which (*i*) there was a contract; (*ii*) actually negotiated; (*iii*) between commercial parties; and (*iv*) at arm's length.[22] A person may be free to make a bad bargain, but it is not obvious that a proposition premised on classical contract theory *therefore* holds true for standard form contracts, attributed to multiple customers by a bank, which are not negotiated, which can be amended by the bank unilaterally, and in which the fees charged - plainly directed at the receipt of instructions which would overdraw an account - do not constitute any assessment by the bank of damage it might suffer as a consequence. The truth is that the present 'contract' is really an

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common law and following the fusion of law and equity, relief against penalties is any longer discretionary": at 220.

[20] At 195: "The equitable jurisdiction did not, however, cease to exist and the terms upon which equitable relief against penalties would be granted remain directly applicable in those comparatively rare cases in which the party asserting unenforceability is constrained to seek positive relief (whether primary or ancillary) which is purely equitable in character, such as an order for reconveyance."

[21] The trial judge referred to the importance of freedom of contract on a number of other occasions: see eg J [41] (CRB___); [55] (CRB___); [73] (CRB___); [78] (CRB___) and [79] (CRB___).

[22] See in particular *Philip Bernstein (Successors) Ltd v Lydiate Textiles Ltd* (Unreported, E&W CA, 26/06/62); sub nom *Sterling Industrial Facilities Ltd v Lydiate Textiles Ltd* (1962) 106 SJ 669, which was heavily relied on in the progress of the case to the House of Lords, in which Diplock LJ (as he then was) had said "...one does not relieve against bargains merely because they are improvident when they are *entered into between parties at arm's length*, as these two were." (emph added): cited in *Export Credits* at 213*a-b* per Staughton J; at 219*a* per Slade LJ.

accounting relationship,[23] with conditions attached to the creation of mutual debts, overlaid by certain statutory requirements;

(c) relatedly, that peculiar phenomenon of the late 19th century - the hegemony of contract – left courts of the early 20th applying 'contract' to everything that was not tort.[24] One unhappy consequence was that principles such as freedom, negotiation and self-reliance, properly at the core of the classical exchange, were sometimes dragged along as if they were equally apt whenever 'contract' was mentioned. Here, the ordinary reasonable customer could quite confidently conclude that the application of contractual freedom as a *reason* why the Exception Fees were incapable of being adjudged penalties is nothing short of imperious fiction. Customers of ANZ did not "freely make a bad bargain" in their negotiations with ANZ at arm's length at all. The customers wanted a deposit account to receive their wages and other income, and from which they could pay the costs and expenses of living. The other major banks were doing the same thing, and it is virtually a necessity for any economically active person in this jurisdiction to obtain an account today. From time to time this will involve an 'instruction' to a bank which could have the effect of overdrawing the account. This could arise because eg a standing order was in place, but the customer was delayed in receiving his or her wages that month; or because eg the total grocery bill at the till came to more than was sitting in the account that day; or because eg in making a late night withdrawal from the ATM, there was no warning that he or she was asking for too much cash; or it could, of course, happen by some intentional serial defaulter. The answer to the last circumstance is that ANZ was under no obligation to permit an overdrawing.

Equity's jurisdiction is not confined to breach of contract

23. Fifthly, once one accepts that 'freedom of contract' does not inevitably require equity's jurisdiction to be limited to cases of contract and breach, no other considerations require such a result:

(a) equity could not be confined to contract because it arose and was applied at least four hundred years before the notion of 'contract' was brought into being.[25] It is noticeable that the English editor of Story[26] in 1884, and the American editor of Pollock in 1906[27] both discussed penalties in terms of *instruments*, rather than contract;

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[23] *Foley v Hill* (1848) 2 HL Cas 28 (9 ER 1002) regarded the banker-customer relationship as such.
[24] Culminating in *Sinclair v Brougham* [1914] AC 398 at 415, with Viscount Haldane LC's observation that for proceedings *in personam*, English law really only recognised two classes of action: tort and contract.
[25] Treating *Slade's Case* (1598) 4 Co Rep 92b (76 ER 1074) as the beginning of the use of assumpsit for 'contract'.
[26] Story, *Commentaries on Equity Jurisprudence* (1st English Ed, WE Grigsby, 1884) at 906 (§1314).
[27] Sir Frederick Pollock, *Principles of Contract at Law and in Equity* (1906) (Samuel Williston ed, 3rd Am Ed from 7th Eng Ed) (Republished by Rothman & Co, Colorado, 1988), p269.

(b) even after contract arose, the equity was applied in circumstances outside of 'contract'. Story identified "The same doctrine as having been applied to cases of leases; and in cases attempting specific performance of contracts".[28] To this can be added pledges, of which a mortgage is one kind;[29] and in *Bridge v Campbell Discount Co Ltd* at 630-1 Lord Denning identified more, as well as a flexibility inherent in equity that is lost in the formulation 'breach of contract':

> "...I must draw attention to the cases of penalties for non-performance of a condition. They, too, are legion. Take mortgages, for instance. At law the mortgagor was subject to a penalty for non-performance of this condition: 'If you repay the money on this day six months, you shall have the land back: but if you do not repay it by that date, you shall lose it for ever', see Littleton, s. 332.[30] The court of equity always relieved the mortgagor in case of non-performance of this condition, and it did so, not by reason of any specialty about mortgages, but in pursuance of its general power to relieve against penalties, see *Krelinger v. New Patagonia Meat and Cold Storage Co. Ltd.* [[1914] A.C. 25, 35; 30 T.L.R. 114, H.L.], by Viscount Haldane L.C. Take next the common penalty bond. It was taken in order to secure that something should be done by the obligor, such as to be of good behaviour (or to pay an annuity, or anything else). The obligor bound himself by his bond to pay a specified sum, say £20, on some such condition as this: 'If you are of good behaviour (or pay the annuity, or whatever else it might be), this obligation shall be void: but if you do not do so, then this obligation shall be of full force and effect.' In many of those cases there was no covenant by the obligor to perform the condition; no covenant by him to be of good behaviour (or to pay the annuity, or to do anything else); no covenant on which he could be sued at law: but simply a bond that if he did not perform the condition, he would pay the specified sum. There was thus no breach of contract for which he could be sued at law for damages but only non-performance of a condition which exposed him to payment of the sum specified in the bond. Yet equity always granted relief in such cases if the sum was a penalty, see, for instance, *Tall v Ryland* [(1670) 1 Cas in Ch, 183, 184 (22 ER 753)]; *Collins v Collins* [(1759) 2 Burr 820, 826 (97 ER 579)]; and the very learned note by Mr Evans in his appendix to Pothier on Obligations (1806), Vol. II, p. 92: and it did so not by reason of any specialty about penalty bonds, but in pursuance of its general power to relieve against penalties. It would restrain the obligee from suing at law on the bond so long as the obligor was ready to pay him the damage he had really sustained. Likewise, even when the sum had already been paid over in the shape of a deposit to secure performance, equity would be prepared to grant restitution if it was a penal sum, see *Benson v Gibson* [(1746) 3 Atk. 395 (26 ER 1027)] by Lord Hardwicke L.C., *Steedman v Drinkle* [[1916] 1 AC 275; 32 T.L.R. 231, P.C.] by Viscount Haldane."[31]

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[28] At 906 (§1315). Also, but less relevantly today, fines, and private statutes (but not public ones): see Story, 917 (§1326).

[29] GDG Hall (ed), *The Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill*, (c1189) (Oxford Medieval Texts, Oxford, 1965), Bk X, [6].

[30] Coke, Edward, *The first part of the Institutes of the laws of England: or, A commentary upon Littleton* (18th ed, London, 1823), s 332.

[31] Even Lord Denning's examples are hardly comprehensive. Take for instance the examples involved in this 1698 Charter: "Where the Forfeiture or Penalty annexed unto any Articles, Agreement, Covenant, Contract, Charter-Party, or other Specialties, or Forfeiture of Estates on Condition, executed by Deed of Mortgage, or Bargain and Sale with Defeasance, shall be found by Verdict of Jury or Confession of the Obligor, Mortgagor or Vender; the Justices of the said Courts respectively where the Tryal is had, are hereby impowred and authorized, to moderate the Rigour of the Law; and on Consideration of such Cases according to Equity and good Conscience, to Chancer the Forfeiture, and enter up Judgment for the just Debt and Damages, and to award

(c) the *whole equity method* was different to the one which might be safely premised on a 'breach of contract' at law. In the equity cases, the party vexed at law came to equity *for relief against* the obligation to pay (or for recovery of something that, according to some requirement at law, had been paid), contending that the payment was in truth a penalty. The form or source of that obligation was never the point; and nor was the kind of writ being employed. Thus, it might have been pursuant to the terms of a pledge, or mortgage; a deed, a deed poll, a variation of the deed known as bond, under a separate bond, or terms of the same bond; or in a lease; a unilateral covenant; *or* on an *assumpsit* based on writing, or later a contract, or a specific performance claim under that contract, and it might have arisen in an action in covenant, or debt, or contract or even account;[32]

(d) confining the doctrine of penalties to the cause of action of breach of contract assumes too much, and creates new injustices. Consistently with the revival of interest in the common money counts,[33] it should still be open to a plaintiff today to sue for the penalty sum at law (by whatever instrument it is created) by a proceeding in debt. A debt can be created by a contract, but the debt action does not remedy the *assumpsit* breach of performance; it simply alleges that there is a debt, meaning a fixed sum of money owed in law which has been detained. Here, if the bank had not exercised self-help, it would not have been very long before it worked out that it should sue for the sums in debt, in which action no allegation of breach of contract is necessary at all;

(e) the whole purpose of equitable intervention was to remedy the harshness of result at common law which enabled choice of drafting techniques, and consequent forms of action, to exclude court examination of unconscientious conduct. The following is taken from *La Zuche v Rokeny* (1297) CP 40/116, m 114 (B&M 250):[34]

> "One [Roger la Zuche] brought his writ of debt against [William de Rokeny] and said that he wrongfully withheld from him and did not render to him 100s which he owed him; and wrongfully because, whereas it was covenanted between them at a certain day, year and place, that this same [William] would levy a fine between them of certain tenements and, when he had the inheritance, would enfoeff this same [Roger] at a certain day, and that if he did not do so [William] would be bound to [Roger] in 100s... [Objection was first taken on the ground that the action should have been brought in covenant and not debt, and then as follows.]

Execution accordingly:" *Anno Regni Regis Gulielmi, III, Decimo* c 14, reprinted in *The Charter Granted by their Majesties King William and Queen Mary, to the Inhabitants of the Province of the Massachusetts-Bay in New-England* (Boston, 1742) at 102.

[32] *Foley v Hill* (1848) 2 HL Cas 28 (9 ER 1002) is an example of an account. As other examples, in *Lord Lonsdale v Church* (1788) 2 TR 388 (100 ER 209) it was a bond "conditioned to account to the plaintiffs for all sums so received by him"; in *Wilde v Clarkson* (1795) 6 TR 303 (101 ER 566) it was a bond "given by the defendant... to indemnify the parish of Ripley against any expence that they might be put to by reason of the then expected birth of a bastard child of J. Shaw...".

[33] Eg *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

[34] Baker & Milsom, *Sources of English Legal History* (2nd ed, OUP, Oxford, 2010).

Huntingdon: Sir, we say that what he demands is but a penalty [to be paid] if the covenant does not take effect; and by the common law such penalties are forbidden, *quia poenae sunt odiosae* ('for penalties are odious'). Besides, this kind of penalty is of the same condition as usury; but usuries are forbidden, ergo so are penalties. So we demand judgment etc..

BEREFORD: You are answering argumentatively. Answer to your deed.

...

Huntingdon: Beside that, whereas he says he is damaged, he may not say that; for we tell you that he never paid anything for it.

BEREFORD: Even if he [the plaintiff] paid nothing, he can still be damaged. So say something else."

In a separate manuscript record of the same case,[35] the exchange is:

"*Huntingdon*: Still he [the plaintiff's case] shall not be answered, for the 100s are only contained in the writing in the name of a penalty (*peine*) and not in the name of debt. For a debt arises from some cause, and you have not shown any cause – as by saying that you did something for him, in return for which he should be bound to you in this debt. Therefore it seems to be rather usury than a debt, and ought to be sent to the Court Christian, for it does not belong to this court to try. So we demand judgment.

Hertipole: He makes you out a good enough cause; in that you did not keep the covenant in that which you promised.

BEREFORD: Even without me giving anything, or you having anything from me, you can still be bound to me in 40s through a deed, and through that deed I shall have an action."[36]

From at least this time, the risk of infringing against usury, or having to front the Ecclesiastical Court, could be avoided by entering the usurious clause or penalty into a separate covenant, sued upon separately, to achieve the same end.[37] The technique became popular in law: see eg Anon (1346) B&M 281; and Anon (1352) B&M 281, which were also debt actions,[38] and that was what opened up the potential for abuse. The result was Chancery's intervention, no later than 1494 in Sir William Capell's Case (1494) B&M 269 (Seldon Soc, vol 102, p13), when Morton C issued a subpoena to Sir William Capell in the Chancery, and is recorded as saying:

"When someone is beholden to another in a principal debt, the debtee cannot in conscience take anything except the principal debt in respect of this indebtedness, even if the debtor is bound to him in twenty penalties... But the debtee may in conscience take so much of the penalty as represents his damage from the withholding of the debt."

(f) nor is it satisfactory to explain away seven centuries of cases with a new legal fiction, namely that most (but not all) of the cases in equity are ones where 'a promise to pay' (and presumably a breach) can be 'readily implied', as if that did

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[35] Harley 25, fo 180v (B&M 252 at 253).
[36] And so the case was sent to be tried before a jury ("to the country"): 253.
[37] The laws against usury were not abolished until 1854: *Usury Laws Repeal Act* 1854 (17 & 18 Vic c90).
[38] Baker & Milsom, *Sources of English Legal History* (2nd ed, OUP, Oxford, 2010), citing YB Pas 20 Edw III, Rolls Series, p320, pl 45; and YB Mich 26 Edw III, fo 17, pl 9 respectively.

no violence to 'contract', 'breach', the cause of action of breach of contract, or to the equity history at all.[39] The better view of equity's jurisdiction, in that sub-set of cases where there is a contract, is that sums which become payable on a breach represent a yet further subset of cases in which equity's scrutiny will be attracted.

24. In summary, there is no good reason for assuming that the equity doctrine must conform to the common law one, or to accept that it has been decided that it does conform to the common law, and no good reason why the equity would be so diminished that it can only apply in cases of breach of contract.

The common law history compels no different result

10 25. Sixthly, as seen above, from about 1297 the common law largely ignored the issue of penalties. Although there are hints of an 'inherent' common law jurisdiction in respect of penalties,[40] the likely origins are the Statute of William III 8 & 9 Will 3 c 11 (1696-7) (*The Administration of Justice Act 1696*); the Statute of Anne 4 & 5 Anne c 16 (1705) (*The Administration of Justice Act 1705*).[41] See now (as those statutes apply in Victoria) the *Instruments Act 1958* (Vic). See also, W Newland, 'Equitable relief against penalties' (2011) 85 ALJ 434.

26. In *Wyllie v Wylkes* (1780) 2 Doug 519 at 522-3 (99 ER 331 at 333) Lord Mansfield explained that the Act of 1705 (4 & 5 Anne) was:

> "an Act made to remove the absurdity which Sir Thomas More unsuccessfully attempted to
20 persuade the Judges to remedy in the reign of Henry VIII. For he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs; and when they said they could not relieve against the penalty, he swore by the body of God, he would grant an injunction."

27. As to the statutes, three things might be noted. First, they extend well beyond 'contract': s 30(1) of the *Instruments Act 1958* (Vic)[42] applies to "any action on any bond or on any penal sum for non-performance of any covenant or agreement in any indenture deed or writing…";[43] and s 30(4) of the Act[44] applies to "any bond". Secondly, it is plain that the

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[39] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190, per Mason & Wilson JJ; see also the Reasons in this case, J [28] (CRB___); [36] (CRB ___); [55] (CRB___).

[40] There was an early use of notions of equity by Bereford J in a decision published by FW Maitland, *Umfraville v Lonstede* (1308-9) 2 Ed II Case 132, p58 in *Year Books of Edward II, Vol II*, (1904) Selden Society, Vol 19. In that case, the defendant who was being sued on a bond offered up performance in Court. The plaintiff, pleading his case in debt, said the defendant could not tender now because performance had not been rendered on the day specified in the bond. Bereford J is recorded as saying "Moreover, this is not, properly speaking, a debt; it is a penalty; and with what equity (look you!) can you demand this penalty?" Bereford J warned the plaintiff that if he pressed for judgment on the bond and refused to accept the payment tendered, the judgment would be postponed for seven years: See Maitland, "Introduction", at pxii.

[41] See *Betts v Burch* (1859) 4 H & N 506 at 511 (157 ER 938 at 940) per Bramwell B (in Exchequer): ("As to the authorities, it is remarkable that from the first to the last the statute is not mentioned. It seems as if, by some singular instinct, the Courts have been right, though without referring to the statute by which they ought to have been governed.")

[42] Section 30(1) repeating in substance the Statute of William III.

[43] At the time of the Statutes of William and Anne, witnesses with interests, or parties, were not able to give evidence. See later Lord Denman's Act 1843 (6 & 7 Vic, c85) and Lord Brougham's *Evidence Act 1851* (14 & 15

Acts were not intended to, and did not, effect an abolition of the equity. Each of them (and the Victorian statute), is premised on a proceeding *brought by a plaintiff* to recover a penalty. That, as has been noted, is not the way in which the proceedings in equity worked. Thirdly, they are not mentioned in *Export Credits* at all.

28. For a time after Lord Mansfield, the common law may have dealt with the issue in the manner explained by Buller J in 1788 in *Lord Lonsdale v Church*,[45] namely, "the constant practice, where an action is brought on a bond, [is] of giving 1*s* damages", presumably allowing any other claim for damages in respect of the obligation being secured by the bond.

10 29. In any event, as contracts became more sophisticated a key issue for the common law became that noted above, namely, of reconciling the apparent tension between contract theory, "liquidated damages" and "penalties" clauses, and in particular the proper *construction* to be given to contracts which included such clauses.[46] This particular issue led the law to an array of presumptions of construction which were irreconcilable, and irrational,[47] and that was the background to *Dunlop Pneumatic*, a case which greatly influenced the Lords in *Export Credits*, but (the applicants contend) in the wrong direction. In respect of *Dunlop Pneumatic*:

(a) the case concerned the proper construction and legal effect of a clause which provided that, if the obligor breached a contractual restraint against the sale of
20 certain products, it should pay £5 for each event, "as and by way of liquidated damages and not as a penalty". The case was tried, and breach of the contract proven. A Master then conducted an inquiry into damages: at 85. The issue for the House was squarely framed as follows: it was a contract case; it was a case where the contract expressly drew a distinction between a disavowed 'penalty' and an asserted bargain for 'liquidated damages'; and it was also a case involving a contract apparently negotiated between two commercial parties (it being entered into between 'most probably good business men': at 96);

(b) Lord Dunedin first noted that the contractual language, 'penalty' and 'liquidated damages', was not conclusive of the parties' intention: at 86. He then famously
30 stated:

> 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...

Vic, c99) respectively. This may explain the focus in the statutes on instruments and writing as evidence.

[44] Section 30(4) repeating in substance the Statute of Anne.

[45] (1788) 2 TR 388 (100 ER 209).

[46] In *Law v Local Board of Redditch* [1892] 1 QB 127 at 134 Kay LJ suggested that the introduction of the words "as and for liquidated damages" in contracts was done in response to the doctrine of penalties in equity, that is, in an attempt to oust expressly the equity.

[47] Which seems to be what really vexed Sir George Jessel MR in *Wallis v Smith* (1882) 21 ChD 243 at 256-262.

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*...

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... This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable, – a subject which much exercised Jessel M.R. in *Wallis v. Smith* – is probably more interesting than material.

   (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'...: at 86-87 (emph added)

(c) Lord Dunedin (correctly) recognised that there was a proper utility in permitting parties to agree in advance on an amount in lieu of having to establish the quantum of damages in the event of and after a breach; yet there were limits beyond which the clause would be treated as having a different, and penal, purpose. In *that context* various presumptions of construction were settled. Lord Dunedin was therefore dealing with a *sub-set* of the law of penalties, namely, the question of the approach to be taken to the construction of a liquidated damages clause. It does not follow that penalties therefore *only* arise in the context of liquidated damages; and it does not follow that penalties therefore *only* arise in the context of breach of contract;

(d) the historical and logical fallacy since *Dunlop Pneumatic* has been to treat the question of penalties as if the *only* question was whether a contractual payment clause was a penalty *or* liquidated damages clause. The scope of the jurisdiction cannot be reduced to these binary forms.[48] Outside the question of the construction of a liquidated damages clause, the binary divide distracts attention from the broader purpose of the penalties doctrine: cf Reasons at J [43]-[44] (CRB___); [84] (CRB___).

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[48] *Metro-Goldwyn-Mayer Pty Ltd v Greenham* [1966] 2 NSWR 717 displays the correct understanding: there it was held not to be a penalty, or liquidated damages, but construed as a licence fee. The point is, it was not 'breach of contract' that confined the inquiry into penalty.

Export Credits should not be followed in Australia

30. Seventhly, contrary to what might be the impression given by a cursory reading of *Export Credits*, it was *not* a case in which the Lords refused to 'expand' the doctrine of penalties beyond *Dunlop Pneumatic*; it was a case in which the law in respect of penalties was substantially *narrowed* by the House of Lords. There are a number of features of the case which, with respect, are unconvincing given the very large change in the law apparently being wrought:

(a) *Export Credits* is reported in the All England Reports and the Weekly Law Reports but did not make the authorised reports. It concerned an appeal from a separate determination of a question stated by Goff J: 208. At first instance Staughton J identified the issue as "difficult", and that there was "little authority which bears directly on it": at 207*f*. This suggests that he did not consider the issue to be an equitable one, because there was certainly a very large body of authority there;

(b) there is little authority referred to in the Lords (or in the Court of Appeal) in support of the ultimate conclusion. As noted, one was *Dunlop Pneumatic*. Staughton J said that "The general test for determining whether a clause provided a penalty or not is set out in the speech of Lord Dunedin in the *Dunlop* case…": at 211*e*; on appeal[49] Waller LJ pointed to *Dunlop Pneumatic* as "governing the decision whether or not a clause is a penalty clause": 215*e*; and in the House, Lord Roskill observed that counsel "conceded that he could not point to an authority whereby the law regarding penalty clauses in contracts as enunciated by this House in [*Dunlop Pneumatic*] had been extended as far as he invited your Lordships now to extend it.": 223*f-g*. This is the error, the applicants submit, identified above: of treating *Dunlop Pneumatic* as dividing the relevant universe into penalties or liquidated damages, of treating the law of penalties as if its only purpose was to ameliorate the enforcement of a harsh bargain as to liquidated damages, and of treating *Dunlop Pneumatic* as having decided much more than was actually in issue in that case;

(c) the second influential case, referred to at each stage, was the decision of Diplock LJ (as he then was) in the Court of Appeal in *Philip Bernstein (Successors) Ltd v Lydiate Textiles Ltd*:[50] at 212*b*-213 per Staughton J; and in the Court of Appeal: at 215*e* per Waller LJ; at 217*j* per Slade LJ; and at 224*d-f* in the Lords. When it came to the Lords, Lord Roskill noted that the House had recently "strongly deprecated the citation of unreported decisions of the Court of Appeal" such as *Philip Bernstein*, and reached his decision stating that he did not rely on that unreported decision at all: 224*d-f;*

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[49] [1983] 2 All ER 205 at 214.

[50] (Unreported, E&W CA, 26/06/62); sub nom *Sterling Industrial Facilities Ltd v Lydiate Textiles Ltd* (1962) 106 SJ 669.

(d) the Lords did not treat with or identify how the principle being laid down was consistent with, or to operate in respect of, the statutes which had grounded the common law jurisdiction, namely, the *Statute of William III* 8 & 9 Will 3 c 11 (1696-7) or the *Statute of Anne* 4 & 5 Anne c 16 (1705);

(e) aside from deprecating the use of *Philip Bernstein*, the *only* other authority cited by Lord Roskill in the course of his reasons and in laying down the principle of 'breach of contract' was *Dunlop Pneumatic*; while in the Court of Appeal their Lordships did not cite any case decided before *Dunlop Pneumatic*. The position in equity received no real attention at all;

(f) Lord Roskill ultimately spoke in qualified terms:

> "...*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 breach of contract* committed by a defendant 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": 224*a-b* (emph added)

(g) as a persuasive decision in Australia, *Export Credits* should be confined to its particular facts. The case really turned on a much simpler point, namely that there was nothing offensive to law for a debtor to be held bound to a promise that, in the event that the debtor's guarantor was called upon by the principal, the debtor would indemnify the guarantor: at 224.

The claim of 'extensive and longstanding authority' compels no different result

31. Eighthly, in the Reasons for judgment at J [59] (CRB___) her Honour adopted certain submissions of ANZ to the effect that:

> "As ANZ submitted, there is extensive and longstanding authority in Australia and the United Kingdom that the law of penalties has no application to a contractual provision requiring a payment on the happening of an event that does not constitute a breach of contract. Those authorities include, in chronological order, [**1**] *In re Apex Supply Co Ltd* [1942] Ch 108 at 109; [**2**] *Campbell Discount Co Ltd v Bridge* [1962] AC 600 at 613-614 (per Viscount Simonds); [**3**] *Philip Bernstein (Successors) Ltd v Lydiate Textiles* (Unreported, Court of Appeal UK, Diplock LJ, 26 June 1962); [**4**] *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54 at 66-67 (per Harman LJ); [**5**] *IAC (Leasing) Ltd v Humphrey* (1972) 126 CLR 131 at 140-144 (per Walsh J, with whom Barwick CJ and McTiernan J agreed); [**6**] *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205 at 224 (per Lord Roskill, with whom Lords Diplock, Elwyn-Jones, Keith of Kinkel and Brightman agreed); [**7**] *AMEV-UDC Finance Ltd* at 184, 189-190 and 211 (per Mason, Wilson JJ and Dawson J (in dissent on the primary issue)); [**8**] *Jervis v Harris* [1996] Ch 195 at 206-207 (per Millet LJ, Otton LJ and Sir Stephen Brown P); [**9**] *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 at [295] (per Andrew Smith J); [**10**] *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292 at [106] (per Allsop P, with whom Giles and Ipp JJA agreed); [**11**] *Fermiscan Pty Ltd v James* [2009] NSWCA 355 at [134]-[136]; [**12**] *Diakos v Mason* [2010] SASCFC 37 at [16] and [18] (per Gray J, with whom Duggan and Kelly JJ agreed) and [**13**] *First East Auction Holdings Pty Ltd v Mimi Ange* [2010] VSC 72 at [151] and [157] (per Hargrave J)..." (emph added)

32. On examination, the cases do not compel this Court to adopt the suggested restriction:

1. In *Re Apex Supply Co Ltd* [1942] Ch 108 Simonds J was concerned with a hire purchase agreement, termination and termination payments. Notwithstanding the headnote, what his Honour actually said was that, on the authorities in respect of hire purchase agreements, "no question of penalty versus liquidated damages arises, but that this is a contract for the payment of a certain sum in a certain event and, that event having happened, that sum is payable"; adding that in any event he would have found a genuine pre-estimate of damage, not a penalty: at 119-120.[51]

2. The reference to *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 613 is a reference to Viscount Simonds' short conclusory speech, but this must be read with Lord Denning's more thorough analysis in respect of equity, esp at 629, referred to above.

3. *Philip Bernstein* has already been mentioned. The case is just that – unreported – and where it was picked up in The Solicitors' Journal in August 1962, no reasoning was included.

4. *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54 at 66-67 does not take things further: Harman LJ merely said, *obiter dicta*, "I do not think you can have a penalty without a breach of contract"; and this statement would have been put much more strongly if the three cases before had in fact established that point.

5. In *IAC (Leasing) Ltd v Humphrey* (1972) 126 CLR 131 at 140-144 Walsh J correctly stated the position in respect of the then English authorities. The case also concerned hire purchase agreements, and all that Walsh J said was that "the rules of this branch of the law are not in all respects finally settled", that there "has been a conflict of judicial opinion" on the peculiar issue raised by hire purchase clauses, that in England the "view has prevailed" that the hire purchase clause could operate as a penalty if imposed on breach, and that "there has been a preponderance of opinion in favour of the view" that it was the breach that triggered the penalty issue: at 142.6-143.5.

6. *Export Credits* is not an example of extensive and long standing authority in support of the proposition it laid down for the first time itself.

7. The *obiter dicta* of Mason & Wilson JJ in *AMEV-UDC*, and the position of Dawson J, have been addressed above. They do not demonstrate extensive and longstanding support for *Export Credits*.

8, 9. *Jervis v Harris* [1996] Ch 195 at 206-207 (per Millet LJ, with whom Otton LJ and Sir Stephen Brown P agreed) and *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 at [295] (per Smith J) only show that in England *Export Credits* is binding on inferior courts.

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[51] See *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86 (CA) doubting the analysis in *Re Apex*.

10-13. In *Interstar* at [106], the NSW Court of Appeal said that it was constrained to follow the decision in *Export Credits*, identifying the issue of the continued role of equity as one that only this Court could determine. *Fermiscan Pty Ltd v James* (2009) 261 ALR 408; [2009] NSWCA 355 at [134]-[136], did not address the issue, and the proposition at [136] was: "[m]any of the complexities that arose in *Interstar* are absent here. In particular, there is no doubt that the operation of each of the impugned clauses is conditioned on breach". In *Diakos v Mason* (2010) 272 LSJS 185; [2010] SASCFC 37 at [16] and [18] Gray J (with whom Duggan and Kelly JJ agreed) cited *Export Credits* without comment, and in *Mimi Ange v First East Auction Holdings Pty Ltd* the Victorian Court of Appeal felt constrained to follow Allsop P in *Interstar*, and therefore *Export Credits*, also identifying the issue as one that could only be resolved by this Court.[52]

33. As to the academic commentary, where her Honour accepted ANZ's submission that it added weight to the suggested restriction, at J [59] (CRB___),[53] the first (Rossiter, *Penalties and Forfeiture* (LBC, Sydney, 1992)) is critical of the decision in *Export Credits*, suggesting that the Lords' formulation "should be seen in the context of the facts in that case" and referring to the "cogent" dicta of Deane J. in *AMEV-UDC*.[54] The second to fifth citations inform the reader of *Export Credits*. The last, RP Meagher's proposition at p52 of *Essays in Equity*, deals with the case where there is a breach of contract: "the law says that a sum sought to be exacted on breach is a penalty unless it can be said to amount to a genuine 'pre-estimate of loss'." Earlier at p50-51 he had recognised the general proposition stated in *Export Credits* while noting that it would produce the anomalous result of allowing the skilled draftsman to avoid the doctrine.

34. In *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 the Court said at [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", and noted as the starting point *Dunlop Pneumatic*. The Court in *Ringrow* (as in *Dunlop Pneumatic*) was concerned with a case where the alleged penalty was payable on breach of a contractual obligation, and with the distinction between liquidated damages and penalties in that context. The correctness of the *Export Credits* limitation did not arise.

Conclusions

35. In summary, this Court should:

(a) hold that the equitable jurisdiction to relieve against penalties remains alive;

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[52] (2011) 284 ALR 638; [2011] VSCA 335 per Sifris AJA at [90] to [94], with whom Neave and Tate JJA agreed.
[53] Rossiter at 66; McGee J, *Snell's Equity* (31st ed, Sweet & Maxwell, 2005) at 294; Carter JW and Harland DJ, *Contract Law in Australia* (4th ed, Butterworths, 2002) at [2216]; Lewison K, *The Interpretation of Contracts* (4th ed, Sweet & Maxwell, 2007) at [16.01]; Parkinson P, *The Principles of Equity* (2nd ed, Lawbook Co, 2003) at [819]; Meagher RP, *Penalties in Chattel Leases* in Finn PD (ed), *Essays in Equity*, (The Law Book Company Limited, 1985), p 52.
[54] Rossiter at 67, and 69 fn18.

(b) hold that such jurisdiction is not limited to cases of (*a*) a contract; and (*b*) breach of contract;

(c) hold that the 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 object usually being framed as an express condition of the transaction, giving particular weight to the statements of principle by Story,[55] and Deane J in *AMEV-UDC*;[56]

(d) hold that equitable relief against penalties is an identified instance of equity's broader concern to prevent the unconscientious exercise of legal rights, and further recognising that punishment is a function of society and should not inure to the benefit of an individual (see especially the statements of principle by Bramwell LJ[57] and Frankfurter J);[58]

(e) answer the outstanding separate questions so as to allow the matter to proceed to trial for a final determination of whether the Exception Fees, irrespective of whether they are payable for breach of contract, constitute penalties;

(f) in doing so, allow the parties to address at trial, within the correct legal framework, the significance of circumstances such as that ANZ was under no duty to lend on an instruction given by the customers contrary to the condition that an account must not be overdrawn; that the fees did not constitute any assessment of any likely damage to the bank; that ANZ reaped substantial fees either way; that ANZ also reserved to itself the right to cancel credit cards, or electronic access without notice in the event of an overdrawing; together with any arguments by the bank that the fees should be treated, not as punishment but rather as 'fees for service';

(g) in doing so, further, allow ANZ, consistent with the traditional approach in equity, to seek to prove in the accounting such loss (if any) as it may have suffered from the failure of the customer to observe the condition.[59]

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[55] Story, *Commentaries on Equity Jurisprudence*, (1st Eng Ed., Grigsby, Stevens & Hayes, London, 1884), p905-6, (§1314).

[56] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 199-200.

[57] *The Protector Endowment Loan and Annuity Company v Grice* (1880) 5 QBD 592 at 596.

[58] *Priebe & Sons Inc v United States* 332 US 407 at 417 (1947). In that case, Frankfurter J dissented on the question of the application of the ordinary principles to a war-time government contract, however, he agreed with the majority otherwise in respect of penalties, and formulated the doctrine consistent with equity. The case is also one where the penalty was triggered other than by breach of contract.

[59] In equity, where the issue merely concerned the calculation of interest and damages, the Masters would take the account (eg *Lord Lonsdale v Church* (1788) 2 TR 388 (100 ER 209) at 210 per Buller J; *Duvall v Terrey* [1694] Show PC 15 (1 ER 11) (cited as *Dewall v Price* Show PC 15)); but if there was an actual issue of quantification of damage, an issue would be referred to the common law and to a jury for the taking of a *quantum damnificatus* (Lloyd, 'Penalties and Forfeitures' (1915) 29 Harv L Rev 117 at 125, citing I Equity Cases Abr. 91, and the cases therein). In either case, the damage was liquidated and, in effect, an account taken on the result.

Part VII – Statutes

36. The relevant text of the relevant sections of (1) the *Statute of William III* 8 & 9 Will 3 c 11 (1696-7) (*The Administration of Justice Act 1696);* (2) the *Statute of Anne* 4 & 5 Anne c 16 (1705) (*The Administration of Justice Act 1705*); and (3) the *Instruments Act 1958* (Vic) are attached as an annexure.

Part VIII – Orders Sought

1. Without prejudice to so much of the cause as remains and the grounds of appeal remaining in the Federal Court of Australia, the applicants have leave to appeal in respect of grounds 1 – 4 of the amended draft notice of appeal.

10 2. The applicants file a notice of appeal, limited to the said grounds 1 – 4, within 7 days.

3. The appeal be allowed with costs.

4. Set aside:

   (a) the orders set out in sub-paragraphs (ii) and (iii) of each of orders 1(a)-(f), 1(j) and 1(l)-(q) of the Federal Court of Australia of 13 December 2011; and

   (b) paragraph 1 of the orders of the Federal Court of Australia of 7 February 2012,

   with ANZ to pay the costs of the hearing of the separate questions below.

5. Order that questions 1(b) and (c), 2(b) and (c), 3(b) and (c), and 4(b) and (c), as set out in Schedule B to the orders of the Federal Court of Australia of 13 December 2011, be answered in the affirmative in respect of the First to Sixth (inclusive), Tenth, and
20 Twelfth to Seventeenth Exception Fees (inclusive).

Dated: 5 June 2012

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Annexure of Statutes

8 & 9 Will 3 c 11 (1696-7) (*The Administration of Justice Act 1696*), s 8

VIII. And be it further enacted, That in all actions, which from and after the said five and twentieth day of *March*, one thousand six hundred ninety and seven, shall be commenced or prosecuted in any of his Majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entred on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *Nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize, or *Nisi prius*, of that county, to enquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize, or *Nisi prius*, that he or they shall make a return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entred, and before any execution executed, shall pay unto the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entred upon record; or if by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expences for executing the said execution, the body, lands, or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entred upon record; but notwithstanding in each case such judgment shall remain, continue, and be, as a further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff or plaintiffs may have a *Scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond of obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid,

of such future damages, costs, and charges, as aforesaid, all further proceedings on the said judgment, are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid.

4 & 5 Anne c 16 (1705) (*The Administration of Justice Act 1705*), ss 12 & 13

XII. And be it further enacted by the authority aforesaid, That from and after the said first day of *Trinity* term, where any action of debt shall be brought upon any single bill, or where action of debt, or *Scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit, and where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeazance or condition of such bond, though such payment was not made strictly according to the condition or defeazance; yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place, according to the condition or defeazance, and had been so pleaded.

XIII. And be it further enacted by the authority aforesaid, That if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.

***Instruments Act 1958* (Vic), ss 30(1) & (4)**

30 Actions on bonds etc.

(1) In any action on any bond or on any penal sum for non-performance of any covenant or agreement in any indenture deed or writing the plaintiff may assign as many breaches as he thinks fit and may recover not only such damages as have been usually awarded in such cases, but also damages for such of the said breaches so assigned as the plaintiff proves to have occurred; and judgment may be entered as nearly as may be as heretofore has been usually done in such actions.

...

(4) Where an action is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor has before the action brought paid to the obligee the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it may nevertheless be pleaded in bar of such action; and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance and had been so pleaded.