

## Andrews v ANZ and penalty clauses

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*Andrews v Australia and New Zealand Banking Group* [2012] HCA 30 decided on 6 September 2012 will have most profound implications for construction law and adjudication. For construction law, it is the most important case since *Pavey & Matthews v Paul* (1986) 162 CLR 221 recognised that unjust enrichment is part of the common law of Australia. Soon *Andrews* will be the case most often cited by claimants in adjudication.

Construction contracts are replete with penalty clauses. In particular, time bar clauses have been used to penalise contractors and subcontractors. Examples of other penalty clauses are considered below. The message this paper is intended to convey is that contractors and subcontractors should not submit to such penalties. Penalty provisions are void.

At present, I find that the case most often cited in adjudications is *John Goss Projects v Leighton Contractors* [2006] NSWSC 798. In that case McDougall J considered a clause that provided that the respondent Leighton would not be liable upon any claim by the contractor John Goss in respect of any matter arising out of the contract including but not limited to variations and claims for damages unless the claim together with full particulars thereof was lodged with Leighton not later than ten business days after the date the contractor became aware or should reasonably have become aware of the occurrence of the events or circumstances on which the claim is based.

The contractor argued that the clause was rendered void by s 34 [*No contracting out*] of the *Building and Construction Industry Security of Payment Act 1999* (NSW) because clause 45 provided a time limitation for the making of claims under the Act which was inconsistent with s 13(4) of the Act which allows a claimant to serve a payment claim within of 12 months after construction work was last carried out. McDougall J found that the time bar was effective and was not inconsistent with the Act. He said:

80 Where John Goss wishes to claim an amount over and above the Contract Amount (for example, for a variation, or for delay or disruption costs), it is required, as a precondition of such a claim, to give notice under, and complying with the terms of, cl 45. It is obvious why a head contractor in Leighton's position might stipulate for such notice. Firstly, it will enable the claim to be investigated promptly (and, perhaps, before any work comprised in it is rebuilt, or built over). Secondly, it will enable Leighton to monitor its overall exposure to the subcontractor. Thirdly, it will enable Leighton to

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assess its own position *vis a vis* its principal. No doubt, there are other good reasons for stipulations of the kind found in cl 45.

81 It is correct to say that cl 45 operates to bar claims if the notice provisions in it are not followed. But it does not follow that cl 45 is thereby inconsistent with the rights given under the Act, so as to attract the operation of one or other of the alternatives set out in s 34(2).

Most major construction companies now have similar time bars in their construction contracts and in adjudication they invoke the time bars to avoid paying a subcontractor what would otherwise be the subcontractor's entitlement. They also use the time bar (when the claimant has failed to claim an extension of time within the prescribed period) to enable them to recoup liquidated damages even though they have delayed the claimant.

One major contractor has general conditions of subcontract that provide that the subcontractor has no entitlement to an extension of time unless the subcontractor has given a written notice of claim within 3 business days after the event causing the delay first occurs.

Those same general conditions provide that the subcontractor must comply with any direction of the contractor and if the subcontractor does not, before complying with the direction and within 3 business days of the direction, provide a written notice of a claim for additional payment and an extension of time, the subcontractor will not be entitled to any additional money or time for complying with the direction.

When the issue of a time bar arises in adjudication the respondent almost invariably cites *John Goss Project v Leighton* as authority for the effectiveness of the time bar. What was not considered in that case was whether the effect of the time bar was to impose a penalty. To date, I have not found any claimant who has attacked the time bar clause on the ground that it is a penalty. However, following the High Court decision in *Andrews*, I anticipate that that will become a major issue in adjudication.

*Andrews* has not changed the law. It merely clarifies the law on penalties. As the Court acknowledges at [38], even in Roman law a penalty might be reduced if found to be excessive. Prior to *Andrews* there was a widespread belief that a contract provision could only be a penalty if it punished a party for breaching the contract. For example, in *Interstar Wholesale Finance v Integral Home Loans* [2008] NSWCA 310 the Court of Appeal at [106] held that the doctrine of penalties is limited to the circumstances of breach of contract. In *Andrews* at [50] the High Court said that the Court of Appeal misunderstood the scope of the penalty doctrine.

Interstar was in the business of lending money on the security of mortgages. Integral contracted with Interstar to introduce borrowers and to manage the loans. There were two contracts. Interstar terminated the contracts on the basis that Integral had engaged in deceptive activity in relation to loan application files. The validity of the termination was not in issue. Clause 20 of the contract

provided that upon termination Integral would have no right to any fees. The consequence was that Integral could not earn fees which had not accrued at the date of termination but would have been earned but for termination. The Court of Appeal found that there was no forfeiture of earned amounts and no relevant breach of contract that could engage the law of penalties.

In *Interstar* the contractor provided services but the time for payment had not yet arrived because the services were incomplete. The principal claimed that the contractor's entitlement to payment was extinguished by the termination of the contract. In *John Goss* the subcontractor had carried out work. The principal contended that the subcontractor's entitlement to payment was extinguished when the subcontractor failed to give a notice. Both are instances of the forfeiture by one party of an entitlement to money where the amount forfeited bore no relationship to the damages suffered by the other party.

In *Andrews*, the High Court found that *Interstar* was wrongly decided. For the same reason, *John Goss* was wrongly decided. Granted, the claimant in *John Goss* failed to raise the argument that the time bar was a penalty. However, the time bar clearly penalised *John Goss*, Leighton's subcontractor. Now any claimant faced with such a time bar clause should argue that the time bar is a penalty. The reasons given by McDougall J for upholding the validity of the time bar are not good law.

*Andrews* involved a class action by customers against the ANZ Bank. The argument of the Bank customers was that certain fees charged by the Bank were void because they were a penalty. The fees were not payable for breach by the customers of their contracts with the bank. If an 'instruction' [for example a cheque or order for a periodical payment] to the Bank by a customer would have the effect of overdrawing the customer's account, the Bank could either honour the instruction [allow the account to be overdrawn] or dishonour it. The Bank would then charge the customer an 'Honour Fee' for honouring the instruction or an 'Outward Dishonour Fee' for dishonouring the instruction.

The customers argued that these fees were a penalty and were therefore unenforceable. They argued that the fees were imposed upon or in default of the occurrence of stipulated events but were out of all proportion to the loss or damage which might have been sustained by the Bank by reason of the occurrence of the events. (*Andrews* at [27]). The Bank argued that since the fees were not charged for breach of contract, they could not be a penalty. The primary judge followed the Court of Appeal decision in *Interstar* and found that the fees were not a penalty. The High Court said that *Interstar* was wrongly decided and, consequently, the primary judge erred in concluding that in the absence of a contractual breach the fees could not be categorised as penalties (*Andrews* at [78]).

The penalty doctrine is described in *Andrews* at [10] as follows:

In general terms, a stipulation *prima facie* imposes a penalty on a party ("the first party") if, as a matter of substance, it is collateral (or accessory) to a

primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and *in terrorem* of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.

I will paraphrase the penalty doctrine in the context of a construction contract. Assume that a construction contract provides that the contractor may or must do something. That is a primary stipulation. If the contractor does not do that, then the primary stipulation has failed. If then the contract imposes upon the contractor an additional detriment to the benefit of the other party, the additional detriment is a collateral or accessory stipulation and that second stipulation may be a penalty.

If compensation can be made to the other party for the prejudice suffered by the failure of the contractor to do the thing first stipulated, the additional detriment can only be enforced to the extent that that is necessary to compensate the other party. To the extent that the additional detriment exceeds that compensation, it is a penalty and unenforceable.

Consider that doctrine in the context of the *John Goss* case. Leighton's subcontract provided that the subcontractor John Goss could make a claim for damages or delay provided that the claim together with full particulars thereof was lodged with Leighton not later than ten business days after the date the contractor became aware or should reasonably have become aware of the occurrence of the events or circumstance on which the claim is based. That was a primary stipulation. A collateral stipulation [the barring of any claim not notified within time] imposed upon the subcontractor an additional detriment to the benefit of Leighton.

The penalty doctrine provides that if compensation can be made to Leighton for the prejudice suffered by the failure of the subcontractor to give the notice within time, the additional detriment can only be enforced to the extent that that is necessary to compensate Leighton. If the additional detriment exceeds that compensation, it is a penalty and unenforceable.

If the notice of claim is one day late, will Leighton incur any damage? If it is a month late what damage, if any, will Leighton incur? The collateral stipulation would result in the forfeiture of an entitlement to payment of the same amount whether the delay is one day or one month or any other period. Similarly, a lump sum for liquidated damages for delay would be a penalty if the same amount was payable irrespective of the length of the delay.

In *John Goss* at [80] McDougall J said:

It is obvious why a head contractor in Leighton's position might stipulate for such notice. Firstly, it will enable the claim to be investigated promptly (and, perhaps, before any work comprised in it is rebuilt, or built over). Secondly, it will enable Leighton to monitor its overall exposure to the subcontractor. Thirdly, it will enable Leighton to assess its own position *vis a vis* its principal.

There is nothing wrong with stipulating for the notice. As McDougall J said, there may be good reasons for such a notice. The question is not whether the stipulation for the notice was valid. The question is whether the collateral stipulation [the barring of the claim] is a penalty. The collateral stipulation imposes an additional detriment on the subcontractor to the benefit of Leighton.

The penalty doctrine provides that if compensation can be made to Leighton for the prejudice suffered by the failure of the contractor to give notice within ten business days, the additional detriment imposed upon the subcontractor can only be enforced to the extent that that is necessary to compensate Leighton. If the additional detriment exceeds that compensation, it is a penalty and unenforceable.

McDougall J identifies three possible prejudices to Leighton, namely, the inability to investigate the claim promptly, the inability to monitor its exposure to the subcontractor and the inability to assess Leighton's position *vis a vis* its principal. Assuming that Leighton suffered these or any other prejudices, can the loss to Leighton can be quantified and damages assessed? The detriment imposed upon the subcontractor bears no relationship to the loss, if any, suffered by Leighton. Consequently, if the loss to Leighton is capable of assessment the second stipulation [the barring of the subcontractor's claim] is a penalty and unenforceable.

The High Court at [11] said that the penalty doctrine does not apply where the prejudice or damage to the interests of the second party [Leighton in the above example] is unsusceptible of evaluation and assessment in money terms. The Court said, 'It is the availability of compensation which generates the "equity" upon which the court intervenes; without it, the parties are left to their rights and obligations.'

No doubt respondents in the position of Leightons in *John Goss* will point to the three possible prejudices identified by McDougall J in *John Goss*, and other alleged prejudices, and argue that the prejudice and damage that they will suffer if notice of a claim is not given within the prescribed time is not susceptible to assessment in money terms. They will argue that therefore the penalty doctrine does not apply.

The fact that it is difficult to assess damages in money terms does not mean that the damages are not assessable in money terms. The first of the three possible prejudices identified by McDougall J is the inability to investigate the claim promptly. He gives the example of where the work compromised is built over. By reason of delay in receipt of the notice, Leighton may have additional cost of investigation of the claim. This can be assessed in money terms.

The other possible prejudices identified by McDougall J are the inability of Leighton to monitor its exposure to the subcontractor and assess its position *vis a vis* its principal. The delay in receipt of the notice of a claim may mean that at times Leighton's exposure to the subcontractor may be greater than Leighton thinks it is. Will this clause cause any loss to Leighton? If as a consequence of the delay in receipt of the notice of a claim, Leighton's exposure to the subcontractor or its position *vis a vis* the principal changes, it seems that the change can be measured in terms of damages. Whether the prejudice or damage to Leighton is insusceptible of evaluation in money terms would be a matter for evidence.

For the penalty doctrine to apply to a time bar, it is not necessary that there is an express contractual requirement for the claimant to give a notice within the specified time. It is sufficient that the absence of a notice within the prescribed time will impose upon the claimant a detriment that is a penalty. See *Andrews* at [67]. The detriment does not have to be the payment by the claimant to the respondent of a sum of money. See *Andrews* at [12].

A well known and sound authority on penalties is *Gilbert-Ash (Northern) v Modern Engineering* [1973] 1 BLR 75. Paragraph 3 of clause 14 of the subcontract the subject of that case provided:

If the Sub-contractor fails to comply with any of the conditions of this Sub-contract, the Contractor reserves the right to withhold payment of any monies due or becoming due to the Sub-contractor.

The House of Lords held that that provision was a penalty. Lord Salmon said:

Paragraph 3 purports to confer much more on contractors than the law allows. According to the natural meaning of its language, it would enable contractors to suspend or withhold payment of very large sums of money due to the sub-contractors in the event of the sub-contractors committing some minor breach of contract causing only trivial damage in no way comparable to the amount owed to sub-contractors. The paragraph is, therefore, unenforceable since it provides for the extraction of a penalty.

The following is an extract from the standard form of subcontract of a major Australian contractor:

The Builder is not obliged to make any payment under the Subcontract until the Subcontractor has ... provided evidence satisfactory to the Builder that as at the relevant date, the Subcontractor is not in breach of the Subcontract.

That is a penalty clause similar to that in *Gilbert Ash*. That same subcontract provides that a progress claim must comply with numerous requirements, in the absence of any of which, the contractor is not liable to make a progress payment. One such requirement is a statutory declaration by the subcontractor that the subcontractor is not in breach of the subcontract and that all secondary subcontractors [ie subcontractors and suppliers to the subcontractor] have been paid all amounts due and payable and there are no disputes in relation to those persons.

The requirements for a progress claim are a primary stipulation. The detriment imposed upon the subcontractor in the event of failure of this primary stipulation is the loss of a right to a progress payment. That detriment bears no relationship to the loss suffered by the head contractor by reason of the progress claim not containing all the stipulated contents. Consequently, the second stipulation [the barring of the subcontractor's claim] is a penalty and unenforceable.

While I am on that subcontract, I will point out some other penalty provisions. The usual definition of 'practical completion' has been expanded so that practical completion is no longer the stage when the works are practically complete and available for occupation. 'Practical completion' under the subcontract is not achieved until all parts of the subcontract works including rectification of any defects are complete. The primary stipulation is that the subcontractor must achieve 'practical completion' by a specified date.

The secondary stipulation is that if the subcontractor does not achieve 'practical completion' by that date, the subcontractor must pay liquidated damages of \$40,000 per day. The detriment which the head contractor incurs as a consequence of all parts of the work including rectification of any defects not being complete may be nominal. The liquidated damages are therefore a penalty.

A party who wants to retain the right to liquidated damages for failure to achieve practical completion by the date for practical completion must be careful to ensure that 'practical completion' is not defined to include matters that will not cause loss commensurate with the amount of liquidated damages.

That same subcontract provides that the subcontractor is only entitled to claim an extension of time for delays caused by the head contractor. It provides that if the subcontractor wishes to claim an extension of time for practical completion the subcontractor must within three business days give a written notice specifying various matters. That is a primary stipulation. The collateral stipulation is that if the subcontractor does not give that notice within time, the subcontractor is not entitled to an extension of time. If the consequence is that the subcontractor is barred from an entitlement to delay costs and liable for liquidated damages for a period of delay caused by the head contractor, the secondary stipulation will result in a penalty.

The subcontract provides that the subcontractor must comply with all directions of the head contractor under the subcontract. If the subcontractor believes that compliance with the direction will involve additional payment, the subcontractor must give the head contractor a notice in writing within 3 business days. That is the primary stipulation. The collateral stipulation is that if the subcontractor does not give the notice within that time, the subcontractor must comply with the direction and will not be entitled to any payment for doing so. This would apply no matter how large a variation directed by the head contractor might be.

If the collateral stipulation [the bar on an entitlement to be paid for extra work] imposes upon the subcontractor a detriment that bears no relationship to the loss suffered by the head contractor by reason of the failure of the subcontractor to give notice within time, the collateral stipulation is a penalty. For the failure of the subcontractor to give notice within time, the head contractor would only be entitled to compensation that is equivalent to the loss that the subcontractor's delay in giving notice caused to the head contractor.

The subcontract contains a clause titled 'Notification of Claims' which states that if any provision of the subcontract specifies a time limit by which a claim must be made and the subcontractor fails to bring the claim within the time limit specified, the subcontractor will have no entitlement to bring the claim. It also provides that if there is no time limit specified for a claim, the subcontractor must make the claim within 5 business days. Otherwise the subcontractor will have no claim for any money, extension of time, cost, expense or damage whatsoever whether pursuant to the contract, in tort, under statute or in restitution. That is clearly a penalty clause.

The clause provides that the head contractor will have 40 days to assess the claim. If the subcontractor disputes the assessment the subcontractor must give a notice of dispute within 5 business days. If the subcontractor fails to do so, the head contractor will not be liable on the claim and the subcontractor will be barred from pursuing the claim. That is another penalty clause.

Another penal provision in this subcontract that is also found in many other construction contracts is the requirement that before release of the final payment, retention or security [usually a bank guarantee] the subcontractor must give the head contractor a deed of release. The required deed must release the head contractor and all associated companies from all past, present or future claims arising out of or in connection with the subcontract works.

The primary stipulation is that the subcontractor will give the head contractor the deed. The collateral stipulation imposes upon the subcontractor a detriment [namely, the withholding of final payment and release of security] that bears no relationship to the loss suffered by the head contractor by reason of the failure of the subcontractor to give the deed. The collateral stipulation is a penalty. For failure to provide the deed, the head contractor may be able to claim damages if, in fact, the head contractor incurs any damages.

Termination clauses in construction contracts are frequently penal. The subcontract that I have been referring to has a provision that if the subcontractor commits any breach of the subcontract, the head contractor can suspend payment and require the subcontractor to show cause why the head contractor should not take the whole or any part of the works out of the hands of the subcontractor or terminate the subcontract.

The clause provides that if by the time specified in the show cause notice the subcontractor failed 'in the discretion of the head contractor', to show cause, the head contractor can take work out of the hands of the subcontractor, and use the



subcontractor's plant, materials and subcontracts to complete the work, or terminate the contract. It provides that following termination, the head contractor is not required to make any further payments to the subcontractor. I won't bother citing the rest of the clause. It suffices to say that for a minor breach by the subcontractor, the collateral stipulation may impose upon the subcontractor a detriment that bears no relationship to the loss suffered by the head contractor by reason of the breach. The collateral stipulation may be a penalty. The head contractor would only be entitled to such damages as flow from the breach by the subcontractor. Loss of bargain damages would only be recoverable by the head contractor where the breach by the subcontractor is so serious that termination by the head contractor was justified.

In *Andrews* at [13] the High Court says that there is no distinction in principle between a stipulation upon default for the transfer or use of property and the payment of money. The Court referred to *Forestry Commission of New South Wales v Stefanetto* [1976] HCA 3. In that case the High Court considered a clause that allowed the principal to take over and use the contractor's plant to complete the works upon default by the contractor. Clause 43.3 provided that no compensation would be payable to the contractor for the use of the plant by the principal. The Court found that the additional cost to the principal of completion of the work would be reduced by the use of the plant. There was no evidence that the principal's use of the plant would impose an impermissible burden or penalty on the contractor. Jacobs J at [6] said:

The additional cost of the works to the appellant payable by the respondent under cl. 43.3 would have been reduced by the fact that the appellant had used the plant and materials instead of incurring the cost of obtaining other plant and materials. In the possible but hardly probable event that the works should be completed for a sum less than the original contract price, the question would arise, and only then would arise, whether equity would treat the provision in cl. 43.3, that no compensation or allowance should be made, as impermissibly penal and would interfere by declaring that provision void and would require upon a final account that compensation or allowance for the use of the plant and materials be made by the appellant to the respondent. It may be that equity would not allow the appellant to make a profit from the respondent's breach of contract. A court of equity can mould its relief so that the substantial purpose of its doctrine of relief against forfeiture and penalties is achieved. It can leave the contractual right to use the plant and materials unaffected and can avoid that part and that part only of the agreement between the parties which is, or may be, open to challenge under the equitable doctrine.

This is an example of a clause that was not a penalty clause but, nevertheless, should it eventuate that the effect of the clause would be to allow the principal to make a profit from the contractor's breach, that would be a penalty and the Court could make orders that would relieve the contractor from liability. That would simply be application of the maxim 'For breach of contract, a person is entitled to damages but not to make a profit from the breach'.

In the subcontract that I have been citing, there is a clause to the effect that the head contractor may notify the subcontractor of a defect in the subcontract

works and state that the head contractor intends to accept the defect. The clause provides that the head contractor may then, in its discretion, deduct or recover from the subcontractor the cost to rectify the works or the diminution in value of the subcontract work 'having no regard to any resulting increase in value to the head contractor'.

The head contractor is entitled to damages for the subcontractor's breach [the defective work] but is not entitled to make a profit. If there is any increase in value, the head contractor must, despite this clause, credit against damages any increase in value.

In *Hoinig v Issacs* [1952] 2 All ER 176 the contractor, an interior decorator, contracted to decorate the defendant's flat for £750. The contractor substantially completed the work but left defects that would cost £55 to make good. The defendant refused to pay the unpaid balance of the contract price, namely £350. The Court held that the defendant was bound to pay £350 less £55 for the cost of rectification.

When a claimant has completed all the work that a claimant is prepared to carry out, if the works are substantially complete, the respondent is only entitled to withhold payment [or release of retention or security] of an amount equivalent to the damages actually incurred by the respondent by reason of the work not being complete. However, it is not uncommon for respondents to withhold more and thereby seek to make a profit out of the claimant's breach. That profit would be a penalty.

Under the particular subcontract I have been discussing, the defects liability period is 52 weeks and thereafter until the head contractor is satisfied that all defects have been rectified. The subcontract provides that final completion will not be achieved until the whole of the subcontract works is approved by the head contractor. Release of retention and the bank guarantee is said to be dependent upon rectification by the subcontractor of all defects. Retention is 10% of each progress payment. This could be a considerable sum.

The primary stipulation is that the subcontractor must rectify all defects. Upon failure, the collateral stipulation [the right of the head contractor to withhold the final payment and release of security and retention moneys] may impose upon the subcontractor an additional detriment that is out of all proportion to the loss suffered by the head contractor on account of the defects. The additional detriment imposed upon the subcontractor can only be enforced to the extent that that is necessary to compensate the head contractor for the defect. If the additional detriment exceeds that compensation, it is a penalty and unenforceable.

In an adjudication where the claimant claims that the respondent is endeavouring to penalise the claimant, the respondent may raise an argument that only a court with jurisdiction in equity can grant relief against a penalty. It is true that an adjudicator cannot grant equitable relief. However, it does not follow that an adjudicator must allow the respondent to penalise the claimant. If it

appears that the respondent is penalising the claimant, the onus is on the respondent to satisfy the adjudicator that this is an instance where a court in equity would not grant relief to the claimant.

If the adjudicator is satisfied that a collateral stipulation relied upon by the respondent to withhold payment to the claimant would impose upon the claimant a detriment [to the benefit of the respondent] that would exceed the loss, if any, that the respondent has demonstrated, the adjudicator should not allow the respondent to withhold more than loss flowing from the failure of the primary stipulation. The excess would be a penalty.

Usually the respondent who relies upon a collateral stipulation such as the time bars discussed above, makes no attempt to show that the failure of the primary stipulation [eg giving of a notice within a prescribed time] caused the respondent any loss.

Respondents will point to *Musico v Davenport* [2003] NSWSC 977. In that case McDougall J quashed my determination on the ground that I failed to have regard to the relevant provisions of the contract. See *Musico* at [119]. I concluded that the liquidated damages clause was a penalty. At [107] McDougall J said:

If an adjudicator is minded to come to a particular determination on a particular ground for which neither party has contended then, in my opinion, the requirements of natural justice require the adjudicator to give the parties notice of that intention so that they may put submissions on it.

It is therefore most important that if a claimant considers that the respondent is invoking a provision of the contract to penalise the claimant, the claimant should say so in the adjudication application and say how the claimant is being penalised. The claimant should refer to *Andrews*.

I have given consideration to what finding an adjudicator might make if a respondent relies upon a time bar as a ground for withholding payment and cites *John Goss* and the claimant asserts that the time bar is a penalty and cites *Andrews*. In any particular adjudication the adjudicator's findings would be based upon the submissions of the parties. Consequently, the following merely a hypothetical reasoning by a hypothetical adjudicator upon hypothetical submissions:

The claimant claims an entitlement to \$... for ... The respondent says that the claim is barred because the claimant failed to give written notice of the claim within the time prescribed by clause ... of the contract. The respondent cites *John Goss Projects v Leighton Contractors* [2006] NSWSC 798 at [80]-[81] as authority for the effectiveness of a time bar. The claimant relies upon *Andrews v Australia and New Zealand Banking Group* [2012] HCA 30.

The time bar is a collateral stipulation that comes into effect if the claimant fails to give the prescribed notice within time. In *Andrews* at [10] the High Court set out in general terms that a stipulation prima facie imposes a penalty on the claimant if it is collateral to a primary stipulation and the collateral stipulation, upon the failure

of the primary stipulation, imposes on the claimant an additional detriment [the penalty] to the benefit of the respondent. The Court held that if compensation can be made to the respondent for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation.

This is an instance where the collateral stipulation [the bar to making a claim] imposes upon the claimant a substantial detriment that bears no relationship to the loss that the failure to give the notice within the prescribed time could cause the respondent. In fact, the respondent has not demonstrated what loss if any, the respondent has incurred as a consequence of the delay by the claimant in giving notice of the claim.

In *John Goss*, it was not argued that the time bar imposed a penalty. *John Goss* is irrelevant. *Andrews* is most relevant. I am satisfied that but for the collateral stipulation [the time bar], the claimant would be entitled to the amount claimed. The collateral stipulation would cause serious detriment to the claimant. The respondent relies upon the time bar. The onus is on the respondent to satisfy me that the collateral stipulation is enforceable. The respondent has failed to do so. It appears to me that to find the claim barred by the time bar would be to penalise the claimant. I am not prepared to do that. I am satisfied that the respondent is not entitled to rely upon the time bar to defeat the claim.

As far as I am aware, this is the first paper to raise the possible implications of *Andrews* for construction contracts. I look forward to a lively debate.