THE 'INTEREST' BASED PENALTY TESTS IN *PACIOCCO* AND *CAVENDISH/PARKINGEYE* AND THE LAW OF PENALTIES AND DAMAGES IN AUSTRALIA AND THE UNITED KINGDOM

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This article maps the current penalty tests in Australia and the United Kingdom following recent revision. It demonstrates how this revision has relaxed the relationship between sums recoverable under liquidated damages clauses and damages recoverable at law for breach of contract. This article acknowledges that the relaxation of that relationship makes liquidated damages clauses more attractive to powerful contracting parties. However, it also cautions that the new penalties tests may spark certain further legal developments, including to realign the scope of interests protectable under liquidated damages clauses with damages recoverable at common law.

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I INTRODUCTION

In 2015, in the cases of *Cavendish Square Holdings BV v Makdessi* (*Cavendish*) and *ParkingEye Ltd v Beavis* (*ParkingEye*) (collectively, *Cavendish/ParkingEye*),[1] the Supreme Court of the United Kingdom (Supreme Court) revised the traditional *Dunlop* test[2] of what constitutes a penalty under the law of the United Kingdom (UK). The Supreme Court undertook an 'interests' based analysis, comparing the payment stipulated by the impugned provisions with the interests those provisions sought to protect. A mere few months later, the High Court of Australia (High Court) undertook a similar revision in *Paciocco v Australia and New Zealand Banking Group Ltd*[3] (*Paciocco*). Since these two decisions were handed down, their revised tests have been the subject of much literature. However, as yet, relatively little attention has been given to the issues of how the new Australian and UK penalty tests interact with, and may impact on, the law of damages or prompt further development in the penalty doctrines in each respective jurisdiction. These issues are taken as this article's focus.

Part II begins by outlining *Cavendish/ParkingEye* and *Paciocco* and the revised penalty test adopted in each. Part III examines how *Cavendish/ParkingEye* and *Paciocco* conceptualise the relationship between liquidated damages clauses and damages at common law. This Part pays close attention to how certain aspects of the revised penalty tests distance sums

[1] [2016] AC 1172 (*Cavendish*).
[2] The traditional test derived from *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.
[3] (2016) 258 CLR 525 (*Paciocco*).

recoverable under a liquidated damages clause from damages recoverable for breach of contract. Part IV discusses potential implications that the revised penalty tests may have for the law of penalties and damages in Australia and the United Kingdom. In particular, this Part considers whether *Cavendish/ParkingEye* and *Paciocco* will increase the incentive for powerful contracting parties to seek to protect their interests via liquidated damages clauses. Part IV also explores possibilities of further legal development, including ways by which the Australian and UK law on penalties may develop in greater conformity with the common law of damages in each jurisdiction.

This article ultimately argues that because the revised penalty tests further unhinge the interests protected by liquidated damages clauses from contractual damages awards, in many respects, they are an increasingly attractive option to contractual parties. Notwithstanding, this article flags the possibility of pressure to revise the *Paciocco* and *Cavendish/ParkingEye* tests to bring them more into line with recovery possible at law.

II REVISING THE UK AND AUSTRALIAN PENALTY TESTS

Since the 1915 decision of *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (*Dunlop*),[4] penalty analysis in the UK has largely focused on whether the payment stipulated by an alleged penalty is a genuine pre-estimate of loss. The High Court affirmed this orthodox *Dunlop* approach in *Ringrow Pty Ltd v BP Australia Pty Ltd*.[5] In *Andrews v Australia and New Zealand Banking Group Ltd* (*Andrews*),[6] the High Court revisited the penalty doctrine, confirming that in Australia its equitable basis endures and, therefore, that it may apply in instances falling short of breach.[7] Notwithstanding, *Andrews* did not disturb the orthodox predominant focus on loss in determining whether a provision is penal. In *Cavendish/ParkingEye*, the Supreme Court did not accept that the penalty

[4] [1915] AC 79.
[5] (2005) 224 CLR 656.
[6] (2012) 247 CLR 205 (*Andrews*).
[7] *Andrews* (2012) 247 CLR 205, 227 [32], [45], [62], [63], [78] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

doctrine could apply if there was no breach.[8] Significantly, it also developed a revised interests based penalty test which the High Court substantially adopted in *Paciocco.*[9] As outlined below, these new Australian and UK penalty tests compare an alleged penalty with the interests in their due observance, rather than with the loss suffered by the party relying on the provision.

A The Cavendish Test

Cavendish related to the enforceability of two non-competition clauses enlivened upon default under a share sale agreement. One clause disentitled the seller from certain interim and final payments to which he would have otherwise been entitled under the share sale agreement. The second clause entitled the buyer to acquire an option to buy the seller's remaining shares at a price which disregarded goodwill. *ParkingEye* concerned the enforceability of a parking fee levied on motorists whose vehicles were parked beyond two hours in an otherwise free park.

In these cases, the Supreme Court revisited the seminal case of *Dunlop*, drawing more heavily on the judgment of Lord Atkinson than the oft-cited and applied tests of Lord Dunedin.[10] Lords Neuberger and Sumption formulated a test for determining whether a clause is penal in nature as being 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.[11] Put in other words, the test is whether the sum stipulated by the clause is exorbitant, extravagant or unconscionable when regard is had to the legitimate interest of the relying party in the performance of the contract.[12] Very similar formulations were proposed by other Justices of the Supreme Court.[13]

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[8] *Cavendish* [2016] AC 1172, 1196 [12] (Lords Neuberger and Sumption), 1240 [129] (Lord Mance), 1274 [239]-[240] (Lord Hodge).
[9] J G H Stumbles, 'Paciocco in the High Court: Penalties and Late Payment Fees' (2017) 91 ALJ 969, 976.
[10] *Cavendish* [2016] AC 1172, 1199-1200 [22]-[23] (Lords Neuberger and Sumption).
[11] Ibid 1204 [31]-[32] (Lords Neuberger and Sumption).
[12] Ibid 1204 [32] (Lords Neuberger and Sumption).
[13] Ibid 1247 [152] (Lord Mance) 1278 [255] (Lord Hodge) (endorsed by Lord Toulson JSC at 1285-6 [293]). See further: Lord David Hope 'The Law on Penalties – A Wasted Opportunity?' (2016) 33

B The Paciocco Test

Paciocco involved the enforceability of a late payment fee imposed on Australia and New Zealand Bank (ANZ) credit card holders for failure to pay the credit card amount shown on their monthly statement within 28 days or failure to immediately pay any overdue or overlimit amount.

Kiefel J (with whom French CJ agreed) considered the relevant penalty test to be whether the stipulated sum is out of all proportion to the interest in receiving the payment.[14] Similarly, Gageler J held that whether an impugned clause is a penalty depends on whether it is a genuine pre-estimate of the innocent party's probable or possible interest in its due observance.[15] His Honour considered that a clause will be a penalty where the negative incentive to perform the contract is so far out of proportion with the positive interest in performance that the negative incentive amounts to deterrence by threat of punishment.[16] Keane J cited *Cavendish/ParkingEye* for the correct inquiry, namely whether the sum is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.[17] Nettle J dissented, more or less applying the orthodox 'genuine pre-estimate of loss' test.[18]

III The Relationship Between Liquidated Damages Clauses and Damages at Common Law

Whereas the orthodox *Dunlop* test clearly required an extent of correspondence between the sum protected by liquidated damages clauses and damages awarded at common law, the *Cavendish/ParkingEye* and *Paciocco* tests

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Journal of Contract Law 93, 105; Nicholas A Tiverios 'A Restatement of Relief Against Contractual Penalties (I): Underlying Principles in Equity and at Common Law' (2017) 11 *Journal of Equity* 1, 20; Lord David Hope 'The Law on Penalties – A Wasted Opportunity?' (2016) 33 *Journal of Contract Law* 93, 104.

[14] *Paciocco* (2016) 258 CLR 525, 557 [69] (Kiefel J).

[15] Ibid 579 [159] (Gageler J).

[16] Ibid 580 [164] (Gageler J).

[17] Ibid 612 [270] (Keane J).

[18] Ibid 634 [340]-[341] (Nettle J).

do not.[19] Instead, the new penalty tests allow liquidated damages clauses to protect losses, and other interests, which would not be recoverable at law.[20] Aspects of the *Cavendish/ParkingEye* and *Paciocco* decisions which demonstrate this are canvassed below. In particular, attention is given to (1) the reformulation of the penalty inquiry away from concepts of 'loss', (2) the movement away from the notion of compensation directly flowing from breach; and (3) the potential inapplicability of concepts of causation and remoteness to liquidated damages clauses. The likely result of *Cavendish/ParkingEye* and *Paciocco* is less correlation between a sum payable under a liquidated damage clauses and the sum which would be payable for a breach of that contract under Australian or UK common law.

A Distancing the Inquiry from Concepts of Loss

In *Cavendish*, Lords Neuberger and Sumption articulated that the penalty inquiry has become whether the payment stipulated is commensurate with the *interest* in performance rather than with the *loss* occasioned.[21] Likewise, in *Paciocco*, Keane J explained that the penalty inquiry is not the proportionality between the payment stipulated and what would be recovered in an action for breach of contract.[22]

In *Paciocco*, certain High Court Justices stressed the concept of 'damage' as distinct from 'damages', thereby distancing the penalty test from damages recoverable for breach of contract. Gageler J emphasised that 'pre-estimate of

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[19] J W Carter, Wayne Courtney and G J Tolhurst 'Assessment of Contractual Penalties: *Dunlop* Deflated' (2017) 34 *Journal of Contract Law* 4, 34. It should be noted that Carter, Courtney and Tolhurst have doubted whether common law concepts of causation and remoteness ever played a direct role in characterising penalty clauses.

[20] Leonie Chapman 'Paciocco v Australia New Zealand Banking Group Ltd' (2016) *Australian Banking and Finance Law Bulletin* 176, 178; Petrina Macpherson and Tom Kearney 'Beyond Bank Fees: What Does Paciocco v ANZ Mean for Liquidated Damages Provisions in Construction Contracts?' (2016) *Australian Construction Law Bulletin* 233, 234; Clare Langford and Michael Legg 'High Court Rules Late Payment Fees not Penalties in Bank Fees Class Action' (2016) 27 *Journal of Banking and Finance Law Practice* 256, 260.

[21] *Cavendish* [2016] AC 1172, 1200 [23] (Lords Neuberger and Sumption).

[22] *Paciocco* (2016) 258 CLR 525, 615 [279] (Keane J). By contrast, at 634 [340]-[341], Nettle J held that the sum permissibly protected pursuant to a liquidated damages clause was limited to the greatest loss that could conceivably be proven confined to what would be recoverable for breach of contract:

damage' refers to 'damage' rather than 'damages'.[23] That is, in his Honour's view, the correct reference is to the probable or possible interest in the due performance of the principle obligation and not the damages recoverable in an action for breach of contract at common law.[24] Keane J agreed that the correct concept is 'damage' rather than 'damages', that is, the loss caused by the breach and not the remedy which might be awarded by a court.[25] Carter, Courtney and Tolhurst have criticised these Justices for emphasising this distinction.[26] In the opinion of those authors, that distinction was always a part of the orthodox model which was never premised on a close relationship with court damages awards because 'the facility to pre-assess liability would be deprived of all utility if the penalty criterion were divergence between the agreed sum and what the court would actually award.'[27] Despite this criticism, Gageler and Keane JJ's definitive clarification of the present position is helpful and instructive.

B Movement Away from Compensation Directly Flowing and Common Law Causation and Remoteness

Cavendish/ParkingEye clarified that, in the UK, liquidated damages clauses are not limited to the protection of compensatory interests. Lords Neuberger and Sumption suggested that the relevant 'interest' protected by an impugned provision is not necessarily limited to the mere recovery of compensation flowing directly from breach.[28] According to their Honours, a liquidated damages clause may protect an interest over and above pecuniary compensation.[29] Lord Mance agreed with Lords Neuberger and Sumption, debunking the traditionally held dichotomy between the compensatory and the penal.[30] Lord Hodge intimated that the compensatory aspect of that dichotomy corresponds with a calculation of what

[23] *Paciocco* (2016) 258 CLR 525, 574 [145] (Gageler J).
[24] Ibid.
[25] Ibid 616 [283] (Keane J). It should be noted that Keane J does not confine recovery to loss caused by the breach but extends it to legitimate interests.
[26] Carter, Courtney and Tolhurst, above n 26, 16, 19.
[27] Ibid 16.
[28] *Cavendish* [2016] AC 1172, 1200 [23], 1204 [32] (Lords Neuberger and Sumption).
[29] Ibid 1200 [23] (Lords Neuberger and Sumption).
[30] Ibid 1247 [152] (Lord Mance).

common law damages would be awarded.[31] Lords Neuberger and Sumption articulated that liquidated damages clauses will be deterrent (and, therefore, penal unless protecting a legitimate interest) where they stipulate a sum greater than that recoverable in the exercise of the right to recover damages for breach of contract.[32] Therefore, together, these Justices suggest that liquidated damages clauses may protect interests over and above what damages would be awarded at common law without being deemed penalty clauses.

In *Paciocco*, it was likewise accepted that liquidated damages clauses can protect interests other than mere compensation consequent on breach. Kiefel J (with whom French CJ agreed) noted that, in *Dunlop*, Lord Atkinson recognised that a provision may protect an interest greater than and different to compensation for loss directly caused by breach.[33] Keane J also held that the interests of a party relying on an impugned provision are not confined to the reimbursement of loss directly occasioned by default.[34]

Members of the High Court clarified that the sum stipulated in a liquidated damages clause is not limited by the concepts of causation and remoteness which would apply to a court award of damages.[35] For example, Gageler J held that liquidated damages clauses 'cannot be limited by considerations of common law causation of damage' to protecting only against incremental loss that a party relying on the provision would sustain as a direct result of the breach.[36] Carter, Courtney and Tolhurst consider that this may mean that Australian law permits parties to 'provide for loss of bargain damages by way of liquidated damages upon the exercise of a contractual right to terminate for breach, even though at common law such a claim would fail for lack of causation.'[37]

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[31] Ibid 1268 [221] (Lord Hodge).
[32] Ibid1226 [99] (Lords Neuberger and Sumption).
[33] *Paciocco* (2016) 258 CLR 525, 546 [26] (Kiefel J).
[34] Ibid 593 [216] (Keane J).
[35] By contrast, Nettle J considered that causation and remoteness do serve to limit the sum which can be stipulated by a liquidated damages clause. See: *Paciocco* (2016) 258 CLR 525, 634-6 [340]-[341], [346] (Nettle J).
[36] *Paciocco* (2016) 258 CLR 525, 579 [161] (Gageler J).
[37] Carter, Courtney and Tolhurst, above n 26, 20.

Particular emphasis was also given to the role, or lack thereof, of common law considerations of remoteness. Gageler J stated that a relying party's protection is not constrained by considerations of common law remoteness of damage merely because the nature and extent of damage is not apparent or foreseeable to the other party at the time of contractual formation.[38] His Honour considered that, even though regulatory capital costs would be too remote to be recovered in an action for breach of contract, they were legitimate commercial interests of ANZ and as such were protected by the impugned provision.[39] Comparably, Keane J considered that liquidated damages clauses could protect loss too remote to be compensable by way of damages by virtue of the rules in *Hadley v Baxendale*.[40] Indeed, it has been argued that even under the traditional *Dunlop* test considerations of remoteness should play no direct role in penalties law.[41] This is because any impugned provision purports to communicate loss anticipated so as to come within the second limb of *Hadley v Baxendale*.[42]

The above examples demonstrate how, upon implementation of the new penalty tests espoused in *Cavendish/ParkingEye* and *Paciocco*, the scope of liquidated damages clauses in Australia and the UK will likely be less constrained by damages awardable at common law for breach of contract. Particularly in the Australian jurisdiction, this distancing seems unsurprising, given the High Court's statements in *Andrews* that the penalty doctrine applies in circumstances falling short of breach.[43] It seems misguided to require proportionality between court damage awards for breach of contract and liquidated damages clauses where the latter does not necessarily pertain to breach.

IV IMPLICATIONS FOR LIQUIDATED DAMAGES CLAUSES AND AUSTRALIAN AND UK PENALTIES AND DAMAGES LAW

[38] *Paciocco* (2016) 258 CLR 525, 579 [162] (Gageler J).
[39] Ibid 583 [171]-[172] (Gageler J).
[40] Ibid 616 [283] (Keane J).
[41] Carter, Courtney and Tolhurst, above n 26, 16, 20.
[42] Ibid, seemingly relying on Diplock CJ in *Robophone.Facilities Ltd v Blank* [1966] 1 WLR 1428.
[43] *Andrews* (2012) 247 CLR 205, 227 [32], [45], [62], [63], [78] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). By contrast, in the United Kingdom, the penalty doctrine only operates in respect of provisions enlivened upon breach. See: *Cavendish* [2016] AC 1172, 1196 [12] (Lords Neuberger and Sumption), 1240 [129] (Lord Mance), 1274 [239]-[240] (Lord Hodge).

Having reviewed how the revised *Cavendish/ParkingEye* and *Paciocco* tests have relaxed the relationship between the sums protected by liquidated damages clauses and awarded as damages at common law, this Part turns to possible attendant implications. It seeks to deal mainly with (1) the likelihood of liquidated damages clauses increasing in use; and (2) how the Australian and UK penalty doctrines may develop in the future.

A Increased Push for Liquidated Damages Clauses?

The new penalty tests espoused in *Cavendish/ParkingEye* and *Paciocco* leave open the distinct possibility that Australia and the UK will see an increased rate of liquidated damages clauses.[44] Powerful contracting parties may be more inclined to insist on liquidated damages clauses now that the Supreme Court and High Court have (1) reformulated the penalty inquiry so as to expand the scope of stipulated sums to wider interests, rather than being confined to compensation for loss; and as a corollary (2) clarified that common law concepts of causation and remoteness do not limit that scope. Such parties are likely to be attracted to relying on liquidated damages clauses for their ability to protect a wider scope of interests, for example reputational, wider commercial, business or financial, intangible and unquantifiable interests.[45] Further, powerful contracting parties may seek to capitalise on the ability to circumvent concepts of common law causation and remoteness. To the extent that a contracting party relies on recovery for 'interests', causation considerations are unlikely to arise. It is difficult to immediately identify a connection between 'interests' now protectable under liquidated damages clauses and concepts of causation. Indeed, no clear nexus even emerges between 'interests' and the contract, within which the relevant liquidated damages clause is included. Likewise, the very presence of a liquidated

[44] In the context of construction contracts, see: Macpherson and Kearney, above n 27, 234.
[45] *Paciocco* (2016) 258 CLR 525, 579 [161] (Gageler J). See: Macpherson and Kearney, above n 27, 234; Peter Size 'Paciocco v Australia and New Zealand Banking Group Ltd and Penalties v "Unfair Contract Terms": The Differences Between Two Laws That Can Both Invalidate a Contractual Term' (2016) *Competition and Consumer Law News* 271, 271; Langford and Legg, above n 27, 260.

damages clause demonstrates that loss connected with those interests is contemplated and remoteness is irrelevant. Comparatively, in the absence of a liquidated damages clause, in order to recover losses under a contract, such a contracting party would need to sue for breach, upon which recovery might be curtailed by causation and remoteness inquiries.

Further, there is little to deter a contracting party from seeking to rely on a liquidated damages clause as, even if that clause is found to be penal, they are in no worse a position. In the UK, penalties are void and wholly unenforceable.[46] No obligation to pay is imposed and the contracting parties are simply left to seek a remedy for breach of contract pursuant to common law principles governing relief.[47] In Australia, the position may be even more favourable; *Andrews* clarified that penalties are enforceable pro tanto on a scaled down basis.[48] The scaling process has not been fully explained by the High Court either in *Andrews* or *Paciocco* as scaling did not arise as a possibility.[49] Notwithstanding, *Andrews* indicates that a penalty is enforced only to the extent that compensation can be made for prejudice suffered by failure of the primary stipulation and that a party who can provide compensation is relieved to that degree from liability to satisfy the collateral stipulation.[50] It has been said that a penalty is enforceable to the extent of the innocent party's actual loss or to the extent of compensation for failure of the primary stipulation.[51] It may be that a penalty is scaled to an extent commensurate with what would be recoverable by the relying party at common law. However, the High Court has not eliminated the possibility that a relying

[46] *Cavendish* [2016] AC 1172, 1194-5 [9] (Lords Neuberger and Sumption), 1283-4 [283] (Lord Hodge); *Clydebank Engineering & Shipbuilding Co Ltd v Yzquierdo y Castaneda* [1905] AC 6, 9, 10 (Earl of Halsbury LC); *Modern Engeineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, 698 (Lord Reid), 703 (Lord Morris of Borth-y-Gest), 723-4 (Lord Salmon); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 C 694, 702 (Lord Diplock).
[47] Tiverios, above n 19, 2; Stumbles, above n 13, 983.
[48] *Andrews* (20120 247 CLR 205, 232 [60] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Jobson v Johnson* [1989] 1 WLR 1026, 1042, 1045-1046 (Nicholls LJ). See also: Tiverios, above n 19, 2-3; Langford and Legg, above n 27, 260.
[49] Stumbles, above n 13, 984-5.
[50] *Andrews* (2012) 247 CLR 205, 216-7 [10] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Paciocco* (2016) 258 CLR 525, 569 [125] (Gageler J).
[51] Langford and Legg, above n 27, 260; Franklin Morean and Andrew Bruton 'The Decision in Andrews v Australia and New Zealand Banking Group Ltd: Implications for Take-or-pay Clauses in Long-term Gas Supply Agreements' (2014) *Australian Energy and Resources Law Bulletin* 12, 13; Stumbles, above n 13, 984.

party may find itself in a better position, by virtue of the scaling process, than at common law. For example, by circumventing causation and remoteness inquiries. The above, coupled with the fact that the onus generally falls on the party impugning a provision to establish that it is a penalty,[52] means that powerful contracting parties have much to gain and little to lose by insisting on the inclusion of liquidated damages clauses in their contracts.

B Further Developments in the Law of Damages or Penalties?

As demonstrated above, the *Cavendish/ParkingEye* and *Paciocco* penalty tests permit a party to protect interests far beyond those recoverable as losses at common law or even those immediately relating to the contract in question. One question which arises is whether this relationship (or lack thereof) is sustainable. It has been said that the penalty doctrine 'prevents clauses that impermissibly derogate too far from the state's jurisdiction to impose remedies for a breach of contract'.[53] It might be thought that for courts to stay relevant there must be a degree of proportionality between what they can award and what contracting parties can apportion between themselves.

There are two ways in which such a concern could be addressed. First, the revised penalty tests might serve to somewhat shape the future development of the common law of damages, thereby lessening the gap between it and the operation of liquidated damages clauses. Stumbles considers that *Paciocco* 'raises the question as to the impact of the legitimate interest test on the measure of unliquidated damages at general law for breach of contract'.[54]

Secondly, the UK and Australian courts may further revise the new penalty tests so as to narrow the scope of liquidated damages clauses in greater conformity with recovery at common law. An examination of *Paciocco* and *Cavendish/ParkingEye* reveals that there may be several methods of doing so. Although, at first glance, these cases appear to exhibit clear top-down reasoning,

[52] Chapman, above n 27, 178; Size, above n 53, 273.
[53] Tiverios, above n 19, 21-2.
[54] Stumbles, above n 13, 982.

they also provide examples of the 'principled' development of penalties law. Each contains multiple judgments and draws on several authorities, none of which are overruled. It may be observed that the High Court and Supreme Court have retained many options by which to narrow the scope of the new penalty tests. This paper offers but a few for consideration.

One avenue is through developing the concept of 'interests', against which the proportionality of an impugned provision is measured.[55] For example, the concept of 'legitimacy of interest' introduced by Lords Neuberger and Sumption in *Cavendish/ParkingEye* could be narrowed. A similar confining concept could be incorporated into the *Paciocco* test.[56] By carving out interests not recognised at law as 'illegitimate' interests, liquidated damages clauses could be brought further back into line with court awards. A second means would be through developing the concept of 'in terrorem' and/or the role of punitiveness. For example, in *Paciocco*, Gageler J considered that the concept of 'in terrorem' captured the essence of the conception to which the whole of penalty analysis is directed.[57] Therefore, his Honour postulated a sole purpose test, whereby an impugned provision will be penal only if it cannot be explained by an interest of the innocent party, making its purpose to punish. In this respect, it is also worth noting that none of the impugned provisions in *Cavendish/ParkingEye* or *Paciocco* were deemed punitive in nature. Therefore, in the future it might be possible for the Supreme Court and the High Court to distinguish those cases on this basis. A clear third option is for those courts to limit the application of the revised tests to particular circumstances.[58]

C Broader Legal Developments?

[55] Ibid 980-1.
[56] For example, as suggested by Keane J at *Paciocco* (2016) 258 CLR 525, 595 [222], 607 [256], 613 [261]-[262], 616 [283].
[57] *Paciocco* (2016) 258 CLR 525, 581 [165] (Gageler J).
[58] Stumbles, above n 13, 981.

In addition to the above, it is possible that the, somewhat drastic, adjustments made to penalties law in *Cavendish/ParkingEye* and *Paciocco* may result in other legal developments. One example is the contemplation of statutory or common law development of the law on unconscionability. Such development may be prompted by the need for regulation in response to the tilt of power towards strong contracting parties, ushered in by the new penalty tests. A further example, in Australia at least, relates to the law surrounding scaling. In *Andrews*, the High Court flagged the possibility of scaling.[59] However, little explanation as to how such a process would proceed was offered then or has been offered subsequently. The possibility of scaling, and how it is to be undertaken, is even more unclear given the *Paciocco* revision. Any further development in the law on scaling, prompted by the new penalty test, would be a welcome and beneficial addition to the area of penalties law.

V CONCLUSION

This article began by examining the reformulation of penalty test in Australia and UK in *Paciocco* and *Cavendish/ParkingEye* respectively. Part III demonstrated how aspects of each judgment divorce sums recoverable pursuant to liquidated damages from those recoverable at common law for breach of contract. In particular, it focused on the movement of the penalty inquiries away from the concepts of loss, of compensation directly flowing and of common law causation and remoteness.

Part IV explored potential implications of this relaxation of the relationship between liquidated damages clauses and court awards. It submitted that the revised tests make liquidated damages clauses a more attractive option for powerful contracting parties and, therefore, that an increase in reliance on

[59] *Andrews* (20120 247 CLR 205, 232 [60] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

liquidated damages clauses might ensue. It also questioned the sustainability of such a disconnect between liquidated damages clauses and damages recoverable at law. It considered the consequent possibilities of the revised penalty tests (1) influencing future development of the common law of damages or (2) being narrowed to better correspond with court awards of damages. It was observed that the latter could be achieved by refining the concepts of 'legitimacy' of interest or 'punitiveness' or by confining the revised tests to particular circumstances. Ultimately, this article suggests that while it currently seems advisable for powerful contracting parties to protect their interests via liquidated damages clauses, those parties should be alive to the future possibilities that the very broad tests laid out in *Cavendish* and *Paciocco* may be narrowed or impacted by further legal developments, such as in the area of unconscionability.