IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 69
EMPC 225/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	8I CORPORATION First Plaintiff
AND	8I LIMITED Second Plaintiff
AND	SABASTIAN MARINO Defendant

Hearing:	7 March 2017 (Heard at Auckland)
Appearances:	R Towner and S L Maxfield, counsel for plaintiffs A Schirnack and S Bonney-Lovegrove, counsel for defendant
Judgment:	6 June 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The preliminary issue before the Court relates to what the defendant characterises as a penalty clause in a settlement agreement certified by a mediator under s 149 of the Employment Relations Act 2000 (the Act). Assuming that it is a penalty clause, does s 149 preclude the defendant from arguing that it cannot be enforced against him or otherwise prevent him from bringing it before the Court?

[2] The issue arises against the backdrop of a claim by the plaintiffs against a former employee, Mr Marino, for various alleged breaches of a full and final settlement agreement dated 25 May 2015. The agreement incorporates by reference an earlier buy-back variation agreement entered into by Mr Marino and the second plaintiff on 28 November 2014. Clause 6 of the settlement agreement provides that:

> Continued payment of instalments of the Settlement Amount under the Buyback Variation Agreement is dependent on Mr Marino not committing a material breach of this Settlement Agreement. If Mr Marino commits such a breach, then the Corporation may, by notice in writing to Mr Marino within 20 days of such breach (Notice), and, subject to the terms of this clause 5, following the expiry of 20 days following the date of the Notice, buy-back any remaining common stock not yet bought back under the Buyback Variation Agreement, and Mr Marino will sell such common stock to the Corporation, for a total nominal consideration of $1.00 i.e not on a per stock basis but in aggregate (and Mr Marino irrevocably appoints the Company and the Corporation as his agent and attorney with full authority to act on Mr Marino's behalf to give effect to the buy-back provisions in clause 5 including executing any necessary share transfer documentation). However, if Mr Marino disputes, by providing notice in writing to the Company within 20 days of the Notice, that a material breach has been committed, then the dispute will be referred to the Employment Relations Authority for final determination and, in the meantime:
>
> (a) the payment of any Settlement Amount monies will be made by the Company to the Bell Gully trust account to be held on trust for the parties; and
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> (b) Mr Marino will continue to hold the remaining shares, pending the outcome of the determination.

[3] The plaintiffs' claim that Mr Marino's alleged breaches of the terms of settlement have triggered cl 6 and the buy-back provisions contained within cl 5 of the agreement.[1] Mr Marino has filed a counterclaim against 8i Corp seeking, amongst other things, a compliance order requiring it to continue making payments to him under cl 5. He alleges that even if he has been in material breach of the settlement agreement (which is denied), cl 6 of the agreement is unenforceable on the grounds that it is a penalty clause. 8i Corp (defendant to the counterclaim) denies that cl 6 is a penalty clause and says that, in any event, Mr Marino is precluded from asserting that it provides for a penalty by operation of s 149(3) of the Act.

[4] The parties invited the Court to consider the operation of s 149(3) as a preliminary issue and on the assumed (yet to be determined) basis that cl 6 constitutes a penalty clause. It is this issue which this judgment deals with.

[5] Because s 149 is central to the issue before the Court, it is convenient to set it out in full. It provides that:

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[1] By way of a statement of problem filed in the Employment Relations Authority but subsequently removed in full to the Court: *8i Corporation v Marino* [2016] NZERA Auckland 312.

149 Settlements

(1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—

(a) who is employed or engaged by the chief executive to provide the services; and

(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—

may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—

(a) explain to the parties the effect of subsection (3); and

(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.

(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and

(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

(3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.

(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[6] The meaning of s 149 is to be ascertained from its text and in light of its purpose. The starting point is the natural and ordinary meaning of the words used in the provision.[2] As Tipping J pointed out in *Commerce Commission v Fonterra Co-operative Group Ltd*:[3]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that

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2 Refer Interpretation Act 1999, s 5(1).

3 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 at [22] (footnotes omitted).

> meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[7] The underlying intention of s 149 is readily discernible, namely to facilitate the full and final settlement of employment relationship issues at an early stage via a mediated process. That reflects the broader legislative scheme, which actively encourages parties to resolve such issues between themselves and without the intervention of the Authority and Court.[4]

[8] The essence of the submission advanced by Mr Towner, counsel for the plaintiffs, is that the wording of s 149 is crystal clear – the terms contained in certified terms of settlement cannot be undone, altered, revoked or subject to litigation (except as expressly provided by the Act) and are enforceable in accordance with the Act. He effectively urges a strict interpretation of the provision in light of what he says is the underlying legislative policy, namely certainty of settlement outcome in the employment sphere.

[9] Not surprisingly Mr Schirnack, counsel for Mr Marino, submits that the wording of s 149 is somewhat more elastic. He advanced three alternative analytical routes to the same suggested end point:

- First, that it is well established at common law that penalty clauses are contrary to public policy and s 149(3), properly interpreted, does not compel enforcement of them (I refer to this as the public policy/interpretation argument).

- Second, the requirements of the certification process in s 149(3) cannot be complied with where a settlement agreement contains unenforceable terms, such as penalty clauses (the ineffective certification argument).

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[4] Employment Relations Act 2000, s 143(b).

- Third, penalty clauses are contrary to equity and, because the Authority/Court must exercise their discretionary powers according to equity and good conscience, the Authority/Court may decline to issue a compliance order enforcing any such a provision (the equity and good conscience discretionary powers argument).

Equity and good conscience - discretionary powers

[10] I deal with the equity and good conscience argument first. The defendant submits that both the Authority and the Court have a discretion to grant (or not grant) a compliance order enforcing terms of settlement.[5] In exercising their discretion they must be guided by equity and good conscience.[6] A penalty clause is contrary to equity. The Authority/Court may decline to issue a compliance order enforcing a penalty clause in a s 149 agreement on the basis that it offends against the duty to act consistently with equity and good conscience.

[11] The Authority's power to make compliance orders is contained within s 137. It provides that:

> **137 Power of Authority to order compliance**
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> (1) This section applies where any person has not observed or complied with-
>
> (a) any provision of – […]
>
> (iii) any terms of settlement or decision that section 151 provides may be enforced by compliance order; or […]
>
> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, … that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

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5 For the Authority's power see s 137(1)(iii); for the Court's power to grant a compliance order see s 139(2). The Court may issue a compliance order on a challenge to a compliance determination of the Authority (s 179), and where a person has failed to comply with a compliance order made under s 137 an application may be made to the Court for the exercise of its powers under s 140(6) (see s 138(6)).

6 See s 157(3) (Authority); s 189 (Court).

[12] Section 157 deals with the role of the Authority and provides that it must act as it thinks fit in equity and good conscience. Section 189 (which relates to the Court's jurisdiction) is to similar effect.

[13] The defendant's equity and good conscience submission spring-boards off observations made by Chief Judge Goddard in *Ozturk v Gultekin t/a Halikarnas Restaurant*.[7] There it was said that:

> [5] In general, any mediated settlement or settlement recorded by a mediator is enforceable. However, the jurisdiction under the Employment Relations Act 2000, ultimately being the jurisdiction of the Court, is one of equity and good conscience. Courts of equity and Courts of conscience have always turned their backs on any agreement that imposes a penalty or a forfeiture. It is one thing for the parties to agree, as part of a settlement, that damages are payable in the event of a particular breach. If the amount agreed on is a genuine estimate of the loss that the parties expect will be caused if there is a breach of the contract, then that estimate is called liquidated damages and is recoverable. However, if the amount concerned is not a genuine pre-estimate, but is an attempt to compel performance by holding it as a threat over the head of one of the parties, it becomes a penalty and will not be recoverable. This is because equity takes the view that it is unconscionable in a case of breach of contract to recover a sum which is out of proportion to the loss which actually occurs. That statement is taken from *Laws of New Zealand*, Wellington, LexisNexis, 1991, Contract, at para 441.
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> [6] It has been put much more pithily by Mr Justice Somers in his very brief judgment in *Aquaculture Corp* v *NZ Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) at p 302 where he said that "equity and penalty are strangers".
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> [7] The Court has the jurisdiction to relieve against penalties and forfeitures, but anyone who seeks equity must be prepared to do equity. The most likely outcome of this case, if it resumes, therefore, is that Mr Gultekin will receive relief against the penalty to which he agreed on condition that he pays compensation to the plaintiff, Mr Ozturk, in a sum broadly equivalent to the interest that Mr Ozturk may be considered to have lost as a result of the defendant's defaults. As I have said, on any view of the matter, that interest could not possibly have exceeded $250 for the period.

[14] The defendant's argument reduces to the following proposition - if Parliament had intended the Authority to have an unfettered duty to enforce s 149 settlement agreements, it would not have made its power to issue compliance orders for breach discretionary.

[15] The difficulty I perceive with the argument that ss 157 and 189 apply, enabling the Authority and the Court (in equity and good conscience) to decline to issue a compliance order to enforce a penalty clause in a s 149 settlement agreement, is its circularity. That is because any discretionary powers exercisable by the

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[7] *Ozturk v Gultekin t/a Halikarnas Restaurant* [2004] 1 ERNZ 572 (EmpC).

Authority/Court are themselves fettered and constrained by statute. As ss 157 and 189 make clear, while both the Authority and the Court must act consistently with equity and good conscience, they must not do anything that is inconsistent with the Act. If s 149, properly interpreted, prohibits a party from bringing into question the enforceability of a penalty clause contained within a settlement agreement, it is difficult to see how the Authority/Court could be said to be acting within the scope of their discretionary powers in declining to make a compliance order on the basis that the agreement contained a penalty clause. Essentially it would represent a backdoor route to achieving what s 149 is said by the plaintiffs to prevent.

[16] While s 189(1) confers an equity and good conscience jurisdiction, it does not entitle the Court to rewrite the statute or cut across other statutory provisions on the basis that it considers it appropriate, for reasons of equity and/or good conscience, to do so. It follows that *if* s 149 excludes inquiry into the characterisation and legality of cl 6, there is no scope for either the Authority or the Court to exercise their discretionary powers in the way the defendant proposes. The question therefore becomes whether s 149 does in fact exclude inquiry.

Public policy/interpretation

[17] Section 149 distinguishes between the enforceability of terms of settlement (s 149(3)(a)) and the right to bring terms of settlement before the Court to question them (s 149(3)(b)). Adopting the plaintiffs' interpretation of the provision in this case would render the alleged penalty clause enforceable and the defendant's ability to challenge it non-existent.

[18] What is the s 149 sign-off process directed at? As Mr Towner points out, s 149(3) is, on its face, clearly directed at supporting finality and certainty in settlement agreements, and limiting the Court's ability to scrutinize terms of settlement and to decide which terms should and should not be enforced. However, it seems to me that the operative word is *limit*, not *prohibit*. In this regard s 149 itself makes it clear that terms of settlement may be brought before the Court for "enforcement purposes" (s 149(3)(b)).

[19] It is implicit in s 149(3A) that there are exceptions to the prohibition on bringing s 149 settlement agreements before the Court other than for enforcement purposes. That is because s 149(3A) overrides provisions of the Minors' Contract Act 1969, which generally make contracts with minors unenforceable.[8] There is no express exclusion of, for example, the Illegal Contracts Act 1970, criminal statutes, and the common law (including the common law prohibition on penalty clauses).

[20] Section 149(3)(ab) specifically prevents a party seeking to cancel an agreement under s 7 of the Contractual Remedies Act 1979 (on the basis of misrepresentation, repudiation or breach). There would be no need for such a provision if s 149(3)(a) bore the literal interpretation contended for by the plaintiffs.

[21] Mr Towner said that the alleged penalty clause in the present case had not been brought before the Court for enforcement purposes, on the basis that it is the plaintiffs who have asserted a breach of the settlement agreement and the consequences provided for in the agreement have flowed from that; the defendant's counterclaim (seeking compliance) is not seeking enforcement of cl 6.

[22] The reference to "enforcement purposes" in s 149(3)(b) may bear two different interpretations – either that terms of settlement may be brought before the Court to enable them to be enforced; or that terms of settlement may be brought before the Court to determine whether they are enforceable. The first, narrow, interpretation is favoured by the plaintiffs. I prefer the second, less restrictive, interpretation. While it is true that the second interpretation may sit somewhat uncomfortably with the wording of s 149(3)(a), that discomfort is largely overcome if s 149(3)(a) is properly interpreted as being subject to exceptions. And while adopting a less restrictive interpretation would undoubtedly reduce the utility of s 149(3)(b), such a result is likely unobjectionable given the countervailing policy concerns which I will come to.

[23] It is well established that a strained construction of an enactment may be justified (and will in some cases be positively required) where the consequences of a

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[8] As reflected in the explanatory note to the Employment Relations Amendment Bill 2010 (No 2) (196-1) (explanatory note).

literal construction are so undesirable that Parliament cannot have intended them, and where there is a repugnancy between the words of an enactment and others within the enactment.[9] Both factors apply in the present case, given the outcome of the interpretation advanced by the plaintiffs and the obvious friction between that interpretation and the equitable underpinnings of the Court's jurisdiction and the Act's statutory objectives, including addressing the inherent imbalance of power between employer and employee.[10]

[24] Because s 149(3)(b) limits a party's ability to bring a mediator-signed settlement agreement before the Court, it is akin to a privative provision. As the authors of *Statute Law in New Zealand* point out:[11]

> *Right of access to the courts* – The courts are particularly unwilling to hold that a statute setting up a tribunal has taken away the right of a citizen to have decisions of that tribunal reviewed by the courts. "Privative clauses", as they are called, have received a notoriously narrow construction.
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> Thus in one New Zealand case it was held that even the following provision (the Industrial Conciliation and Arbitration Act 1908, s 96) did not entirely deprive an affected person of the right to have decisions of the Arbitration Court reviewed by the Supreme Court:
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> "No award, or proceeding of the Court shall be liable to be reviewed, quashed, or called in question by any Court of judicature on any account whatsoever."
>
> It was held that awards made by the Arbitration Court in excess of its jurisdiction were not covered by this prohibition; and of course the limits of jurisdictional error can be very amply defined.

[25] In *Anisminic Ltd v Foreign Compensation Commission*, Lord Reid observed that:[12]

> It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

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9 O Jones (ed) *Bennion on Statutory Interpretation: A Code* (6th ed, LexisNexis, London, 2013) at 430-431.

10 See s 3(a)(ii).

11 R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 339.

12 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208 (HL) at 213.

[26] While it is well established that a penalty clause is unenforceable at law for public policy reasons,[13] the interpretation advanced by the plaintiffs would mean that such a rule had no application in the employment institutions in respect of s 149 agreements, simply because they had been signed by a mediator (who need not be legally qualified and who need not, on the plaintiffs' argument, have any role in explaining the lawfulness or otherwise of the parties' agreed terms of settlement). Conversely a penalty clause in a settlement agreement which had not been signed by a mediator, but which had nevertheless been reached following a formal mediation process under the Act, would be able to be challenged as unenforceable.[14] Such a result appears to be inexplicable if the mediator's role in signing-off an agreement is as limited as the plaintiffs suggest (a point I return to).

[27] The most troubling logical corollary of the plaintiffs' interpretation of s 149 is that s 149 settlements agreements would be the only agreements known to law which could contain otherwise unlawful terms; which could not be called into question in the Employment Court and which the Court would be required to enforce. This would fly in the face of established law, that "a court will not enforce a contract which, or the purpose of which, is illegal either under statute or under the general law."[15] Such a result would, in my view, require very clear exclusory language, particularly in the context of legislation underpinned by notions of equity and good conscience.

[28] The following hypothetical (albeit extreme) scenario illustrates the ramifications of adopting the plaintiffs' analysis on the scope of the Authority/Court's powers under s 149. A migrant worker with no knowledge of New Zealand law or employment practices attends mediation. She agrees to enter a settlement agreement which the employer has drafted. It contains a penalty clause.

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13 See for example *G L Freeman Holdings Ltd v Livingston* [2015] NZEmpC 120 at [20]; citing *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1914] UKHL 1 [1915] AC 79. See also *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614 (CA) at [56].

14 *G L Freeman Holdings Ltd* provides an example of the Court declining to enforce a penalty provision in an employment agreement (not a s 149 settlement agreement). A settlement agreement was set aside in *Horry v Tate & Lyle Refineries* [1982] 2 Lloyd's Rep 416 (QB), referred to in *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655 (CA) at 659.

15 D Foskett *The Law on Compromise* (8th ed, Thomson Reuters, London, 2015) at 4-71; referring to H G Beale (ed) *Chitty on Contracts* (32nd ed, Sweet and Maxwell, London 2015) vol 2 at 16-001.

The penalty clause provides that the employee must transfer all her personal property to the employer in the event of a breach of a term of settlement requiring her to undertake a counselling session within five days of the date of mediation. The mediator is asked to sign off the agreement.

[29] The mediator complies with what the plaintiffs contend are the minimum statutory requirements for sign-off. No mention is made of the individual terms of the settlement, or the impact or otherwise of incorporating them in the agreement. The unrepresented employee does not know that a penalty clause is generally regarded as unlawful and no-one draws this to her attention. She indicates to the mediator that she understands that the agreement will be full and final and enforceable against her and signs it. The mediator then signs off the agreement. The employee does not attend counselling within five days. One of two things then occurs: the employer takes steps to enforce the agreement, requiring the transfer of all of the employee's personal property; the employee takes legal advice and seeks to bring the terms of the agreement before the Court.

[30] Any such agreement would be unlawful and unenforceable in any other court. Did Parliament intend, in introducing s 149, that the Employment Relations Authority and Employment Court would be the exception to this rule? It seems a long bow to draw that Parliament would wish to close the door to the employment institutions simply to support the general policy goal of finality in employment settlements. I make the obvious point that while this policy objective applies in contract law generally, it has not resulted in the demise of the rule against penalties at common law. Quite the contrary. As the authors of *Law of Contract in New Zealand* point out:[16]

> The parties to a contract may agree beforehand what sums shall be payable by way of damages in the event of breach, as, for example, where a builder agrees to pay $100 a day for every day that the building remains unfinished after the contractual date for completion. Such provision may reflect good business sense and be advantageous to both parties. It enables them to envisage the financial consequences of a breach: and if litigation proves inevitable it avoids the difficulty and the legal costs, often heavy, of proving what loss has in fact been suffered by the innocent party. However, it cannot be used in effect as a means of forcing the offending party to perform the

[16] J Burrow, J Finn and S Todd *Law of Contract in New Zealand* (5th ed LexisNexis, Wellington 2016) at 21.2.6.

> contract. *The courts will not enforce provisions which do not seek to compensate the innocent party but which seek to penalise the party in breach.*
>
> (Emphasis added)

[31] Further, it has been said:[17]

> Parliament has very large powers to make law. Democratic principle argues that its will is to be given effect to. The courts are not to stand in the way of that will. On the other side and in potential conflict with democratic principle, are enduring principles (at least as they appear to the courts) which are not to be ignored unless Parliament has made itself very clear.

[32] I also observe that while the term "final and binding" in s 149(3)(a) may appear, on its face, to be unambiguous, the courts have long seen such faces to be multi-faceted. For example, in the law on compromise agreements it is well established that the phrase "full and final" is subject to exceptions (such as where a party deliberately withholds information about an issue which, if it had been known, would have affected the agreement).[18] If the phrase "full and final" is susceptible to such interpretation, "final and binding" may be similarly interpreted, thereby allowing the unlawfulness of a term to provide a gateway into re-examining an agreement. That, combined with the meaning I prefer to be taken from s 149(3)(b), leads me to infer that the lawfulness or otherwise of a term of an agreement will be relevant to the question of enforceability.

[33] It is also notable, particularly in the context of the arguments advanced in this case, that s 149 itself creates a mechanism for imposing a penalty[19] and, accordingly, a heightened incentive for compliance over and above the remedies which are generally available for contractual breach.

[34] Mr Towner sought to rely on a number of proposed amendments to what became s 149 at a pre-legislative stage. These were said to support the plaintiffs' position. In this regard he noted that an amendment was proposed (by way of Supplementary Order Paper dated 9 August 2000) to insert into what was to become

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17 K Keith (OP No 19, New Zealand Centre for Public Law, 2009) at 33-34 as cited in *Statute Law in New Zealand*, above n 11 at 343.

18 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2001] IRLR 292 at [10] per Lord Bingham of Cornhill LJ.

19 Employment Relations Act 2000, s 149(4).

s 149(3)(a) the words "except where that outcome is procured by mistake, fraud or coercion". As Mr Towner pointed out, that proposed wording did not find its way into the final form of the provision. He also drew attention to an amendment proposed during the course of the second reading of the Bill to add a subclause: "(4) That any such settlement may however be challenged on the grounds that it is unconscionable." The amendment was negatived.

[35] While the plaintiffs submitted that these proposed amendments and the way in which they were dealt with was revealing, I disagree. The failure to adopt one or other of the proposed amendments may be taken as reflective of an intention to preclude any judicial intervention, even in cases involving agreements containing otherwise egregious provisions, but equally it may be viewed as an acknowledgment that s 149, properly interpreted, contained sufficient flexibility to accommodate such concerns.

[36] The objection to penalty clauses is self-evident and has obvious application in the context of employment relationships. As Lord Hodge recently observed in *Cavendish Square Holding BV v Makdessi*, the rule against penalties is designed to protect weaker parties from significant power imbalances.[20]

[37] While there is scope for arguing on the literal wording of the provision that a penalty clause contained within a s 149 settlement agreement falls beyond the Court's reach, I consider that had Parliament intended to override the common law position it would have done so expressly, as it did in enacting s 113, which displaces the common law right for an employee to claim wrongful dismissal and sue for damages for breach (by providing that the only way to challenge a dismissal is by way of personal grievance).[21] Parliament did not take this step. It follows that s 149(3) should not be read in the restrictive way contended for by the plaintiffs.

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[20] *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at [262].

[21] See further examples where statute has not replaced the common law rule in *Statute Law in New Zealand*, above n 11, at 576-577.

Ineffective certification

[38] The defendant's second (alternative) argument is based on the certification process which s 149 mandates. In summary it is said that there are limitations on what a mediator can certify; that a settlement agreement containing a penalty provision cannot be the subject of an effective certification; and that where the certification process has failed (for whatever reason) the constraints within s 149(3) are inoperative. Support for this argument also emerges from *Ozturk*:[22]

> [9] My final observation about the matter relates to the Mediation Service. I do not intend any criticism of the mediator who recorded the settlement. It is really a training issue for mediators. I do not know how prevalent this practice of inserting penalties is, but I do note that it is an obligation of the mediator under s 149 of the Employment Relations Act 2000 to explain to the parties that the terms of settlement are final and binding and enforceable by the parties. Obviously, a mediator is not able to make such a statement to the parties where the settlement contains a penalty which is completely out of proportion, and is unrelated, to any genuine estimate of what the impact of a default under the agreement may be.
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> [10] Any training undertaken for mediators should explain that it is perfectly open for settlements to provide for interest at reasonable rates on any payment that is in arrear, or to provide for a discount on the payment due in the event that it is paid early or on time.
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> [11] Also, it is open for such settlements to provide that they will attract additional compensation if payment is not made on time so long as that compensation is clearly and reasonably a genuine pre-estimate of the loss to the party entitled to the payments in the event of default in payment.

[39] As Mr Towner pointed out, the *Ozturk* judgment arose at a preliminary stage of an action for a compliance order, following a hearing at which there was no appearance for the allegedly defaulting employer and in the absence of argument as to the scope of s 149. Nonetheless, I do not think that the observations contained within it can be so readily dismissed.

[40] It is true that the approval process prescribed by s 149(1) and (2) appears, on its face, to be directed at a simple explanation of the particular matters in s 149(3), and the full and final nature of the settlement, rather than the substantive legal effect of particular provisions of the parties' agreement or the extent to which the proposed terms may or may not be appropriate as a matter of law. Section 152

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[22] *Ozturk v Gultekin*, above n 7.

may be said to reinforce the point by providing that mediation services are not to be questioned as being inappropriate, including the manner in which the services have been provided (s 152(1)(b)). Mediation services include the sign-off process.[23] And while s 152(2)(a) provides that nothing in s 149 prevents any agreed terms of settlement signed under s 149 from being challenged or called into question on the ground that the provisions of s 149(2) and (3) (which relate to knowledge about the effect of a settlement) were not complied with, that does not take the matter any further if the scope of the sign-off process is as limited as a first-blush reading of s 149 suggests. It is perhaps also notable that the statute does not follow the same sort of formulation as, for example, the processes applying to settlement agreements involving relationship property (namely requiring certification by a lawyer that independent legal advice had been given and had been understood).[24]

[41] However, the defendant's certification argument has some strength when the role of an approved mediator is examined, the wording of s 149(2) is read in context, and the broader statutory scheme is considered.

[42] Attendance at mediation is generally a precursor to pursuing a claim in the Authority/Court. Parties are not required to use the mediation services prescribed by the Act, but many do. The Act requires that any mediator providing such services, including signing off on s 149 settlement agreements, must be approved by the Chief Executive of the Ministry of Business, Innovation and Employment.[25] The evident legislative purpose is to have specialist alternative dispute resolution services available to assist parties to an employment relationship to reach a satisfactory settlement of their differences.

[43] Only approved mediators may sign-off on a s 149 agreement. In undertaking their functions they are exercising a statutory power. It is well established that a statutory power must be exercised in accordance with principle and consistently with the empowering statute. A mediator may, but need not, exercise their discretion to

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23 "Mediation services" is a term defined, non-exclusively, in s 144.

24 See the requirements of the Property (Relationships) Act 1976, s 21F, which, among other requirements, makes mandatory the seeking of independent legal advice, without which a privately settled property agreement will be void.

25 Employment Relations Act 2000, s 154.

sign an agreement in response to a request from the parties. The point can be made by reference to terms which the Act expressly provides a mediator *must not* sign-off on, namely agreed terms of settlement in which a party agrees to forego all, or part, of the party's minimum entitlements specified in s 148A(3).[26]

[44] As Mr Schirnack observed, while Parliament has introduced an express prohibition on mediator sign-offs in the circumstances referred to in s 148A(3), it has said nothing about the way in which the consequences of sign-off contrary to the prohibition are to be dealt with. He infers that the consequence must be a failure of the s 149 sign-off process. On the plaintiffs' analysis it would make no difference - an agreement containing such a term would nevertheless be enforceable and could not be called into question in the Court, whether by way of action, appeal, application for review or otherwise. That seems to me to be nonsensical, reinforcing the need to read the exclusory references in s 149(3) narrowly and s 149 in a way which works.

[45] While the Act provides that mediator signed-off agreements are full and final and enforceable, and may not be called into question, this is predicated on the earlier operation of a protective safety mechanism for the parties. A literal interpretation of s 149 would mean that a mediator approved by the Chief Executive to undertake employment mediations in circumstances involving acknowledged imbalances of power and vulnerability, could discharge their obligations (activating the far-reaching consequences in s 149(3)) simply by repeating the words in s 149(3)(a), (ab) and (c), and by being satisfied that the parties understood that the terms of their proposed agreement were final and binding and enforceable; could not be cancelled under s 7 of the Contractual Remedies Act 1979; and (except for enforcement purposes) could not be brought before the employment institutions. There would be no need to ensure that the parties, however vulnerable or lacking in capacity (through age or otherwise), understood the substance of the proposed terms and/or whether they were otherwise lawful.

[46] All of this begs the question as to whether Parliament, by enacting a mediation approval process with such potentially serious consequences, can have

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[26] Employment Relations Act 2000, s 148A.

intended that a mere mantra was all that was required to render legal what would otherwise be illegal terms of settlement. It seems to me that the question only needs to be asked for the answer to emerge.

[47] Finally, I note for completeness a submission raised by Mr Towner in respect of workability. He raised a concern that interpreting s 149 in the way contended for by the defendant would create considerable uncertainty and difficulties if a penalty clause in an agreement was rendered ineffective but others remained. He also raised the spectre of other arguments being mounted, including as to the enforceability or otherwise of restraint of trade provisions. The issues which he identified would no doubt need to be worked through on a case-by-case basis but can hardly be insurmountable given the approach of the ordinary courts to setting aside penalty clauses in agreements.

Conclusion

[48] A penalty clause is unlawful and unenforceable. Properly interpreted, s 149(3) does not prevent the Court from inquiring into the enforceability of the terms of an agreement.

[49] If I am wrong about that, I would have found that it is not within the scope of a mediator's discretionary power to certify a s 149 settlement agreement which contained a penalty clause and, if that had been done, the certification would be ineffective. While the plaintiffs' contention as to the nature and scope of the sign-off process has some immediate appeal, it does not withstand analysis. The argument that a mediator can sign any agreement he/she likes provided the s 149(3) mantra has been faithfully recited, cannot be correct. It cannot have been Parliament's intention to allow a mediator to ignore and undo well established rules of contract law with the sweep of a pen. A narrow reading of the s 149 safeguard process would render it virtually devoid of utility.

[50] Costs are reserved. If they cannot otherwise be agreed I will receive memoranda.

Christina Inglis
Judge

Judgment signed at 10 am on 6 June 2017