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EDITORIAL 311

ARTICLES

Breach no longer necessary: The High Court's reconsideration of the penalty doctrine – *Richard Manly SC*

In 1915 the House of Lords delivered reasons for judgment in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* in which it set out the applicable test and guidelines to determine whether a stipulated sum payable on breach of a contract was to be treated as liquidated damages and enforceable, or a penalty and hence unenforceable. That test was universally applied throughout the common law world. The High Court of Australia's decision in 2012 in *Andrews v Australia and New Zealand Banking Group* has recast the test. This article reviews the first instance decision of Gordon J from the Federal Court of Australia together with the High Court decision and concludes that the latter is unsatisfactory, as it will be difficult to apply to a wide variety of commercial transactions and thereby lead to uncertainty and confusion in an area of contract law that had been trouble free for nearly a century. 314

The distinction between the duty of care and the duties to act bona fide in the interests of the company and for proper purposes – *Rosemary Teele Langford*

There has been contention recently as to the distinction between the equitable duty of care and the fiduciary duties to act bona fide in the interests of the company and for proper purposes. In particular, it is sometimes asserted that positive aspects of the latter duties are more appropriately part of the duty of care. This article demonstrates that the duties are in fact distinct. It provides a reasoned method of distinguishing the operation of each. This is particularly relevant given the differing remedial implications. It is also significant given that this was at issue in the long-running litigation involving the Bell Group of companies, which will no longer be resolved by the High Court. 337

Are there stresses and strains in the remedial structure of the Competition and Consumer Act 2010 (Cth)? – *The Hon J D Heydon*

This article sets out the background to litigation in the Federal Court of Australia in which penalties are sought for contravention of the *Competition and Consumer Act 2010 (Cth)*, which the parties resolve to settle, and in which the court accepts the orders proposed by the parties. It turns to discuss the extent to which persons injured by conduct contravening that Act and in relation to which the court has made orders can rely on the findings in later civil proceedings. It refers to s 87(1A)(b) and s 87(1A)(ba) proceedings and s 79B proceedings. It describes the difficulties which the general law creates in the path of a civil claimant seeking to rely on the earlier findings. Then it examines the advantages of relying on s 83 and the obscurities of that section. It concludes by indicating how those obscurities might be overcome. 354

The acquisition of pre-encumbered personal property in the ordinary course of the seller's business – *Rasih Gengatharen*

Under s 46(1) of the *Personal Property Securities Act 2009* (Cth), a buyer who acquires personal property in the ordinary course of the seller's business takes it free of a security interest given by the seller. As the application of the provision is limited to a security interest given by the seller, there is always the risk that a buyer may be affected by prior security interests, especially if the personal property is used goods or antiques. This article examines the rationale, implications and justification for the "given by the seller" limitation. It argues that the limitation should be removed so that s 46(1) better meets the reasonable expectations of ordinary buyers. 367

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