

Too entrenched to be challenged? A commentary on the rule against contractual penalties post Cavendish v Makdessi and ParkingEye v Beavis

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**Too entrenched to be challenged? A
commentary on the rule against contractual
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*ParkingEye v Beavis***

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In the recent conjoined appeals of *Cavendish v Makdessi* and *ParkingEye v Beavis*, the Supreme Court declined to abolish English law's highly controversial rule against contractual penalties, choosing instead merely to reformulate the test. This commentary examines the new test and asks whether the rule's critics should now accept defeat.

1. INTRODUCTION

For at least a century, the common law of England and Wales has prohibited contracting parties from agreeing terms which are designed to punish a contract-breaker by extending liability for a particular breach of contract significantly beyond a genuine pre-estimate of the financial losses that the innocent party might suffer as a result of that breach. [1] This, in its simplest form, is what became known as the rule against penalties; such terms were effectively unenforceable. [2]

However, since its inception, the very existence of the rule has increasingly been challenged by both academics [3] and members of the judiciary; [4] in essence, its opponents have argued that it defies party autonomy, without sufficient justification. The freedom of parties to contract with whomever and on whatever terms they see fit has been described as a 'fundamental right' in English law; [5] this principle is firmly rooted in philosophical and economic theory [6] and is well-established in national [7] and European law. [8] Whilst in recent decades English law makers have departed from this cornerstone principle, they have typically done so only where there is a compelling and well-justified need for paternalistic intervention in order to protect weaker parties. [9] Similarly the European view is that '[p]arty autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection'. [10]

Whilst many commentators have attempted to justify the existence of the rule against penalties, [\[11\]](#) none have been able to definitively silence its critics. Opponents assert that there is no reason of principle or policy why contracting parties should not be free to agree the measure of damages payable following a breach of contract and that the rule against penalties is therefore an unjustified and unnecessary restriction on party freedom.[\[12\]](#)

Nearly 30 years ago, Dillon LJ described the rule as 'too entrenched to be challenged' [\[13\]](#) and the recent decision of the Supreme Court in the conjoined appeals of *Cavendish Square Holdings BV v Makdessi* and *ParkingEye Limited v Beavis* [\[14\]](#) appears to support this hypothesis. In those appeals, the Supreme Court was invited to abolish the rule but, under the weight of authority that it has gathered in this jurisdiction and overseas, [\[15\]](#) the court declined to dispense with it altogether, opting instead merely to significantly narrow its scope. A clause will now be considered penal and therefore unenforceable where it is a 'secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party...'.[\[16\]](#)

Whilst the common law undoubtedly owes much to tradition, tradition hinders progress if in any respect the status quo is perceived to be beyond challenge. Accordingly, this paper is intended to once again place a spotlight on the rule against penalties. It is submitted that the historic objections apply equally to the new test and the weight of judicial authority in favour of the rule should not of itself be sufficient to secure its future.

2. THE HISTORY

In stark contrast to penalty clauses, English law has not objected to clauses prescribing the amount of damages that are payable following a breach, where the amount specified represents a genuine attempt by the parties to predict in advance the losses that might be suffered as a result of that breach; so-called 'liquidated damages' clauses. The courts have long recognised the commercial utility of such clauses and in particular the fact that they spare contracting parties from the time and cost that they might otherwise have to incur calculating, agreeing or even proving losses caused by a breach of contract.[\[17\]](#) However, when the courts have perceived that the dominant purpose of such a provision was not efficiency, but rather, deterrence and/or punishment, they have felt the need to intervene.

The modern version of the rule against penalties was first formally articulated over a century ago, in *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited*. [\[18\]](#) Dunlop

contracted to supply New Garage with certain goods and the written agreement expressly provided that New Garage would not (inter alia) resell any of the goods to private customers at prices below those specified by Dunlop. Clause 5 of the agreement further provided that, where New Garage failed to comply with this and/or other similar restrictions in the agreement, it would pay to Dunlop £5 '...for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty'. [19] Dunlop sued New Garage, relying on these provisions, and it was established that New Garage was in fact in breach. The question before the House of Lords was whether clause 5 was an enforceable liquidated damages clause, or an unenforceable penalty.

In the leading judgment, Lord Dunedin outlined a very detailed set of principles which were to be followed when deciding whether or not a particular clause was penal. In essence, the principles were as follows: (1) the parties' use of the words 'penalty' and/or 'liquidated damages' were not determinative; (2) a penalty clause was a provision requiring a payment of money which created fear [20] in some way, whereas a liquidated damages clause was a genuine pre-estimate of damage; (3) whether a clause was penal was a matter of construction and to be decided as at contract formation, rather than at breach; and (4) various tests existed to assist construction of the clause (of which Lord Dunedin outlined four) and these were also to be applied. [21]

Applying these principles in the *Dunlop* case itself, Lord Dunedin concluded that the term in question was an enforceable liquidated damages clause, not least because the precise amount of Dunlop's loss would have been difficult to ascertain and thus it was 'quite reasonable for parties to contract that they should estimate that damage at a certain figure...'. [22] However, the *Dunlop* case soon became known for far more than its result. In a century of case law that followed, Lord Dunedin's principles (and in particular the apparent dichotomy between a genuine pre-estimate of loss on the one hand and a penalty on the other) gained quasi-legislative status and were heavily relied upon by claimants and defendants alike. In the years that followed, the courts struggled to balance fairness and certainty when applying and developing this highly controversial rule. [23]

For example, such was the perceived advantage of the liquidated damages clause, that even in *Dunlop* itself, the courts felt compelled to caveat that such a clause would still be effective (and therefore not penal), even if accurate prediction of losses was almost impossible. [24] In other words, where an agreed measure of damages exceeded the losses that an innocent party would expect to

suffer, the clause would be penal and effectively unenforceable, but where it was almost impossible for parties to predict in advance the likely amount of such losses, they could potentially set values for liquidated damages at really quite an extravagant level. Whilst this approach favours party autonomy to a greater extent than would a more inflexible rule (and therefore it was a workable decision in *Dunlop*), this did create, right from the outset, extremely blurred boundaries between the acceptable (and enforceable) liquidated damages clause and the unacceptable (and unenforceable) penalty clause.

Post-*Dunlop*, it soon became clear that the rule was lacking justification, as the courts often felt compelled to restrict its application when faced with hard cases. Arguably the most significant example of this in recent years is *Lordsvale Finance Plc v Bank of Zambia*, [25] in which the High Court explained that a clause which did not represent a genuine pre-estimate of loss, would nevertheless be enforceable where 'there [was] a good commercial reason for deducing that deterrence [was] not the dominant contractual purpose of the term'. [26]

In addition, clauses drafted so as to make similar payments primary obligations (rather than secondary obligations arising following breach) were declared to be outside the scope of the rule, even where in reality they had the same effect. [27] Decisions like these have clearly watered down the rule, but in so doing they have ironically strengthened the intensity of its opposition, as well as creating even more uncertainty for litigants, who are left wondering whether the rule will be further restricted when their case reaches the courtroom.

In terms of resultant legal anomalies, perhaps the most outrageous example comes from the contrast between the judicial treatment of liquidated damages clauses and of deposits in property contracts. It has long been the case that deposits need not be repaid in the event that a transaction does not proceed to completion by reason of a purchaser's default, [28] yet it is not clear how this differs (morally, politically or economically) from a payment obligation triggered by a breach of contract; a conflict that did not go unnoticed by the Law Commission in its Working Paper of 1975, [29] but which remains unresolved to this day.

Amongst others, these issues gave rise to more than 100 years of case law on the penalty clause doctrine, culminating in the recent conjoined appeals of *Cavendish Square Holdings v Makdessi* and *ParkingEye Limited v Beavis*. [30]

3. THE CONJOINED APPEALS

(A) *CAVENDISH SQUARE HOLDINGS BV V MAKDESSI*

Mr Makdessi was a preeminent businessman in the Middle East, having founded a group 'which by 2008 had become the largest advertising and marketing communications group' in that region. [31] In February 2008, he and another shareholder agreed to sell a large proportion of their shares in the group's holding company to an entity within the WPP group of companies, a marketing communications services group which was described in the judgment as the largest in the world. [32] This agreement, together with some reorganisation of pre-existing holdings within the purchaser group, gave Cavendish Square Holdings BV (Cavendish) a 60 per cent shareholding in the target, and left Mr Makdessi and his fellow shareholder with 40 per cent. For present purposes, Cavendish can be treated as the purchaser entity in this transaction.

The consideration payable by Cavendish comprised fixed instalments totalling \$65.5m, followed by so-called 'interim' and 'final' payments, the values of which were to be later calculated with reference to the net operating profit achieved by the target between 2007 and 2011. At the time of the agreement the values of these latter payments were unknown, but the agreement stipulated they would be not more than \$82m, nor less than zero, such that there would in no circumstances be any refund of the fixed instalments. Mr Makdessi was to personally receive 53.88 per cent of all sums paid under the agreement.

The fixed payments alone represented more than double the warranted net asset value of the target and it was therefore clear that the majority (and potentially the vast majority) of the consideration was payable for goodwill. [33] As a measure stated to protect this goodwill, Mr Makdessi and his co-seller agreed, by clause 11.2, to restrictive covenants preventing them from competing with the target group for the two years following their employment with and/or membership of the target. Clause 5.1 of the agreement provided that if a seller, inter alia, was in breach of any of those restrictive covenants, Cavendish would no longer be required to pay that seller any outstanding share of the interim and/or final payments to which he would otherwise be entitled. Furthermore, in such circumstances, clause 5.6 provided that Cavendish would also be entitled to purchase the remaining shares held by the seller in default, for a sum reflective of the target's net asset value. This latter provision had the effect of cancelling that seller's put option under the agreement, pursuant to which he might have received substantially more for his remaining shares than under clause 5.6, depending on the net operating profits of the

target at the relevant time. The range of possible losses that could accrue to Mr Makdessi as a result of the clauses in question was anything from 'zero to over \$44m'. [\[34\]](#)

When the agreement was entered into, the parties also agreed that Mr Makdessi would serve as non-executive director and non-executive chairman of the target, for an initial term of 18 months. Some time after the agreement, Mr Makdessi was alleged to be in breach of his fiduciary duties owed to the target as a result of these appointments. He made certain admissions and reached a settlement with the target; he agreed to pay \$500,000. However, Cavendish argued that the very same conduct also amounted to breaches of the restrictive covenants under the agreement, thereby engaging clauses 5.1 and 5.6, relieving its obligation to make the 'interim' and 'final' payments and entitling it to exercise its call option in respect of Mr Makdessi's remaining shares.

Mr Makdessi argued that Cavendish had itself suffered no loss in addition to that suffered by the target (which had been compensated) and that clauses 5.1 and 5.6 were unenforceable as they offended the penalty rule. At first instance, Burton J was unpersuaded that either clause amounted to a penalty, considering there to be a commercial justification for each clause. [\[35\]](#) Mr Makdessi appealed.

Christopher Clarke LJ delivered the leading judgment in the Court of Appeal, incorporating what has been described as 'a masterfully concise but insightful analysis of the development of the law of penalties'. [\[36\]](#) He acknowledged that the rule was 'a blatant interference with freedom of contract' [\[37\]](#) and that clauses 5.1 and 5.6 fell outside the 'paradigm case in which the law of penalties [was] engaged'; [\[38\]](#) but nevertheless he upheld the appeal and concluded that the clauses were unenforceable penalties, [\[39\]](#) as neither constituted a genuine pre-estimate of loss, [\[40\]](#) nor did either have a 'justifiable commercial or economic function'. [\[41\]](#) Both Tomlinson LJ and Patten LJ endorsed Christopher Clarke LJ's judgment without further comment.

In its appeal, Cavendish invited the Supreme Court to consider three questions: (1) whether the rule against penalties applied to commercial contracts between sophisticated parties; (2) if it did so apply, whether clauses 5.1 and 5.6 were within the scope of the rule; and (3) if they were within its scope, whether they were in fact penal. The primary position advocated by Miss Joanna Smith QC (for Cavendish) was that *Dunlop* should be overruled and the doctrine of penalties should be dispensed with altogether, since it was out of date, difficult to apply and without a sound legal foundation. [\[42\]](#) In the alternative she argued that, if the doctrine was to remain, it should cease to apply to commercial contracts or

that it should only apply to clauses which require payment of a sum of money following breach and/or to those which cannot be commercially justified. [\[43\]](#)

The leading judgment was delivered by Lord Neuberger and Lord Sumption SCJJ (with whom Lord Carnwath SCJJ agreed). In their judgment, they described the penalty rule variously as: 'an ancient, haphazardly constructed edifice which has not weathered well';[\[44\]](#) 'somewhat artificial'; [\[45\]](#) and 'an interference with freedom of contract [which] undermines the certainty which parties are entitled to expect of the law', [\[46\]](#) as well as noting that the 'test for distinguishing penal from other principles [was] unclear' [\[47\]](#) and that they 'rather doubt[ed] that the courts would have invented the rule today if their predecessors had not done so three centuries ago'. [\[48\]](#) In spite of this scathing criticism, the court declined to abrogate the rule altogether, citing that the rule: has a long history; exists in all major systems of law; features in 'influential attempts to codify the law of contracts internationally'; provides important protection for professionals and small business who fall outside the scope of the consumer legislation; and has been the subject of two significant Law Commission reports, neither of which recommended abolition. [\[49\]](#) They further reasoned that the rule was consistent with other judge-made principles, such as 'relief from forfeiture, the equity of redemption, and refusal to grant specific performance'.[\[50\]](#)

After a detailed analysis of the historical development of the rule from *Peachy v Duke of Somerset* [\[51\]](#) to the present day, the court concluded that it was 'unfortunate' that many of the cases on this issue over the last century represented 'little more than a detailed exegesis or application of [Lord Dunedin's four tests in *Dunlop*] with a view to discovering whether the clause in issue can be brought within one or more of them'; such a formulaic approach was neither intended by Lord Dunedin, nor did it reflect the reasons of the majority for reaching the decision in that case.[\[52\]](#) As such, the court clarified that:

'The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter.'[\[53\]](#)

The only real caveat to this was that:

'In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences for breach.'[\[54\]](#)

Even in *Cavendish v Makdessi* itself, the court was not united in its application of this new test. In particular, the leading judgment (supported by three Justices) concluded that clauses 5.1 and 5.6 were not secondary obligations intended to punish Mr Makdessi, but rather, they were primary obligations to which the penalty rule did not apply, [55] stating that there was 'no reason in principle why a contract should not provide for a party to earn his remuneration, or part of it, by performing his obligations'. [56] Specifically, clause 5.1 was 'plainly not a liquidated damages clause' and was 'not a contractual alternative to damages at law'. [57] In contrast, Lord Hodge and Lord Clarke JSC preferred to keep an open mind regarding the classification of clause 5.1 as either primary or secondary, [58] and there is no explicit support for the leading judgment on this point in the judgments of Lord Mance or Lord Toulson JSC. This division may give rise to some uncertainty for future litigants seeking to establish whether or not a clause falls within the scope of the rule and therefore the new test at all.

The court was however united in its conclusion that neither clause 5.1 nor clause 5.6 contravened the rule against penalties. Cavendish had 'a legitimate interest in the observance of the restrictive covenants which extended beyond the recovery of that loss'. [59] The court refused to render the clauses unenforceable saying that:

'We cannot know what Cavendish would have paid without the assurance of the Sellers' loyalty, even assuming that they would have bought the business at all. We cannot know whether the basic price or the maximum price fixed by clause 3.1 would have been the same if they were not adjustable in the event of breach of the restrictive covenants.' [60]

Equally, the purpose of clause 5.6 was to sever the connection between the parties in the event of a breach of the restrictive covenants. The court said that the call option (for a transfer at net asset value) triggered by clause 5.6, 'reflect[ed] the reduced price which Cavendish was prepared to pay for the acquisition of the business in circumstances where it could not count on the loyalty of Mr Makdessi and/or [his co-seller]'. [61]

(B) PARKINGEYE LIMITED V BEAVIS

The second case in the conjoined appeal also sought clarification of the rule against penalties, but in a consumer context. On 15 April 2013, Barry Beavis parked his car in a private car park which was managed by ParkingEye Limited (ParkingEye). The car park contained a large number of clearly visible signs, outlining the car park's terms of use; in particular, the signs stated:

'2 hour max stay...Failure to comply...will result in a Parking Charge of £85...A reduction of the Parking Charge is available for a period, as detailed in the Parking Charge Notice. The reduced amount payable will not exceed £75, and the overall amount will not exceed £150 prior to any court action, after which additional costs will be incurred.' [\[62\]](#)

Mr Beavis left his car in the car park for two hours and 56 minutes. Accordingly, ParkingEye issued a Parking Charge Notice, seeking to recover the sum of £85. Mr Beavis refused to pay the charge and ParkingEye eventually issued proceedings. The main point in dispute between the parties was whether the contractual requirement to pay the parking charge amounted to either: (1) a penalty clause; or (2) an unfair term under the (then applicable) Unfair Terms in Consumer Contract Regulations 1999 (see now Part 2 of the Consumer Rights Act 2015). If either question was answered in the affirmative, the clause would be unenforceable.

At first instance, Judge Moloney QC accepted that ParkingEye did not suffer any specific financial loss when a motorist stayed in the car park for more than two hours, since once vacated a space would typically either be left empty, or filled by another motorist taking advantage of the free period; in that respect, the parking charge term 'had the characteristics of a penalty'. [\[63\]](#) However, the judge nevertheless considered that it was not a penalty, but rather, the clause was 'commercially justifiable because it was neither improper in its purpose nor manifestly excessive in its amount'. [\[64\]](#)

In the Court of Appeal, counsel for Mr Beavis argued that the key question was whether the clause was intended to deter breach and that, if it was, it had to be an unenforceable penalty. [\[65\]](#) However, the Court of Appeal preferred the respondent's analysis; namely, that the real questions were whether a term was extravagant and unconscionable and whether it was commercially justifiable. Unanimously, the Court of Appeal upheld the decision of the lower court, reasoning that the clause was commercially justifiable, not least because a mechanism of this kind was necessary to ensure that ParkingEye did not lose its contract with the landowner, which would give rise to significant indirect financial losses, similar to those arising in *Dunlop* [\[66\]](#).

On appeal, the Supreme Court held firstly that the Parking Charge did fall within the scope of the rule against penalties. Primarily, this was a contractual agreement which concerned the provision by ParkingEye to Beavis of a licence to park on certain private land, subject to Beavis' agreement to the conditions of doing so. It was only when Beavis failed to comply with the terms of the contractual licence, that the obligation to pay the parking charge arose; accordingly, that payment obligation was a secondary obligation

arising on breach, subject to the rule against penalties. [67]

However, adopting the new formulation of the rule as outlined above, the court decided that the parking charge was not intended merely to punish breach, but rather, ParkingEye had a legitimate purpose in including such a term, namely, ensuring the efficient use of the parking spaces, for the benefit of the retail tenants on site and to make some money in order to profit from its activities, without which the first purpose could not be achieved. [68] As part of its agreement with the landowner, ParkingEye guaranteed to pay the landowner a minimum sum per week, and typically it had paid about £1,000 per week, which money could come only from Parking Charges levied at overstaying motorists. [69] The court said:

'[t]hese two objectives appear to us to be perfectly reasonably in themselves. Subject to the penalty rule and the Regulations, the imposition of a charge to deter overstayers is a reasonable mode of achieving them. Indeed, once it is resolved to allow up to two hours free parking, it is difficult to see how else those objectives could be achieved.' [70]

The court placed reliance on the fact that: (1) the sum of £85 was less than the maximum charge stipulated by the British Parking Association in its Code of Practice; (2) local authorities would charge a slightly lower sum, but may well not offer 2 hours of free parking; and (3) similar schemes were in place across the country. [71] As such, the court decided that the clause was not a penalty. [72]

The court also decided that the clause did not fall foul of the consumer rights legislation, [73] but the court's reasoning on this issue is beyond the scope of this paper.

4. THE NEW TEST AND THE FUTURE

By application of the *Dunlop* test as it was commonly understood prior to the Supreme Court's recent judgment, one might reasonably have advised that the relevant clauses in *Makdessi* and *ParkingEye* themselves were likely to be declared penal - indeed, if *Cavendish* and *Beavis* respectively had not been so advised, these cases would not have reached the Supreme Court. However, they now provide valuable authority for contracting parties who wish to enforce similar provisions, in circumstances where the actual loss suffered is much less than the value of the contractually agreed remedy. As such, there is no doubt that the rule against penalties has once again been significantly weakened and is now narrower in its scope. Far more clauses triggered by a breach of contract will now be enforceable and the judgment has been described as a 'pyrrhic

victory' [74] for the rule; sophisticated commercial parties in particular can take real comfort from this decision.

It seems likely that the absence of a clear justification for the rule's existence played at least some part in influencing the Supreme Court's decision to restrict its application so dramatically. For opponents of the rule, such a step is to be commended since it reduces the injustice that results from its existence. However, a mere reduction in injustice (however significant) will not and should not mark the end of a campaign to abolish any doctrine which is alleged to lack an underpinning justification for its intrusion into party freedom.

For the Supreme Court, the long history of the rule and its equivalents in other well-respected systems of law deterred it from removing the doctrine from English law altogether. To justify abolition, Lord Mance felt the Kingdom separated itself from so general a consensus'. [76] Whilst these factors explain and to some extent justify the court's reluctance to relegate the doctrine to the history books, legal theorists and democratically elected law makers should not feel constrained by such matters in the same way.

t '...there would have to be shown the strongest reasons for so radical a reversal of jurisprudence which goes back over a century in its current definition and much longer in its antecedents', [75] adding that: '[i]t would be odd, to say the least if the United

In summary therefore, the rule against penalties does survive post-*Makdessi*, yet there is nothing in the judgment that points to any new justification for the doctrine's existence. We now face an unfortunate problem: a doctrine which is alleged to be without any underpinning theoretical or policy justification has now been a part of our law for so long, and is present in so many systems of law, that it has arguably become too entrenched to be challenged.

5. CONCLUSIONS AND RECOMMENDATIONS

Calls for a reversal of the trend towards paternalism at the expense of party autonomy existed before *Cavendish v Makdessi* came to the Supreme Court [77] and, since the scope of the rule against penalties has now almost certainly been reduced by that decision, the case can be seen as a small victory for supporters of that cause. However, the rule against penalties lives on and the Supreme Court's judgment does little to advance the case for its existence, so calls for its abolition will and should continue.

In the *Cavendish* judgment, in defence of the penalty rule Lord Mance SCJ reasoned that:

'Cavendish's submission that this court should abolish or rewrite radically the penalty doctrine is made without the benefit of the sort of research into the consequences and merits of such a step, which the Law Commission or Parliament would undertake before venturing upon it.'

It is unfortunate that a rule so lacking in justification is now entrenched to this degree. It is submitted that further research into the consequences of abolition (and not the weight of existing authority) should determine whether or not there is a place for the rule against contractual penalties in the future of English law.

[1] *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1915] AC 79.

[2] See for example *El Makdessi v Cavendish Square Holdings BV & Anor* [2014] 2 All ER (Comm) 125.

[3] S Worthington 'Common Law Values: The Role of Party Autonomy in Private Law' in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016), Ch 14 (pp 301-322); J Morgan *Great Debates in Law: Contract Law* (2nd edn, Palgrave 2015) pp 234-242.

[4] *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1446 per Diplock LJ.

[5] *Chertsey Urban District Council v Mixnam's Properties Ltd* [1965] AC 735 at 764 per Upjohn LJ.

[6] For a full discussion see PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979).

[7] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848.

[8] Case C-441/07 *European Commission v Alrosa Co Ltd* [2010] ECR I-5945, Opinion of AG Kokott, at para 225.

[9] See for example the Unfair Contract Terms Act 1977 and now the Consumer Rights Act 2015.

[10] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* Com(2011) 0635 final, recital 30.

[11] See H Collins 'Fairness in Agreed Remedies' in C Willet (ed), *Aspects of Fairness in Contract* (Blackstone Press 1996), pp 97-121; MA Eisenberg 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211; and SV Shffrin 'The Divergence of Contract and Promise' (2007) 120 *Harvard Law Review* 708.

[12] See for example Worthington, above n 3.

[13] *Jobson v Jobson* [1989] 1 WLR 1026, 1032.

[14] [2015] 3 WLR 1373.

[15] See in particular the High Court of Australia's recent decision to extend the rule's application in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

[16] *Makdessi*, above n 14, at [41].

[17] *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, at 11.

[18] *Dunlop*, above n 1.

[19] *Ibid*, p 85.

[20] The precise words used by Lord Dunedin were 'a payment of money stipulated as in terrorem of the offending party' (see *Dunlop*, above n 1, at 86), but later case law has interpreted this as a payment intended to deter breach and no fear is considered to be necessary.

[21] *Dunlop*, above n 1, at 86-87.

[22] *Ibid*, at 88.

[23] See for example *Watts, Watts and Company, Limited v Mitsui and Company, Limited* [1917] AC 227; *Cooden Engineering Co LD v Stanford* [1953] 1 QB 86; *Phonographic Equipment (1958) Ltd and Another v Muslu* [1961] 1 WLR 1379; *Bridge Appellant v Campbell Discount Co Ltd* [1962] 2 WLR 439; *Paul Jeremy Duffen v FRA BO SpA* [1999] ECC 58; *Giraud UK Ltd v Smith* [2000] IRLR 763; *Jeancharm Ltd (t/a Beaver International) v Barnet Football Club Ltd* [2003] EWCA Civ 58; *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] BLR 271; *Murray v Leisureplay Plc* [2005] IRLR 946; and *Lansat Shipping Co Ltd v Glencore Grain BV (The Paragon)* [2009] All ER (Comm) 12.

[24] *Dunlop*, above n 1, at 88.

[25] [1996] 3 WLR 688.

[26] *Ibid*, at 763 per Coleman J.

[27] *Export Credits Guarantee Department v Universal Oil Products Co and Others* [1983] 1 WLR 399.

[28] *Howe v Smith* (1884) 27 Ch D 89.

[29] Law Commission *Penalty Clauses and Forfeiture of Monies Paid* (Law Com No 61, 1975).

[30] *Makdessi*, above n 14.

[31] *Ibid*, at [44].

[32] *Ibid*, at [45].

[33] *Ibid*, at [49].

[34] *El Makdessi v Cavendish Square Holdings BV & Anor* [2013] EWCA Civ 1539, at [107].

[35] *Cavendish Square Holdings BV v Makdessi* [2013] 1 All ER (Comm) 787 (QB).

[36] E Peel 'Unjustified penalties or an unjustified rule against penalties?' (2014) 130 LQR 365.

[37] *Makdessi*, above n 34, at [44].

[38] *Ibid*, at [46].

[39] *Ibid*, at [128]

[40] *Ibid*, at [117].

[41] *Ibid*, at [121].

[42] *Makdessi*, above n 14, at [126].

[43] *Ibid*.

[44] *Ibid*, at [3].

[45] *Ibid*, at [16].

[46] *Ibid*, at [33].

[47] *Ibid*, at [3].

[48] *Ibid*, at [36].

[49] *Ibid*, at [37]-[38].

[50] Ibid, at [39].

[51] (1720) 1 Strange 447.

[52] *Makdessi*, above n 14, at [22].

[53] Ibid, at [32].

[54] Ibid, at [35].

[55] Ibid, at [73].

[56] Ibid.

[57] Ibid, at [74].

[58] Ibid, at [270] and [291].

[59] Ibid.

[60] Ibid, at [75].

[61] Ibid, at [81].

[62] Ibid, at [91].

[63] Ibid, at [5].

[64] Ibid.

[65] Ibid, at [6].

[66] Ibid, at [24].

[67] Ibid, at [94].

[68] Ibid, at [98].

[69] Ibid, at [124].

[70] Ibid, at [98].

[71] Ibid, at [99].

[72] Ibid, at [101].

[73] Ibid, at [107].

[74] W Day 'A Pyrrhic victory for the doctrine against penalties: *Makdessi v Cavendish Square Holding BV*' [2016] JBL 115-127, p 115; see also W Day 'Penalty clauses following *Makdessi*: postscript' [2016] JBL 251-252.

[75] *Makdessi*, above n 14, at [162].

[76] Ibid, at [166].

[77] Worthington, above n 3, p234.