LAW REFORM

Liquidated Damages and Penalties, Discussion Paper no. 10, May 1988, Law Reform Commission of Victoria.

The Commission is required to examine and make recommendations on the distinction between liquidated damages and penalties in contract law. This involves an examination of the desirability of reducing unnecessary regulation in business, and of the work done by UNCITRAL in the area of liquidated damages and penalty clauses in international trade contracts.

The law seeks to strike a balance between competing principles. The first is the principle of freedom of contract, which dictates that the law should be slow in intervening to declare a liquidated damages clause void or unenforceable. This facilitates efficiency in business dealings. The second arises from the fact that an agreed damages clause may set an amount bearing no relationship to the loss likely to be suffered on breach. The innocent party should be entitled to no more than compensation. The rule against penalties is the compromise.

However, the rule has been subject to criticism on a number of grounds: it only applies in the case of breach, leading to the anomolous situation that a penalty clause stated to come into effect on the happening of some other event remains unenforceable; and it does not apply to a clause framed as an indulgence, that is a provision under which an obligation to pay a certain amount is defeated if a lesser amount is paid by a certain date.

Other problems lie in the basis of assessment, the difficulty arising when the innocent party causes the loss, and an inflexible application of the principle in some recent cases, calling into question the basis of the relief.

The Commission has tentatively concluded that the present rule against penalties should be abolished, in favour of a more flexible rule, investing in the Courts a discretion to set aside an agreed damages clause, which in the circumstances is found to be unconscionable. In the case of clauses providing for forfeiture of money paid as a deposit of instalment, the Commission tentatively concluded that there should be no change to the law.

The Commission examined the work of UNIDROIT and UNCITRAL. It concluded that it was restricted to international contracts, and of limited assistance in reviewing domestic law relating to agreed damages clauses.

Priorities, Discussion Paper No. 6, May 1988, Law Reform Commission of Victoria.

The introduction of the Torrens System achieved the virtual elimination of priorities disputes through adoption of the principle that priority in registration gave priority in interest. However, the existence of proprietary interests outside the register gave rise to further priority problems. The discussion paper considers aspects of this problem.

Registration and its significance

The Transfer of Land Act confers indefeasibility on registered interests and supercedes general law priorities rules in relation to Torrens System land. This is advantageous in several respects:

— the purchaser has a virtually infallible guide to the possibility of an adverse claim.
— owners of minor interests in land can protect their interests.
— the system avoids the cost, delays and complexity of a system recognising unregistered interests.
— it introduces consistency in the law.

However, difficulties in interpretation have required clarification to reinforce the effectiveness of registration. The commission proposes that it should be clarified that there is no requirement to deal with the registered proprietor or to deal on the faith of the register before the protection of registration is given. It notes that lodging a document does not amount to registration. A registered title obtained through a gift by a person who is not fraudulent should be indefeasible, and the issue of a duplicate title should not be compulsory, but optional at the request of the owner.

Unregistered Interests

The Commission lists the important unregistered interests, then considers a proposal for the elimination of priority disputes by encouraging registration of interests. This proposal would dispose of the uncertainty, firstly, in deciding whether an interest exists, and then in determining its priority. The Commission considered that terms contracts and informal mortgages, now equitable interests, should be converted to registrable interests. Proprietors of other unregistered interests should be able to protect interests by lodging caveats. In particular, the Commission considers:

— that the Sale of Land Act should be amended so the credit obtained from the vendor is provided by purchase back from the purchaser to the vendor;
— that registration of mortgages should be encouraged, and an unregistered mortagage not protected by caveat should be defeated by a subsequent transaction;
— that the interest of a purchaser who fails to lodge a caveat to protect it, should be defeated by any subsequent inconsistent caveat or registration;
— that the absolute restriction on the registration of trusts should remain; and
— that beneficiaries should not be required to lodge a caveat, but their interests should be defeated by any inconsistent caveat or registration.

Priority Between Unregistered Interests

The Commission goes on to consider the rules governing priority between unregistered interests based on the competing policy requirements of predictability and social equity. It then considers the use and effect of a caveat, the way in which courts have interpreted the effect of a caveat, and the Canadian approach.

In particular, the Commission proposes that caveats should be available to protect both registrable and unregistrable interests in land, and that they should determine priority.

Our Criminal Procedure, Communique on Report 32, June 1988, Law Reform Commission of Canada.

The Communique contains a summary of principles underlying Report 32, tabled in the House of Commons in Canada, entitled *Our Criminal Procedure*. The Report will constitute the basis for the forthcoming model Code of Criminal Procedure. The review is intended to overcome the scattered and incoherent procedural provisions in the present Criminal Code, and replace it with coherent principles reflected in the organisation, structure and content of the Code.

Sale of Land, Discussion Paper no. 8, May 1988, Law Reform Commission of Victoria.

This Discussion Paper is concerned with the procedures governing the sale of land registered under the Transfer of Land Act 1958, their further simplication and modernisation pursuant to the introduction of the Government's centralised land information network, (Landata), and increasing the efficiency of their operation. The paper traces the procedures involved in a conveyance:

Obligations of a seller before entering a contract

The vendor's statement must comply with s. 32 of the Sale of Land Act. Section 36(1) of the House Contracts Guarantee Act 1987, (not yet proclaimed), and the Subdivision Bill 1987 (not yet law) will impose additional requirements. A material misstatement or omission is a ground for rescission until acceptance of title and entitlement to possession. However, the Commission proposes that the vendor should not be required to provide information in the vendor's statement concerning provision of services or the suitability of land for the buyer's intended use.

The contract itself

The Commission proposes that s. 126 and related provisions of the Instruments Act should be repealed, removing the requirement that a contract for the sale of land be evidenced in writing. It considers the money ceiling for the cooling-off period under s. 31 Sale of Land Act should be increased and revised regularly on a set basis. Contracts should indicate where a cooling-off period is not available.

The Commission also recommends that:

— terms contracts should be replaced by a transfer to the buyer and a mortgage back to the seller.
— gaps in open contracts should be filled by statute, rather than common-law terms, but parties should be permitted to contract out of these statutory terms, which would otherwise be automatically implied.
— the conditions of sale applying to a contract for sale of land should be consolidated and re-drafted in modern language.

— the seller should be required to indicate whether the land as occupied and as shown on the title are the same, and to identify the differences in the vendor's statement.

Between Contract and Settlement

A number of proposals are made here, relating to insurance for damage to the property, defects in buildings, requisitions on title, and breach of contract.

Settlement

The Commission proposes that the doctrine of merger should be retained. It then examines the practice surrounding making title. It suggests that, subject to the contract of sale, a seller of land should be entitled to make title by delivering to the buyer all documents necessary to have the buyer registered as owner. These should not have to be in the form of a direct transfer from the registered owner to the buyer.

Special Titles

The Commission considers that stratum titles should be coverted by law to strata titles, and service companies to bodies corporate.

Improvements in Conveyancing

The possibilities for streamlining consequent upon the Landata system are considered, along with registrable contracts of sale, dispensing with the buyer's signature, the use of duplicate titles, and the preparation of the separate transfer by the buyer. The development of mechanised lodging through external terminals is canvassed, as are the necessary security considerations subsequent thereto.

Evidence, Report 56, June 1988, New South Wales Law Reform Commission.

The Australian Law Reform Commission, acting under a reference dated July 1979, produced a draft Evidence Bill. The N.S.W. Law Reform Commission, having suspended its own work on evidence pending the outcome of the A.L.R.C.'s inquiry, considered the desirability of adopting the A.L.R.C.'s recommendations. In the interests of uniformity between states, the N.S.W. Commission put aside many of its reservations about the draft Bill and adopted the bulk of the A.L.R.C.'s proposals. The Report contains a draft Evidence Bill (N.S.W.) and recommends that it be enacted. It differs only in minor respects from the A.L.R.C. draft Bill.

Given the breadth of the reforms, the Commission considered that a formal system should be established to ensure that the new law is monitored closely.

The Commission placed some weight on the advantages of uniformity in avoiding confusion and inconvenience. The forthcoming implementation of cross-vesting legislation, in all states and federally, increases the need for uniformity.

The existing laws are excessively technical and have developed in an ad-hoc manner, leading to inconsistency and uncertainty. As the primary purpose of the rules of evidence is to facilitate the fact-finding task of the court, the proposals should reflect that purpose.

The Commission accepts the A.L.R.C. guidelines for striking a balance between the prosecution and the accused in a criminal trial, whilst in the case of a civil trial, the rules of evidence should be directed towards dispute-resolution. The Commission stresses that the law should be expressed in the form of clear and simple rules, minimising judicial discretion, and that the rules of evidence should be formulated in the light of modern knowledge about human behaviour and perceptions, taking into account modern technological developments.

The Commission goes on to examine the A.L.R.C. draft Bill and the reasons for implementing changes to the present law. The only substantive difference between the A.L.R.C. draft Bill and the N.S.W.L.R.C. recommedations relates to unsworn statements.

The Commission proceeds to deal with matters not dealt with by the A.L.R.C. Bill, but covered in the federal sphere by the A.C.T. Evidence Ordinance 1972. Implementation of the A.L.R.C. Bill without alteration would leave gaps in the N.S.W. law.

Developments in case law since the A.L.R.C. Report are examined, and recommendations are made for consequential amendments in N.S.W.

Finally, the Report considers the utilisation of judicial power to direct affidavit evidence in order to expedite proceedings. The Commission makes no recommendation on the issue.

In Vitro Fertilization, Report 2, July 1988, New South Wales Law Reform Commission.

This report on In Vitro Fertilization is published pursuant to the New South Wales Law Reform Commission's general reference on Artifical Conception of 5 October 1983. It recommends that the practice of IVF should continue. A majority of the Commission recommends that all types of research be permitted on the human embryo. A minority recommends that research be restricted to research of a therapeutic, non-destructive nature.

The principal recommendation of the report is that a council should be established, to be called the New South Wales Biomedical Council, to advise the Minister for Health and develop guidelines for the medical profession in the practice and research of IVF. It is recommended that the Council consist of an equal number of men and women members appointed by the Governor, to be drawn from a wide range of disciplines and fields of interest, as well as the general community. Its functions would cover giving policy advice, giving advice on the practice of IVF, and the assessment and approval of all research proposed in the future. It is suggested that any individual or institution intending to engage in IVF research be required to obtain a licence, and that the Council would have the power to revoke such licences.

However the Commission recommends that certain matters should be controlled by legislation and not by the N.S.W. Biomedical Council. It proposes the following legislative controls:

— cloning and any research involving trans-species fertilization should be prohibited,
— the maximum period for which a human embyro can be stored should be 10 years,
— no human embyro should be permitted to develop *in vitro* beyond the time when implementation would normally occur (14 days),
— an embryo should not be used, dealth with or disposed of except with the consent of the couple for whom the ovum was fertilized.

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