HIGH COURT OF AUSTRALIA

Public Information Officer

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RINGROW PTY LTD v BP AUSTRALIA PTY LTD
ULTIMATE FUEL PTY LTD v BP AUSTRALIA PTY LTD
NADER-ONE PTY LTD v BP AUSTRALIA PTY LTD

The High Court of Australia today upheld a clause in contracts relating to the sale of service station sites, which permitted BP to buy back the site in the event of breach of a term of a related contract under which the purchaser agreed, for a certain period, to supply only BP fuel from the site.

Ringrow, Ultimate Fuel and Nader-One were Sydney service station operators who later bought their sites under a BP privately owned sites agreement (POSA). In 2002, BP served notices on all three operators that it intended to exercise its contractual option to buy back the sites as the operators had bought fuel from suppliers other than BP. In the Federal Court of Australia, Justice Peter Hely made declarations upholding the validity of BP's termination of the POSA and its exercise of the option to buy back sites. The Full Court of the Federal Court unanimously dismissed an appeal. The service station operators then appealed to the High Court.

The Court unanimously dismissed the appeal and held that the option clause did not amount to a penalty. The law of penalties is attracted, for example, where a contract stipulates that if a breach occurs the contract breaker will pay an agreed sum which exceeds what can be regarded as genuine pre-estimate of the damage likely to be caused by the breach. The service station operators argued that the POSA involved three penal factors: exclusion of goodwill from the resale price even though each operator had paid for goodwill; a double remedy for the same breach from the cumulative imposition of the buyback option upon the liability to pay damages should BP enforce that liability before exercising the option; and "the indiscriminate factor" – that the entitlement to terminate the POSA was indiscriminate regarding the nature of the breach.

The High Court rejected all three arguments. It held that the difference between the original price and the buyback price must be extravagant and unconscionable or disproportionate to the point of oppressiveness to amount to a penalty. Because the service station operators failed to demonstrate the monetary value of the goodwill, it was not possible to say what money would be lost on buyback. The Court held therefore that it could not be said that the imposition of the buyback option was oppressive or was extravagant and unconscionable. The service station operators argued unsuccessfully for a concept of proportionality to be applied in determining penalty questions. The Court held that parties to a contract are normally free to agree upon its terms, and exceptions from that freedom of contact require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6273 3025
Email: fhamilton@hcourt.gov.au