FEDERAL COURT OF AUSTRALIA

Spotwire Pty Limited v Visa International Service Association (No 2) [2004] FCA 571

TRADE PRACTICES – contract, arrangement or understanding within s 4D of the *Trade Practices Act 1974* (Cth) – vertical agreement – horizontal agreement – meeting of minds – consensus – knowledge – in a series of vertical agreements if no express horizontal agreement whether requirement for necessary implication and agency – need to plead offer and acceptance when alleging contract – consent to unlawful term in contract

PRACTICE AND PROCEDURE – statement of claim – summary dismissal – strike out – obligation to provide documents referred to in the statement of claim

TORT – inducing breach of contract – knowledge – intention – pleading foreign law

COSTS – tax forthwith – general considerations

WORDS AND PHRASES – 'contract, arrangement or understanding'

Trade Practices Act 1974 (Cth) s 4D, s 45(2)(a)(i), s 45(2)(b)(i)

Federal Court Rules O 11 r 16, O 15 r 10, O 20 r 2, O 62 r 3

Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 13) [1995] FCA 626
Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 14) [1995] FCA 660
Allstate Life Insurance Company v Australia & New Zealand Banking Group Ltd (1995) 58 FCR 26
Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd (2000) 169 ALR 344
Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (1999) 92 FCR 375
Australian Competition and Consumer Commission v Chaste Corp Pty Ltd (in liq) (2003) 127 FCR 433
Australian Competition and Consumer Commission v Golden West Network Pty Ltd [1997] FCA 792
Australian Liquor, Hospitality and Miscellaneous Workers Union v Liquorland (Aust) Pty Ltd (2002) Aust Torts Reports 81-655
Bailey v Beagle Management Pty Ltd (2001) 105 FCR 136
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153
Brasington v Overton Investments Pty Ltd [2001] FCA 571
Breavington v Godleman (1987) 169 CLR 41
Bridgetown Greenbushes / Friends of the Forest Inc v Department of Conservation and Land (unreported, Western Australian Supreme Court, 30 April 1997)
Clarke v Earl of Dunraven and Mount Earl [1897] AC 59
Emerald Construction Co Ltd v Lowthian [1966] 1 WLR 691
Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523
Eunson v Beaulieu United Ltd (2002) 190 ALR 110

Independent Oil Industries Ltd v Shell Co of Australia Ltd (1937) 37 SR(NSW) 394
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110
Life Airbag Co of Australia Pty Ltd & Ors v Life Airbag Co (New Zealand) Ltd [1998] FCA 545
McCannel v Mabee-McLaren Motors Ltd [1926] 1 DLR 282
McKellar v Container Terminal Management Services Ltd [1999] FCA 1639
Murran Investments Pty Ltd v Aromatic Beauty Products Pty Ltd (2000) 191 ALR 579
News Limited v Australian Rugby League Football Limited (1996) 64 FCR 410
Raguz v Sullivan (2000) 50 NSWLR 236
Re British Basic Slag's Application, British Basic Slag Ltd v Registrar of Restrictive Trading Agreements [1963] 1 WLR 727
Regie National des Usines Renault SA v Zhang (2002) 210 CLR 491
Rural Press Limited v Australian Competition and Consumer Commission (2003) ALR 217
Rural Press Ltd v Australian Competition and Consumer Commission (2002) 118 FCR 236
Sanders v Snell (1998) 196 CLR 329
Spotwire Pty Ltd v Visa International Service Association Inc (2003) ATPR 41-949
Stationers Supply Pty Ltd v Victorian Authorised Newsagents Association Ltd (1993) 44 FCR 35
Thunderdome Racetiming and Scoring Pty Ltd v Dorian Industries Pty Ltd 36 FCR 297
Top Performance Motors Pty Ltd v Iva Berk (Queensland) Pty Ltd (1975) 24 FLR 286
Vasyli v AOL International Pty Ltd [1996] FCA 804
Vroon BV v Foster's Brewing Group Ltd [1994] 2 VR 32
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Anson's Law of Contract, 27th ed (J Beatson), Oxford, Oxford University Press, 1988
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SPOTWIRE PTY LIMITED (ACN 091 282 647) V VISA INTERNATIONAL SERVICE ASSOCIATION (ABN 70 007 507 511) AND COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)

N426 OF 2003

BENNETT J
SYDNEY
7 MAY 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N426 OF 2003**

BETWEEN:	**SPOTWIRE PTY LIMITED (ACN 091 282 647) APPLICANT**
AND:	**VISA INTERNATIONAL SERVICE ASSOCIATION (ABN 70 007 507 571) FIRST RESPONDENT**
	COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124) SECOND RESPONDENT

JUDGE: **BENNETT J**

DATE OF ORDER: **7 MAY 2004**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The applicant is to provide to the respondents proposed orders and directions to give effect to these reasons and the future conduct of this matter by 21 May 2004.
2. The matter is stood over for directions on 3 June 2004 at 9.30 am.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

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NEW SOUTH WALES DISTRICT REGISTRY **N426 OF 2003**

BETWEEN:	**SPOTWIRE PTY LIMITED (ACN 091 282 647) APPLICANT**
AND:	**VISA INTERNATIONAL SERVICE ASSOCIATION (ABN 70 007 507 511) FIRST RESPONDENT**
	COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124) SECOND RESPONDENT
JUDGE:	**BENNETT J**
DATE:	**7 MAY 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE PROCEEDINGS GENERALLY

1 The applicant, Spotwire Pty Limited ('Spotwire'), seeks *inter alia* declarations and orders in respect of an alleged contraventions by the respondents of s 45(2)(a)(i) and s 45(2)(b)(i) of the *Trade Practices Act 1974* (Cth) ('the TPA'), on the basis that the respondents entered into and/or gave effect to a contract or arrangement, or arrived at an understanding, which contains an exclusionary provision within the meaning of s 4D of the TPA.

2 Spotwire also seeks damages as against the first respondent for the tort of inducing breach of contract.

THE NOTICE OF MOTION

3 By notice of motion filed 1 October 2003, the first respondent, Visa International Service Association ('Visa'), seeks:

(a) to have the applicant's amended statement of claim ('ASC') struck out under Order 11 rule 16 of the Federal Court Rules or have the proceedings summarily dismissed

under Order 20 rule 2 of the Federal Court Rules;

(b) in the alternative to (a), the proceedings be stayed pending full provision of particulars previously requested;

(c) security for costs; and

(d) leave to tax forthwith its costs of the notice of motion filed 30 May 2003.

PROCEDURAL HISTORY

4 On 2 April 2003, Spotwire filed an application and statement of claim, initiating these proceedings. On 30 May 2003, Visa filed a notice of motion seeking (*inter alia*) strike out of the statement of claim or summary dismissal of the proceedings against the first respondent. On 23 July 2003, I dealt with this notice of motion in *Spotwire Pty Ltd v Visa International Service Association Inc* (2003) ATPR 41-949 (‘*Spotwire No 1*’). I ordered that the statement of claim be struck out under Order 11 rule 16 of the Federal Court Rules and that Spotwire be given leave to file an amended statement of claim. These reasons should be read with those in *Spotwire No 1*, as I do not propose to repeat the background of the matter.

5 On 27 August 2003, Spotwire filed an amended application and the ASC. On 1 October 2003, the second respondent, the Commonwealth Bank of Australia (‘the CBA’), filed a notice of motion seeking security for its costs and, on 14 October 2003, filed a notice of motion for the provision of further and better particulars pursuant to Order 12 rule 5 of the Federal Court Rules. On 1 October 2003, Visa filed a notice of motion seeking orders outlined at [3] above. On 19 November 2003, Visa filed a notice of motion seeking to have the proceedings against it stayed or dismissed pursuant to Order 15 rule 16 of the Federal Court Rules.

6 When the motions came before me for hearing, I was informed, by senior counsel for the CBA, that the second respondent’s notices of motion had been resolved by consent. Although the second respondent did not bring an application to strike out or dismiss the pleading of claims that are common to both respondents, it was submitted that, if I were minded to strike out or dismiss that part of the claim as against the first respondent, it necessarily follows that the claim ought to be struck out or dismissed as against the second

respondent. I propose to follow that course.

7 I was also informed, by senior counsel for Visa, Mr Macfarlan QC, that the question of security for costs as between Visa and Spotwire had been resolved by consent. I was not asked to make any orders at this stage. Mr Macfarlan indicated that, if Visa were unsuccessful on their motions and Visa remained a party to the proceedings, Visa and Spotwire will seek to have orders made by consent in relation to security for costs. Accordingly, by consent, I stood over that part of Visa's notice of motion filed 1 October 2004 relating to security for costs to the date upon which I delivered judgment on the motion.

8 The framework of the Membership Agreements, the Visa Members, the Issuing Members and the Acquiring Members and the Visa Rules and the TIMF are as outlined in the original statement of claim and summarised in *Spotwire No 1*.

9 The terms below are defined as they appear in the amended statement of claim and will be used in accordance with those definitions in these reasons:

- Acquiring Members: class of Visa Members who, amongst other things, contract with persons who originate transactions using Visa cards;

- Acquiring Services: the following services provided by Acquiring Members:

    (i) contracting with Merchants to obtain details of goods sold or services provided by those Merchants to Visa cardholders and paid for by Visa cards;

    (ii) paying Merchants the price of the goods or services referred to in (i) less an agreed discount;

    (iii) obtaining payment from Issuing Members in respect of the payments made to Merchants for the price of the goods or services so provided, less the discount referred to in (ii) and less interchange fees;

- Internet Merchant: Merchant conducting business on the internet;

- Issuing Members: issue Visa credit cards to their customers;

- Membership Agreements: the written agreements between Visa and the Visa Members;
- Merchants: persons who originate transactions using Visa cards;
- TIMF: Terminated Internet Merchant File;
- Visa Members: worldwide membership of over 21,000 banks and other financial institutions to whom Visa licenses its intellectual property pursuant to agreements in writing
- Visa Rules: the rules to which Visa and the Visa Members have agreed to be bound and have included rules known as the *"Visa International Operating Regulations"* and the *"Visa Regional Operating Regulations"*.

10 As in *Spotwire No 1*, for the purposes of these proceedings, which have proceeded in respect of the application of s 4D of the TPA, I have assumed that the exclusionary provision as pleaded can be characterised as such.

GENERAL PRINCIPLES RELATING TO PLEADINGS

11 The general principles in relation to pleadings are outlined at [4] – [10] of *Spotwire No 1*. There is no dispute as to these principles.

SPOTWIRE NO 1

12 The original statement of claim was struck out on the following bases:

(a) Paragraph 8 pleaded an arrangement or understanding between each Acquiring Member on one hand and Visa on the other. Such an arrangement or understanding cannot come within s 4D of the TPA, as Visa and the Acquiring Member, the CBA, are not competitive with each other. This has been amended (paragraph 8 of the ASC).

(b) Paragraph 22(b) pleaded a contract, arrangement or understanding between Visa and the CBA. Again, this cannot come with s 4D of the TPA and give rise to the alleged contravention of s 45(2)(a)(i) of the TPA as pleaded. This has been amended (paragraph 27(b) of the ASC).

(c) There was no pleading of material facts to support the allegation of an agreement between the Acquiring Members, outside the Membership Agreement, to be bound by a common set of rules, where the consideration is the mutual promise that they will be bound. Spotwire is no longer alleging agreement outside of the Membership Agreement (paragraph 5 and 10 of the ASC).

(d) To the extent that Spotwire was relying upon common Visa membership as giving rise to an agreement between the Acquiring Members, communication or knowledge, actual or imputed, was not pleaded. This has now been pleaded (paragraph 5 (a)-(f) and paragraph 10 of the ASC).

(e) The statement of claim was internally inconsistent. It was not clear from the pleading, which alleged that the CBA was an Acquiring Member at all material times **and** that it was the entry into the Membership Agreement that caused the alleged contravention of the TPA, whether the CBA was the first such Australian Acquiring Member. It was conceded by Sptowire that, if the CBA were the first Australian bank to enter into the Membership Agreement, s 4D would not apply to that agreement. In any event, these allegations were inconsistent and embarrassing and needed to be repleaded. This seemed to be accepted by Spotwire and has been clarified (paragraph 25 of the ASC – publication of the TIMF provisions is now the relevant date).

(f) The allegation of unlawful interference with contractual relations did not properly plead the elements required in *Sanders v Snell* (1998) 196 CLR 329 (‘*Sanders*’). (This tort is no longer alleged.)

(g) The applicant conceded that the allegation of inducing breach of contract was not sufficiently pleaded. This allegation is again being pursued (paragraphs 30 to 46 of the ASC).

THE AMENDED STATEMENT OF CLAIM

13 The ASC relevantly alleges that:

- Spotwire has at all material times conducted the business of providing an internet based subscription service to its customers (ASC paragraph 1(b)).

- Visa has since 1979 carried on business in Australia as a service organisation providing use of certain intellectual property (ASC paragraph 2(c)).

- The CBA has at all material times carried on business in Australia as a trading bank (ASC paragraph 3(b)).

- At all material times Visa has had a worldwide membership of over 21,000 Vis Members to whom it licenses its intellectual property pursuant to the Membership Agreements (ASC paragraph 4(a) and (b)).

- Acquiring Members contract with Merchants to obtain details of goods sold or services provided by those Merchants to Visa cardholders and paid for by Visa Cards (ASC paragraph 4(c) and (e)).

- Each Visa Member has agreed with Visa to be bound by the Visa Rules, as promulgated from time to time (ASC paragraph 5(a)). The Visa Rules are common rules among the Visa Members (ASC paragraph 5(c)). Each Visa Member has known that each other Visa Member has been obliged to comply with the Visa Rules during their period of membership (ASC paragraph 5(f)).

- At all material times the Visa Rules have provided that amendments take effect upon publication of a version of the Visa Rules containing the amendment (ASC paragraph 5(j)).

- The Visa Rules have operated since no later than 19 December 1990 (ASC paragraph 5).

- CBA has been a Visa Member since on or about 19th December 1990 (ASC paragraph 6) and agreed to be bound by and perform the requirements of the Visa Rules (ASC paragraph 7).

- Between January 1995 and 15 May 2001 the Visa Rules were amended to include the TIMF Program Provisions, which require Acquiring Members *inter alia* to cease to offer or provide acquiring services to any Internet Merchant listed on the

TIMF (ASC paragraphs 8 and 9).

- Visa published the TIMF Program Provisions to each of the existing Visa Members at or about the date on which the TIMF Program Provisions were introduced into the Visa Rules (ASC paragraph 10).

- As at the date of the publication of the TIMF Program Provisions, each Acquiring Member was obliged, by the terms of their Membership Agreement, to comply with the TIMF Program Provisions (ASC paragraph 11(a)); knew that each other Acquiring Member was so obliged (ASC paragraph 11(b)); and **thereby** agreed with Visa and each other Acquiring Member not to offer or provide the Acquiring Services to merchants listed on the TIMF (ASC paragraph 11(c)).

- Further, or in the alternative to the agreement pleaded in paragraph 11(c) of the ASC, it is alleged that an arrangement was **thereby** entered into or an understanding was **thereby** arrived at, and has at all material times continued to exist among Acquiring Members and between the Acquiring Members and Visa, that Acquiring Members not offer or provide the Acquiring Services to merchants whose details were listed, and remained listed, on the TIMF (ASC paragraph 11(d)).

- As at the date of the TIMF Program Provisions publication there were a number of Acquiring Members who carried on business within Australia ('the Australian Acquiring Members') including, at least, Westpac Banking Corporation, the CBA, the Australian and New Zealand Savings Bank Limited and the National Australia Bank, each of which was competitive with each other (ASC paragraphs 12 and 13).

- By reason of the matters pleaded at ASC paragraphs 8-13, upon Visa's publication of the TIMF Program Provisions, the CBA entered into a contract or arrangement, or arrived at an understanding with Visa and the Acquiring Members, which contained an exclusionary provision within the meaning of s 4D of the TPA, and in contravention of s 45(2)(a)(i) of the TPA (ASC paragraphs 25, 26 and 27).

- On or about 4 February 2002 the CBA, acting pursuant to the CBA Visa Membership Agreement, the TIMF Program Provisions and the agreement, arrangement or understanding referred to at ASC paragraph 11, provided details regarding Spotwire to Visa, for the purpose of having Spotwire listed on the TIMF, and terminated the CBA Merchant facility agreement (ASC paragraphs 20, 21, 22 and 23).

- Visa and CBA thereby gave effect to the exclusionary provision referred to in ASC paragraph 25, in contravention of s 45(2)(b)(i) of the TPA (ASC paragraph 27).

VISA'S APPLICATION TO STRIKE OUT OR SUMMARILY DISMISS THE "EXCLUSIONARY PROVISION" PLEADING – NO REASONABLE CAUSE OF ACTION DISCLOSED

The necessity of pleading offer and acceptance as part of the pleading of a contract

14 Visa submits that there has been no pleading of offer and acceptance, said to be material facts necessary to constitute a contract between all Acquiring Members and Visa or between Acquiring members. As the only offer pleaded was by Visa it is clear, according to Visa, that there can be no offer and acceptance as between Acquiring Members and therefore no contract within s 4D of the TPA. Spotwire disputes the necessity of pleading offer and acceptance between the Acquiring Members.

15 In *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 ('*Brambles*'), Heydon JA analysed offer and acceptance in ascertaining the existence of a contract. His Honour considered the question whether the offer and acceptance analysis must invariably be employed in reaching decisions about the formation of contracts and concluded (at [71]) that such analysis does not work well in various circumstances, although it is '*a useful tool*' in most circumstances (at [74]). As an example where the analysis does not work, his Honour cited a contract between competitors, as in *Clarke v Earl of Dunraven and Mount Earl* [1897] AC 59 ('*The Satanita*') and *Raguz v Sullivan* (2000) 50 NSWLR 236 ('*Raguz*'). In *The Satanita*, entering a regatta and undertaking to be bound by a common set of rules which indicated liability, to the knowledge of each other, was sufficient to create a contractual obligation to discharge that liability. In *Raguz*, the New South Wales Court of Appeal held that several interlocking documents, intended to be an integrated scheme, may

evidence or constitute a multipartite contract so that each adherent promised in favour of the others to abide by the rules attending the contest. This contract was enforceable, notwithstanding traditional notions of offer and acceptance.

16 Indeed, as Heydon JA noted (at [73]), *Anson's Law of Contract,* 27th ed (J Beatson), Oxford, Oxford University Press, 1988 concludes:

> *'It would be a mistake to think that* all *contracts can thus be analysed into the form of offer and acceptance or that, in determining whether an exchange does give rise to a contract, the sole issue is whether the communications match and are identical.'*

The view that traditional rules of offer and acceptance apply in all cases has also been rejected by other text writers, such as *Chitty on Contracts*, 28th ed (H G Beale), London, Sweet Maxwell, 1999, vol 1 at [2-101]; *Cheshire & Fifoot's Law of Contract,* 7th Australia ed (N.G. Seddon & M.P. Ellinghaus), North Ryde, Butterworths, 1997 at [3-5]; D.W. Greig & J.L.R. Davis, *The Law of Contract*, Sydney, Law Book Company Limited, 1987 at 247-249; 252-253.

17 Heydon JA (at [75]) also cited the conclusion of Ormiston J in *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 that '*there is now sufficient authority to justify the court enquiring as to the existence of an agreement evidenced otherwise than by offer and acceptance*' and (at [77]) the observation of McHugh JA in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 ('*Integrated Computer*') at 11,117 that:

> *'Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words. …The question in this class of case is whether the conduct of the parties, viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract'.*

18 Mason P observed at [1] of *Brambles* that the analysis by Heydon JA '*shows the difficulties of pressing too far classical theory of contract formation based upon offer and acceptance*'.

19 In light of the analysis in *Brambles,* it must be said to be arguable that the pleading of contract in a case such as the present does not necessitate a pleading of offer and acceptance.

I do not propose to strike out the pleading on this ground.

Contract, arrangement or understanding

Written Submissions

20 Spotwire relies upon the Membership Agreement and the obligation to comply with the Visa Rules (amended to include the TIMF Program Provisions) and the fact that each Acquiring Member was bound, to the knowledge of each other Acquiring Member, to comply with that agreement. What is alleged to exist is an integrated scheme that affects the rights and obligations of the Acquiring Members, including obligations to list Internet Merchants on the TIMF and not to supply listed Internet Merchants. The fact that an Acquiring Member remained as such after the TIMF Program Provisions publication is said to constitute acceptance of those mutual obligations, despite no allegation of direct communication between those Members. It was submitted that the TIMF operated on the basis of recognition that each Acquiring Member would abide by the TIMF Program Provisions.

21 The ASC includes an allegation of a contract, arrangement or understanding between the Acquiring Members, confined as set out above and of inferred knowledge on the part of the Acquiring Members. That knowledge will, as noted in *Stationers Supply Pty Ltd v Victorian Authorised Newsagents Association Ltd* (1993) 44 FCR 35 (‘*Stationers Supply*’) at 61; *Re British Basic Slag’s Application, British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 727 at 746-747; and *News Limited v Australian Rugby League Football Limited* (1996) 64 FCR 410 (‘*News Limited*’) at 572-575; need to be established by evidence in due course, before a series of vertical agreements can be said to constitute the contract, arrangement or understanding within s 4D of the TPA. The question whether the requisite consensus is established is a matter of fact. Spotwire accepts that it is necessary to establish more than a series of vertical agreements and denies that the pleading is so limited.

22 I dealt with this aspect in *Spotwire No 1* at [35] – [49]. I have been asked to revisit my previous decision, from which there was no appeal, on substantially the same submissions filed in respect of the application that gave rise to *Spotwire No 1*. I do not propose to do so.

23 However, Mr Macfarlan submits that, while the original statement of claim was struck

out for a failure to plead knowledge, that was not to say that the pleading of knowledge was not only necessary but also sufficient, that is, additional material facts needed to be pleaded to make out the cause of action. The consideration of additional necessary matters for pleading was not necessary in my previous decision and it is those matters that presently fall for consideration.

24 Visa still submits that what is pleaded is merely a series of vertical agreements, or a series of vertical Membership Agreements and mutual inferred knowledge, which is insufficient to establish a contract within the meaning of s 4D of the TPA. Visa submits that, putting Spotwire's case at its highest, Acquiring Members could have no more than a mere '*hope or expectation*' (*Stationers Supply* at 61) that other Acquiring Members would remain Visa Members and abide by the Visa Rules as amended.

25 The failure to allege direct or indirect contact between Acquiring Members at the time of the TIMF Provisions publication, when it is alleged that the Acquiring Members entered into the arrangement containing the exclusionary provision means, according to Visa, that those members could have had no more than a '*hope or expectation*' that other Members would remain Visa Members and abide by the Visa Rules as amended. Visa asserts that Spotwire has failed to plead material facts alleged to constitute the necessary meeting of minds between all Acquiring Members and Visa, specifically actual communication between the parties to the alleged arrangement or understanding.

26 Visa's written submissions seem to ignore the decisions in *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 ('*CC*') and *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 and the analysis in *Spotwire No 1*, particularly at [38], [42] and [45]-[46], to the effect that it is arguable that actual communication was not necessary and that the acceptance of mutual rights and obligations may be sufficient.

27 I shall, however, consider additional submissions put by Visa in respect of *The Satanita* and *Raguz. The Satanita* formed part of the reasoning in *Spotwire No 1* ([43]-[44]). In its written submissions, Visa says that in *The Satanita* a condition of the finding that there was a contract between the parties ('the owners') who entered into identical agreements with a third party (the organiser of the race) was the express knowledge held by each owner that

the other owners were agreeing to the same terms, which were expressed to create a contractual obligation between the owners. Visa submits that, in the present case, the fact that Acquiring Members are not, by the Visa Rules, agreeing the terms on which they will enter a competition or otherwise compete with each other and the fact that the TIMF Program Provisions, as pleaded, do not impose any liabilities or obligations between members of the nature that existed between the competitors in *The Satanita* and *Raguz* is sufficient to distinguish those two cases. The impact of the submission that the Acquiring Members do not otherwise compete with each other is not immediately relevant as it is pleaded that the Acquiring Members are competitive with each other, a necessary requirement for the application of s 4D. Visa also submits that the TIMF Program Provisions simply impose obligations on Acquiring Members to Visa and, in any event, there is no pleading that Visa Members had **express** knowledge of the agreements entered into by other Visa Members.

28 I do not see *The Satanita* and *Raguz* as so limited in their application. Heydon JA in *Brambles* did not consider that the principles there espoused were only relevant to racing competitors. The words of Lord Herschell in *The Satanita* (at 63) purport to set out a more general principle, albeit based on the facts of that case, which concerned a race:

> *'The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.'*

29 In *Raguz*, *The Satanita* was cited by Spigelman CJ and Mason P (at [65]) as standing for the general proposition that '[t]*he law recognises that several interlocking documents may evidence or constitute a multipartite contract*'. The ASC alleges that several interlocutory documents in the present case constitute a multipartite contract, arrangement or understanding.

30 Visa asserts that a prerequisite for the application of *The Satanita* and *Raguz* is the existence of mutual promises between the Acquiring Members, express knowledge that the other parties were agreeing to the same terms and the fact that the terms were **expressed** to create a contractual obligation between the owners. Those assertions may put the facts in those cases too highly. For example, I note that Lord Herschell refers to the fact that the rules only '***indicate*** *a liability on the part of the one to the other*' (emphasis added) and, as I noted in *Spotwire No 1*, the construction of the whole of the Visa Rules is a matter to be determined

at the trial. However, even if the factual situation in those cases were as Visa asserts, the principles as expressed and the cases referred to by Heydon JA in *Brambles* are not so narrow. It is arguable that they are capable of application to the circumstances as pleaded in the ASC, in particular at paragraphs 11(a) and (b) with respect to a contract. It is also, in my opinion, arguable that they are capable of application to an arrangement or understanding as pleaded in paragraph 11(c) and (d).

Oral Submissions

31 In argument, the issues between the parties were clarified and expanded. As I understood the effect of the submissions of Mr Macfarlan, they may be summarised as follows:

(a) The allegation in the ASC is that, by reasons of the knowledge of each Acquiring Member of the obligations to Visa, the Acquiring Members thereby agreed not only with Visa but also with each other.

(b) The knowledge as pleaded is insufficient to amount to a pleading of the material facts justifying the conclusion that there was an agreement involving the parties as alleged. There must be something to indicate an intention to have a contract '*at the horizontal level*'.

(c) In *The Satanita* the contract between the yacht owners arose because there was an **express** promise to pay damages one to the other. The contractual relationship arose by **necessary** implication.

(d) The contract was made through the agency of the yacht club as in *McCannel v Mabee-McLaren Motors Ltd* [1926] 1 DLR 282 ('*McCannell'*), where the contract between the motor dealers containing an express recognition of an agreement between the dealers, was made through the agency of a common party. Such an agency must exist where there is no direct communication to form a contract between people at a horizontal level.

(e) To the extent that the application of *The Satanita* by Heydon JA in *Brambles* did not import the necessity for the rules to indicate liability on the part of the one to

the other to create a contractual obligation to discharge that liability, the '*passing comment*' by Heydon JA should not be taken to have been intended to change the law to say that knowledge, of itself, is sufficient.

(f) In *Raguz* the appeal process **necessarily** involved other athletes who are mutually bound to the Federation to abide the outcome of the dispute resolution. The Court of Appeal found an implied promise because it was necessary to enable the appeal scheme to work.

(g) It must be express or necessarily implicit in the Visa Rules that they regulated the obligations as between the Visa Members, including the Acquiring Members.

(h) The only express promise by an Acquiring Member is in favour of Visa. There must be a necessary inference that the Acquiring Members promise in favour of the other Acquiring Members.

(i) One has to look at the content of the Visa Rules to determine whether the necessary inference is present.

(j) There must, at least, be an inference that it was an intention that an obligation be assumed by one Acquiring Member to another Acquiring Member. If that is established, it is easy then to assume or infer that there was an intention to appoint the head party (Visa) as the agent, the agency conclusion follows 'as a matter of course' from the intention to create the obligation.

(k) The principle to be taken from the cases is that there has to be a reason why the scheme would not work effectively in the manner intended if there were no horizontal contracts. This scheme, with Visa as the administrator, can work well and it is Visa that can sanction the members by way of the fine.

(l) There is no obligation in the Visa Rules, or something to indicate an obligation or consensus, as between the Acquiring Members. There is only an obligation by an Acquiring Member to pay Visa; there is no obligation to pay a fine or damages to another Acquiring Member. There is no liability on the part of one Acquiring

Member to another.

(m) There has to be shown an intention that the obligations be enforceable directly by the other Acquiring Member rather than by Visa, as the administrator of the scheme. Such an obligation enforceable at law would be necessary for the establishment of a contract but, for an arrangement or understanding, the obligation there still has to be such an obligation identified and a reason for it to be implied.

(n) From the pleading, it is not clear for whose benefit the provisions concerning the TIMF operate. The most likely inference is that they are for the benefit of Visa. It is a matter of speculation to suggest that they are for the benefit of the Acquiring Members.

(o) If there is no agent, in order for a relevant expectation to exist, it must be aroused by direct communication, which then gives rise to the obligation, be it legal or moral.

32 Mr Macfarlan conceded that, if it is reasonably arguable that one can construe the arrangement as one where there has been a creation of mutual obligations, then it should proceed to hearing. He also conceded that, following *Amcor*, there does not need to be mutual commitment but submitted that there must be a commitment from one Acquiring Member to another. He submitted that the ASC must plead a reason for the implication of such a commitment, which it fails to do.

33 As I understood the effect of the submissions of Mr Gibson QC, senior counsel for Spotwire, they may be summarised as follows:

(a) In *The Satanita* it was implicit in the rules under consideration there that they could affect the rights of each of the participants. It does not follow that the Visa Rules are of a different character. They do have the capacity materially and directly to affect financially each of the Acquiring Members.

(b) The Visa Rules do indicate a liability on the part of one Acquiring Member to

the other, such that a contractual obligation is created between them. This is inferred from the Visa Rules which bind the Acquiring Members in the same way as occurred in *The Satanita* and *Raguz* and *McCannell*. There is an integrated scheme, as in *Raguz.*

(c) Those cases do not require that the obligation be inferred by necessity. It is a question of interpretation and assessment of the nature and extent of the rights and obligations of the parties.

(d) The consequence of a failure to observe the requirement to list on the TIMF is borne not only by the Acquiring Member who fails to list and pays the fine to Visa. The effect of paragraphs 4 and 9 of the ASC is that an Acquiring Member also bears the loss if it has paid the Merchant for the price of the goods and seeks payment from an Issuing Member, where an Internet Merchant has failed to pay. The TIMF provisions maintain the integrity of the whole operation to the benefit of Visa and of the Acquiring Members and the financial integrity of the scheme depends on all Acquiring Members adhering to its terms. The fine is an incentive to adhere to those terms, a pecuniary imposition intended to secure compliance with the TIMF Program Provisions.

(e) It is not necessary to find mutual obligation but there does have to be a meeting of minds or consensus among the parties to the arrangement or understanding such as to give rise to an expectation by each party to the arrangement or understanding that each other party will act in accordance with the terms of that arrangement or understanding.

(f) The test for the existence of a contract may involve obligations that are legally mutually enforceable, however, that is not the test for an arrangement or understanding.

(g) There is an inextricable relationship developed between Acquiring Members regulated by the terms of, *inter alia*, the TIMF Program Provisions.

(h) As in other cases where the relationship created between the parties involved

an obligation for breach of which an action will lie, one Acquiring Member could sue another Acquiring Member if that member fails to list on the TIMF.

(i) As pleaded, the TIMF transactions proceeded on the basis of the maintenance of a particular state of affairs. Each Acquiring Member entered into the agreement on the basis of and in the knowledge of the maintenance of a particular state of affairs, being the entry of each other Acquiring Member into an identical agreement and each Acquiring Member abiding by the terms of the Visa Rules, including the TIMF Program Provisions.

(j) This was the expectation and it rose higher than a mere expectation. As such it was sufficient to amount to an arrangement or understanding within s 4D of the TPA (*CC* at [141]). The expectation, which is the consequence of the arrangement or understanding is that, as a matter of moral duty, each of the Acquiring Members and Visa will act in a certain way.

(k) The question before the Court for the purposes of this application involves questions of fact as well as of law.

Consideration

34 From *CC* (cited with apparent approval in *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 ('*Rural Press*') it can be said that, for there to be an arrangement or understanding, there may be an obligation not enforceable at law but of the nature of a moral obligation. While a mere expectation is not enough, Lindgren J, after considering a number of cases, expressed the view that the necessary element was described by Smithers J in *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 at 291:

> *'the existence of an arrangement of the kind contemplated in s 45 is conditional upon a meeting of the minds of the parties to the arrangement in which one of them is understood, by the other or others, and intends to be so understood, as undertaking, in the role of a reasonable and conscientious man, to regard himself as being in some degree under a duty, moral or legal, to conduct himself in some particular way, at any rate so long as the other party or parties conducted themselves it the way contemplated by the arrangement.*

Smithers J added (at 291):

> *'Where the minds of the parties are at one that a proposed transaction between them proceeds on the basis of the maintenance of a particular state of affairs or the adoption of a particular course of conduct, it would seem that there would be an understanding within the meaning of the Act.'*

35 It seems to me that the pleaded position is very similar to that in *Raguz*. There is a scheme, the integrity of which depends on each Acquiring Member adhering to its terms, to list the Internet Merchant. Failure to comply results in the payment of a fine to Visa as an incentive to comply and not to supply such a listed Merchant. Adherence is in an Acquiring Member's own financial self interest and arguably necessary for the scheme to work to the mutual benefit of each of the Acquiring Members and Visa. If the factual basis for the existence of, knowledge of and compliance with the scheme is established, it is arguable that, as in *Raguz* and as pleaded, each Acquiring Member impliedly promised in favour of the others that it would abide by the TIMF Program Provisions and such an agreement is enforceable or is, at the least, an arrangement or understanding between the Acquiring Members.

Timing issues

The TIMF Program Provisions Publication

36 It is the date of the TIMF Program Provisions publication that is said to be the date on which each Acquiring Member was obliged to comply with the TIMF Program Provisions and knew that each other Acquiring Member was so obliged, by reason of the Visa Rules and the TIMF Program Provisions publication. It is also the date on which the Acquiring Members are said to have agreed and/or entered into an arrangement or understanding with Visa and with each other not to offer or provide the Acquiring Services to Merchants whose details were listed and remained listed on the TIMF or on any similar file or list. As at that date, there were Acquiring Members, including the CBA, in competition with each other in Australia.

37 Visa points to what it says is a pleading defect: the failure to plead that the TIMF Program Provisions were published to each Acquiring Member at the same time. The example is given by Visa that, if the publication were made first to the CBA, there could be no exclusionary provision as none of the other Acquiring Members could have agreed to it at

that time. This alleged defect is said to arise because the relevant time for determining whether there is an exclusionary provision is when the contract, arrangement or understanding was made. If all of the requirements of s 4D are not present at this time, it will not contain an exclusionary provision even if a missing requirement is subsequently fulfilled (*Spotwire No 1* at [35] and the cases there cited).

38 Spotwire submits that the statement of principle as to the time of determining the requirements of s 4D goes only to the ascertainment of the class of persons to whom the exclusionary provision is directed. That does not seem to me to be correct, as the statement of principle is directed to all of the requirements of s 4D. In *Rural Press* (at [97]), the Full Court stated:

> *'Breach of the alleged exclusionary provision is assessed at the time at which the provision comes into effect …The prohibited purpose must exist at that time. Regardless of the definition of a particular class of persons, the class of persons who are the object of the provision must be identified by all parties to the provision at that time and "aimed at specifically"'.*

39 At [105], their Honours said: *'As we have discussed, at the time the arrangement is entered into the parties must have a common purpose which is aimed at a particular class of persons which is the target*'. I note that it is preferable to speak of the purpose of the provision being '*directed towards*', as particular class rather than '*aimed at*' ('*News Limited* (2003) 200 ALR 157 at [79] per Gummow J); *Rural Press Limited v Australian Competition and Consumer Commission* (2003) ALR 217at [70]). It was in that context that the matter under consideration, the question of the particular class, was discussed and the comment at [108] in respect of the need to identify the class at the time the arrangement came into effect was made. However, the principle is not so limited.

40 Paragraph 10 of the ASC alleges that the TIMF Program Provisions were published to each of the then existing Visa members '[a]*s at or about the date on which the TIMF Program Provisions were introduced into the Visa Rules*'. The pleading therefore alleges a single publication date. The existence of the exclusionary provision may not, however, necessarily depend upon simultaneous publication to all of the Acquiring Members. Section 4D refers to persons any 2 or more of whom are competitive with each other. The pleading also alleges that, as at the date of the TIMF Program Provisions publication, there was the relevant consensus between the Acquiring Members. Accordingly, the ASC does not fail to

disclose a cause of action by reason of this timing issue raised by Visa. The ASC pleads the date of the TIMF Program Provisions publication as the date of the agreement. It is a matter of fact to establish whether, as pleaded, the alleged timing was correct.

The effect of the amendments to the Visa Rules

41 It should be noted that the pleading is that the introduction of the TIMF Program Provisions was as part of the Visa Rules, by which the Acquiring Members had, by the terms of the Membership Agreements, agreed to be bound as rules promulgated by Visa from time to time.Visa submits that the amendment to the Visa Rules constituted a new offer to each Acquiring Member to remain a Visa Member on new terms.

42 Paragraph 5 of the ASC elaborates the notice given of proposed amendments to the Visa Rules:

> *'(k) further, the effect of amendments to the Visa Rules has been communicated by Visa to each of the Visa Members, from time to time as the amendments have been made by Visa International's Board but before those amendments have been formally incorporated into the Visa Rules, by documents referred to by Visa as "International Member Letters" ("**International Member Letters**").*
>
> ***Particulars***
>
> *(i) The Visa Rules provide that the International Member Letters are written by Visa staff and sent to Visa Members to communicate changes to the Visa Rules that have been approved by Visa's International Board but which are not yet incorporated into the Visa Rules'.*

43 The ASC alleges that it was by the Membership Agreements that each Acquiring Member agreed to abide by the Visa Rules, as amended from time to time. The TIMF Program Provisions were such an amendment. Mr Macfarlan submitted that a provision in the Membership Agreement to abide by the Visa Rules and a provision that Visa may amend the Visa Rules does not mean that the amendment itself amends the Membership Agreement. It is a question, he submits, of performance of the contract. Visa's proposition is that, after the TIMF Program Provisions publication, each Acquiring Member made a decision whether to stay as a Visa Member, so that the date of the contract, arrangement or understanding is deferred to the date of that decision.

44 If the agreement was, as pleaded, made partly by conduct or evidenced by conduct, Visa submitted that the date of that agreement could not have been the date of the TIMF Program Provisions publication and that date would need to be identified by a specific pleading.

45 Mr Gibson's submission is that the Membership Agreement and Visa Rules permit Visa to amend the Visa Rules such that there is no fresh agreement entered into with each amendment. That is reflected in the ASC. He says that it is pleaded that the conduct of the Visa Members in remaining as members following the TIMF Program Provisions publication demonstrates an agreement with that amendment being incorporated into the Membership Agreement. Mr Gibson distinguished between conduct that went to the formation of the agreement and post-contractual conduct that evidences the agreement.

46 Spotwire has pleaded that the agreement between Acquiring Members not to offer or provide the Acquiring Services to Merchants whose details were listed and remained listed on the TIMF was in writing or, alternatively, was partly in writing and partly by conduct. The conduct was said to comprise a number of actions after the date of the TIMF Program Provisions publication, including remaining as Visa Members. Mr Gibson asserts that regard may be had to post-contractual conduct, not to determine the terms of the contract but to determine whether a contract was formed (*Brambles* per Heydon JA). It is said that the pleading is an uncontroversial application of that principle.

47 Spotwire's submission is that, if the agreement were evidenced by conduct, then the correct analysis is that the agreement pre-dated the conduct by which it was evidenced. As to the alternative pleading, that the agreement was formed by the conduct, he says that the conduct pleaded is, for all practical purposes, '*at or about*' the date of the TIMF Program Provisions Publication. If an Acquiring Member finds the amendment to the Visa Rules unacceptable, it can terminate the Membership Agreement.

48 The pleading does not reflect this distinction. The problem is that the pleading is in a compendious form such that the same conduct, some post-contractual, is said to both form and to evidence the agreement.

49 The conduct relied upon is dealt with in paragraph 11(c)(iii) of the ASC:

'In so far as the agreement was by conduct or evidenced by conduct, the conduct comprised:

(A) the establishment of the TIMF;

(B) the conduct of each of the Acquiring Members in remaining as Visa Members following the TIMF Program Provisions Publication;

(C) from time to time, following the TIMF Program Provisions Publication, the Acquiring Members contributing to the content of the TIMF by submitting to Visa written notifications of Merchants to be placed on the TIMF;

(D) from time to time, following the TIMF Program Provisions Publication, the Acquiring Members making inquiries of the TIMF to ascertain whether an Internet Merchant was listed on the TIMF before signing such a Merchant;

(E) the Acquiring Members paying Visa the amount of US$25 in respect of any such inquiry made by them;

(F) from time to time, following the TIMF Program Provisions Publication, the Acquiring Members refraining from providing, or refusing to provide, the Acquiring Services to Internet Merchants listed on the TIMF.

50 In argument, Mr Gibson clarified his reliance on the conduct pleaded in paragraph 11:

- Subparagraph A reflects the date of the TIMF Program Provisions publication.
- The conduct in subparagraph B occurred at or about the same date.
- As to subparagraphs C, D, E and F, Mr Gibson said that the intention was to rely upon the conduct there described as evidencing an agreement entered into at or about the time of the publication and not as conduct by which the agreement was formed.

That is not clear in the pleading as it stands. Spotwire should amend the ASC in this regard.

51 The pleading in paragraph 11 of the ASC alleges the formation of a contract in writing or evidenced by writing or, alternatively, partly in writing or evidenced by writing and partly by the conduct in paragraph 11(c)(iii) (A) and (B). I do not agree that it is unarguable that the writing and conduct alleged are capable of amounting to the agreement as alleged. As noted by Kirby P in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty*

Ltd (1988) 14 NSWLR 523 at 528, a court may be willing to infer a party's acceptance of a contract where, for example, there have been previous dealings between the parties or where the history between the parties gives rise to '*an inevitable inference from the conduct*' and from silence. While caution must be exercised as to conclusions that can be properly be drawn from conduct (*Integrated Computer* as cited at [17] above), that will be a matter to be determined on the facts.

Amendment to include an unlawful term

52 Further, Mr Macfarlan says, there could be no agreement which extends to an agreement to comply with an unlawful amendment of the Visa Rules, which the TIMF Program Provisions are alleged to be. The Membership Agreement should not be construed to permit Visa unilaterally to amend it to incorporate an unlawful provision.

53 Mr Macfarlan agreed that a party can contract with another party to permit a unilateral right to amend the contract but says that one could not automatically be a party to an unlawful contract without consent.

54 Visa's submissions as to deferral of the contract date also affects, it is said, the right of Visa to amend the Visa Rules to include an unlawful term. Visa asserts that, if that acceptance is the basis for Visa's right to include an unlawful term, the date upon which the unlawful term became contractually binding must be deferred and pleaded. Mr Macfarlan accepted that, if pleaded in that way, he would accept that the inclusion of the unlawful term into the Visa Rules is arguable.

55 Spotwire relies on the act of remaining as a Visa Member after amendment.

56 Mr Macfarlan's further response is that, with the matters in paragraph 11(c)(iii) excluded as conduct going to the formation of the agreement, there is not sufficient pleaded to permit Visa to amend the contract to contain an unlawful provision. Spotwire relies upon the writing as pleaded and the conduct in subparagraph B. Visa submits that, if this means that there was a contract formed by silence, further facts would need to be pleaded going to an obligation to take positive action to disabuse the other party.

57 The ASC pleads that, by the terms of the Membership Agreement, the Visa Members

have agreed with Visa to be bound by rules as promulgated by Visa from time to time (paragraph 5(a)). By way of amendment, the TIMF Program Provisions became part of the Visa Rules. The ASC pleads that Visa had, by agreement, the right unilaterally to amend the Visa Rules. The Acquiring Members were notified in advance of the proposed amendment (paragraph 5(k)) and it took effect on publication. It is alleged that, by remaining as Visa Members, the Acquiring Members agreed to the incorporation of the allegedly unlawful provision. In my opinion, it cannot be said to be unarguable.

Knowledge

58 Visa contends that Spotwire has not alleged that the Membership Agreements were in the same form or pleaded that each member had knowledge that other members had to comply with the same Visa Rules or in the same way that it did.

59 The pleading as to the Membership Agreements can be read to refer to Membership Agreements in a standard form and I read it that way. Spotwire's submissions explicitly state that the Membership Agreements were in the same form, so that is binding upon Spotwire. Similarly, the ASC does allege that each Member knew that each other Member had to comply with the Visa Rules which were, again, described as a standard set of rules applicable to all Visa Members.

Inconsistencies in pleading the target of the exclusionary provision

60 Visa also points to the fact that the target of the exclusionary provision is variously identified in the ASC as *'the applicant'*, *'Internet Merchants'* and *'Merchants'* and emphasises the importance that the particular class must be unambiguously identified. Visa submits that the inconsistencies result in an embarrassing pleading. Spotwire points to the structure of the pleading and asserts in written submissions that, in context, there can be no doubt that the target of the exclusionary provision are Merchants whose details were listed and remain listed, on the TIMF, that is Internet Merchants.

61 At the hearing, Mr Gibson accepted that paragraph 25 should not have referred to '*the applicant*' as the object of the exclusionary provision but to '*Internet Merchants*' and sought leave to amend that paragraph in order to correct those words and to substitute '*their*' for '*the applicants*' in the same paragraph. That amendment is not opposed.

62 I note that *'Merchants'* and *'Internet Merchants'* are separately defined in the ASC. Nowhere is it pleaded that Spotwire is an Internet Merchant as defined in the ASC. That does, in my view, raise an ambiguity as to the precise class claimed to be the target and therefore the pleading would seem to be embarrassing. Similarly paragraph 11(c) of the ASC also refers to the provision of Acquiring Services to '*Merchants whose details were listed and remained listed on the TIMF*'. However, I was also informed that Visa withdrew its complaint about that wording so I will not make orders with respect to that aspect of paragraph 11(c).

63 In any event, paragraph 25 should be repleaded.

Additional specific pleading matters

64 The effect of Visa's submissions and Spotwire's responses are:

Submission (a)

The agreement is alleged to have been made as at the date of the TIMF Program Provisions publication. That date is pleaded as the date of the introduction of those provision into the Visa Rules being between in or about January 1995 and no later than in or about 15 May 2001. There is insufficient specification.

Response to submission (a):

Spotwire is presently unable to particularise the date but Visa will know it. There is no evidence that the pleading is a genuine source of embarrassment.

Submission (b)

The agreement is pleaded as between a large but unspecified number of all Acquiring Members worldwide

Response to submission (b):

The class is identified; the size is not a relevant source of embarrassment.

Submission (c)

The Merchant Facility Agreement between Spotwire and the CBA was entered into on 19 July 2001 and not terminated until about 4 February 2002. This means that the alleged

agreement to exclude Spotwire was made before Spotwire signed up as a Visa Merchant. As paragraph 25 pleads that the exclusionary provision was that such Acquiring Members would not supply the Acquiring Services to Spotwire, this would seem to raise a problem. It raises the embarrassing allegation that the CBA and others agreed to exclude the applicant at a time before the applicant signed up as a Visa Merchant.

Response to submission (c):
Spotwire provided no response on this aspect but made reference to its submissions on the different targets identified in the pleading. The anticipated amendment, replacing '*the applicant*' with '*Internet Merchants*' answers this timing issue.

65 In the absence of any evidence as to embarrassment, which is not self-evident, the matters in (a) and (b) do not warrant striking out but should be clarified in the evidence. The matters in (c) are related to the previously identified problems as to the different targets of the exclusionary provision which Spotwire is to replead, so that this issue should be resolved by the proposed amendment.

APPLICATION TO STRIKE OUT OR SUMMARILY DISMISS THE "INDUCING BREACH OF CONTRACT" PLEADING

66 As I outlined in *Spotwire No 1*, the statement of claim referred to '***Visa inducing breach of contract***' but Spotwire did not seek to support such a pleading and sought to support an allegation of unlawful interference by Visa with the contractual relations that existed between Spotwire and Electronic Billing Systems AG ('EBS'). In the ASC, Spotwire has retained the heading '***Visa inducing breach of contract***' and now alleges that Visa intentionally induced EBS to breach the agreement between Spotwire and EBS ('the EBS Agreement').

Visa's knowledge of the terms of the contract

67 Visa asserts that the ASC fails to plead the essential elements of the tort. One such element is that Visa acted with the intention of procuring what it knew to be a breach of the contract; Visa says that general knowledge of the existence of the contractual arrangement, which is pleaded, is insufficient to found the tort.

68 Spotwire concedes that it does not allege that Visa was aware of the precise terms of the contract but says that such knowledge is not necessary for the tort to be established. The allegation, that Visa was aware of the contract and was intent on the contract being brought to an end by breach if there were no means of bringing it to an end lawfully, is said to satisfy the elements of the tort.

69 In *Allstate Life Insurance Company v Australia and New Zealand Banking Group Limited* (1995) 58 FCR 26 ('*Allstate*'), Lindgren J (with whom Lockhart and Tamberlin JJ agreed) considered (at 43-44) the question whether knowledge of the contract is sufficient for the purpose of grounding the necessary intention to interfere with contractual rights although the precise term breached is not known. That consideration was *obiter* as, in *Allstate*, the alleged wrongdoer was said to know of the term breached. Lindgren J cited the decisions of Lord Denning MR and Diplock LJ in *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 ('*Emerald Construction*'). Lord Denning MR (at 700) addressed the question of how much was known about the contract, noted that it was not known on what grounds it could be terminated and said:

> *'Such being the facts, how stands the law? This "labour only" subcontract was disliked intensely by this trade union and its officers. But nevertheless it was a perfectly lawful contract. The parties to it had a right to have their contractual relations preserved inviolate without unlawful interference by others: see* Quinn v. Leathem, *by Lord McNaghten. If the officers of the trade union, knowing of the contract, deliberately sought to procure a breach of it, they would do wrong: see* Lumley v. Gye. *Even if they did not know of the actual terms of the contract, but had the means of knowledge – which they deliberately disregarded – that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.'*

Lord Diplock (at 703-704) said:

> *'Upon the claim framed in this way there is no real dispute as to the law applicable. There are three essential elements in the tort of unlawful procurement of a breach of contract: the act, the intent and the resulting damage. In a quia timet action such as this, it is sufficient to prove the act and the intent and the likelihood of damage resulting if the act is successful in procuring a breach of contract. The only issue on this part of the case is one of fact as to the defendants' intent. At all relevant times they knew of the existence of a "labour only" subcontract for brickwork between the main*

> *contractors and the plaintiffs, but until it was disclosed to them on the interlocutory application to the judge in chambers for an injunction, they did not know its precise terms. They say in somewhat equivocal language that they assumed that it could be lawfully terminated by the main contractors on short notice and that such lawful termination was all that they insisted on. But ignorance of the precise terms of the contract is not enough to show absence of intent to procure its breach. The element of intent needed to constitute the tort of unlawful procurement of a breach of contract is, in my view, sufficiently established if it be proved that the defendants intended the party procured to bring the contract to an end by breach of it if there were no way of bringing it to an end lawfully. A defendant who acts with such intent runs the risk that if the contract is broken as a result of the party acting in the manner in which he is procured to act by the defendant, the defendant will be liable in damages to the other party to the contract.'*

70 In *Emerald Construction,* the Court of Appeal was considering whether to grant an injunction and, viewed in context, the decisions went to the question '*whether the plaintiffs have established on the evidence before us a prima facie case that the steps taken by the defendants which they threaten to continue constitute unlawful acts likely to cause damage to the plaintiffs which would be recoverable in an action by the plaintiffs*' (per Lord Diplock at 702).

71 In *Allstate,* Lindgren J (at 44) concluded from *Emerald Construction*:

> *'Lord Denning accommodated the law's general requirement that there be an intention to procure a breach to lack of knowledge of the precise contractual provision breached, by abandoning the terminology of "intention" with respect to breach in favour of that of "recklessness" and "indifference" (cf* Falconer v ASLEF *[1986] IRLR 331 at 334, par 35). Lord Diplock retained the word "intention", holding that intention might be proved by evidence of what may be appropriately referred to as "reckless indifference".'*

72 His Honour thus apparently extended the principle (at 41-42), derived from his consideration of *Independent Oil Industries Ltd v Shell Co of Australia Ltd* (1937) 37 SR(NSW) 394, that the alleged tortfeasor must intend that what he is inducing will be a breach of contract, to the situation where it was not alleged that the alleged tortfeasor knew of the term breached as discussed in *Emerald Construction*. In any event, although the consideration of *Emerald Construction* was *obiter,* it was cited with approval.

73 In *Australian Liquor, Hospitality and Miscellaneous Workers Union v Liquorland (Aust) Pty Ltd* (2002) Aust Torts Reports 81-655 Cooper J applying, *inter alia, Emerald*

Construction set out (at [61]-[66]) the relevant principles:

- It is no answer to a claim based on wrongfully inducing a breach of contract to assert that the defendants did not know all the terms of the contract. It is a question of sufficient knowledge of the terms to know that they were inducing a breach of contract.

- If the wrongdoer did not know of the actual terms of the contract, but had the means of knowledge which it deliberately disregarded, that is sufficient for the cause of action. It is unlawful to procure a breach of contract knowingly or recklessly indifferent whether it is a breach or not.

- Indifference as to whether the party to the contract terminates the contract lawfully or breaches it, is sufficient intention, although communication of the desire that the contract be breached is necessary.

- In a case of direct interference with contractual relations, the persuasion, procurement, inducement or other form of interference is wrongful in itself and provides the necessary element of unlawful means.

- There must be special damage caused to the claimant by the breach.

It is apparent that the absence of a pleading of knowledge of the terms of the contract is not a reason to strike out the ASC.

The effect of the communication requiring immediate termination

74 Paragraph 39 of the ASC states:

> *'On or about 26 June 2002, Visa sent to EBS a letter or email requiring EBS to immediately terminate its dealings with the applicant.'* ('the letter').

75 Mr Macfarlan pointed out that termination of the EBS Agreement did not occur until three months after the letter. The EBS Agreement provided for a lawful termination on 30 days notice. Accordingly, the Visa direction was not inconsistent with a lawful termination of the contract, as the word '*immediately*' was ignored or it did not convey immediate non-

lawful termination.

76 Mr Gibson submitted that the question whether the letter continued to have operative effect on EBS when it acted on 30 September 2002 was a question of fact. He conceded that, if a finding were made that the 'requirement' in the letter had ceased to have any operative effect, the allegation in paragraph 39 of the ASC would be of no relevance. He also relies upon the communication of 30 September 2002 referred to in paragraph 40 and the allegation that the termination took place on that same date.

77 Paragraph 40 alleges:

> *'On or about 30 September 2002, Visa threatened EBS to cease providing services to the applicant.*
>
> ***Particulars***
>
> *(a) On or about 30 September 2002, a representative of Visa (whose identity the applicant is currently unable to particularise) telephoned Mr Tobias Schreyer, a representative of EBS-AG;*
>
> *(b) During the telephone conversation, the Visa representative said to Mr Schreyer words to the effect of "you should cease processing on behalf of Supabill Services otherwise you will jeopardise your relationship with Visa".'*

78 In paragraphs 37 - 40 of the ASC, reliance is placed on a series of communications from Visa to EBS which are said to have induced EBS to terminate the EBS Agreement, of which the letter is one. It seems to me that, as pleaded, Spotwire alleges continued operation of the letter.

79 Mr Gibson submitted that the determination of the effect of the letter cannot be made on the pleading. If the effect of Visa's communication with EBS was expressing a desire that EBS terminate the contract with Spotwire as soon as EBS could lawfully do so, then the facts would be materially identical with *Sanders* and there would be no cause of action but that is not what is pleaded**.** While there was no 30 day notice of termination given, the link between the events, the Visa communications and the termination, is a question of fact to be determined. It is for the evidence to establish the effect of the communications, including the letter. As pleaded, the cause of action is arguable.

The EBS Agreement could have been terminated lawfully

80 Visa's submission is that the EBS Merchant Agreement could have been brought to an end lawfully, by EBS providing the appropriate notice period, as was the case in *Sanders*. In light of the fact that the contract **could** have been terminated lawfully, there is nothing in the conduct pleaded to indicate that Visa intended EBS to breach the contract in terminating Spotwire. Accordingly, Visa says, an essential element of the tort that must be pleaded is that Visa intended EBS to terminate the contract without providing the 30 day notice period, which would have permitted EBS to terminate the contract lawfully.

81 In *Sanders* Gleeson CJ, Gaudron, Kirby and Hayne JJ at [20] observed that the law in regard to 'economic torts' is far from settled. I dealt with *Sanders* in the context of the previous submissions on unlawful interference with contractual relations in *Spotwire No 1* at [68]. In *Sanders*, it was pointed out (at [23]) that, to persuade or direct a contracting party to terminate the contract lawfully is not to procure a breach of the contract. Where a direction is given to terminate and nothing said, directly or indirectly, such that the contract could have been terminated lawfully, the majority concluded (at [26]) that the decision as to how to terminate was then the decision of the recipient of the direction (here, EBS). On this analysis, as the pleading stands, Visa did not procure or induce the termination of the contract between EBS and Spotwire. However, Spotwire points to the different factual context of *Sanders*. Counsel contends that, in *Sanders*, the termination could have been effected lawfully, consistent with the direction given and the direction could not have been read or understood as requiring or suggesting the breaking of the contract. In contrast, it is said, the pleading in the ASC alleges a direction that EBS '*immediately terminate its dealings with the applicant*'. Such a direction was not, he says, consistent with the lawful termination of the EBS Agreement or, alternatively, Visa was indifferent as to whether the termination was lawful.

82 Visa submits that the essential element of the tort is that Visa acted with the intention of procuring what it knew to be a breach of contract, that is that it intended EBS to terminate the agreement without providing the (lawful) 30 day notice period. Spotwire's riposte, relying on *Allstate* and *Emerald Construction,* is that this would necessitate knowledge by Visa of the precise term breached and that indifference to the terms of the contract is sufficient to satisfy the intention element of the tort.

83 Paragraphs 42 and 43 of the ASC provide:

> *'42. At the material times of its conduct described in paragraphs 37 to 40 above, Visa knew that EBS was providing to the applicant the services referred to in paragraphs 32(a) to (c) above pursuant to a contractual relationship.*
>
> ***Particulars***
>
> *Visa's knowledge is to be inferred from:*
>
> *(a) the matters referred to in paragraphs 4(e), 4(f), 4(g), 4(h) and 30 above;*
>
> *(b) the fact that Visa, by its conduct referred to in paragraph 38 above, acknowledged the existence of a relationship between EBS and the applicant;*
>
> *(c) the matters referred to in paragraph 40(b) above;*
>
> *(d) the fact that, as a matter of commercial reality, transactions could only be processed by EBS on behalf of the applicant pursuant to an agreement such as that referred to at paragraphs 31 and 32 above.*
>
> *43. By acting in the manner referred to in paragraphs 37 to 40 above, Visa intended EBS to bring the EBS Merchant Services Agreement to an end by breaching its terms if there were no way of bringing it to an end lawfully.'*

84 If the principles in *Emerald Construction* are applied and if Spotwire can, on the evidence, distinguish *Sanders*, it seems to me that it is arguable that the knowledge alleged in paragraph 42 and 43 of the ASC are sufficient to found the tort.

Prejudice, embarrassment or delay

85 The ASC pleads that the governing law of the EBS Agreement is the law of the Federal Republic of Germany. Spotwire has pleaded an implied term of the EBS Agreement by reason of articles 157 and 242 of the German *Burgerliches Gesetzbuch*. The location of the communications and other conduct alleged have not been particularised and the pleading does not allege where the breach occurred or that the breach was a wrong according to the law of the Federal Republic of Germany. It is not in dispute between the parties that, following *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 ('*Regie*'), the substantive law for the determination of foreign torts is the *lex loci delicti*. Visa submitted in

its written submissions that it is necessary to identify in pleading the tort where the wrong occurred, in order to determine the applicable law and that Spotwire has not done so.

86 Visa seemed to accept at the hearing that the applicant was not obliged to plead the foreign law if it does not rely on any particular aspect of it but submits that Visa is entitled to know the alleged applicable law in order to determine whether it can, for example, plead a relevant defence.

87 Visa says that it does not know what is alleged to be the law which governs the alleged wrong or whether at least part of the proceedings should be stayed on the grounds of *forum non conveniens.* Visa's essential complaint is that it is prejudiced and embarrassed because it has an obligation to plead foreign law if it intends to rely on foreign law but until it knows where the alleged wrong is supposed to have occurred it cannot begin to consider the application of any foreign law.

88 Spotwire says that *Regie* is authority to the contrary. The question raised directly in *Regie* (at [70]) was whether it is necessary for the plaintiff to plead the foreign law in order to establish a cause of action. The joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ answered that question in the negative.

89 In *Regie*, the joint judgment held (at [60]) that the so called 'double actionability rule' should now be held to have no application in Australia in relation international torts. The double actionability rule had been formulated by Brennan J in *Breavington v Godleman* (1987) 169 CLR 41 at 110-111 in the following terms:

> *'A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if -- 1 the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and 2 by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.'*

90 In *Regie* (at [75]), the joint judgment rejected the double actionability rule in favour of a rule which provides that the substantive law for the determination of rights and liabilities in respect of foreign torts should be the *lex loci delicti* without the addition of any flexible

exception. However, in preferring the *lex loci delicti* as the source of substantive law, their Honours noted (at [68]) that:

> *'Once the distinction between jurisdiction as a "threshold requirement" and choice of law is appreciated, it will be seen that there is no obligation upon either party to plead foreign law in order to render a claim or cross-claim justiciable. If, however, either party seeks to rely on foreign law, rules of court and general principles of pleading may oblige the party to plead the relevant foreign law.'*

91 At (at [70]), the joint judgment then embarked upon the consideration of two particular questions which arise in respect of the pleading of foreign law in tort actions. The first question is presently relevant and was addressed as follows:

> *'The first question is whether it is* necessary *for the plaintiff to plead the foreign law in order to establish a cause of action. The answer preferred by Dicey (138)* [*and Morris on the Conflicts of Laws*, 13th ed (Collins), London, Maxwell Sweet, 2000, vol 2, p 1569] *is in the negative. In* Walker v W A Pickles Pty Ltd *(139)* [[1980] 2 NSWLR 281 ('*Walker*') at 284 - 285], *Hutley JA explained:*
>
> > *'An action of tort may be brought in New South Wales courts irrespective of where the facts founding the action may have occurred, even if they occurred in a place where there may be no law at all: see* Mostyn v Fabrigas [(1774) 1 Cowp 161 at 181] *(140). A pleading of a cause of action in tort which did not allege that the facts occurred in any particular law district would be formally valid. On the basis that the utmost economy is enjoined by the rules, it would seem to me that pleading of a foreign element in the initiating process in a claim in tort can never be necessary …*
> >
> > *This approach is reinforced by the principle that foreign law, which is, except between the States and the Territories of the Commonwealth, a fact, is presumed to be the same as local law; and a fact presumed to be true does not have to be pleaded: see* Supreme Court Rules, *Pt 15, r 10(a).'"* (emphasis in original citation).

92 In *Walker* (at 285), Hutley JA had also said:

> *'In the case of torts where the foreign element is a law of another State, it is not necessary to plead that law. It follows, in my opinion, that not only is it unnecessary for a plaintiff to set out the law of another State, but it is wrong to do so; and, further, there is no obligation, as a matter of strict pleading, to allege where the acts relied upon occurred.'*

93 Mr Gibson submits that, if Visa seeks to rely on a foreign *lex causae*, it is for Visa to

allege and prove that law as an exculpatory fact as stated by the High Court in *Regie* (at [70]) but contends that this can not displace the primary rule that the pleading of a foreign element in the initiating process in a claim in tort is not necessary. He recognises that Visa may be entitled to more information in order to determine which law applies, such as who is alleged to have acted and where but contends that Visa should first make reasonable attempts to ascertain those facts for itself, as the pleading alleges actions by Visa personnel.

94 It seems to me that Visa has the right to sufficient particulars to determine questions of the applicability of foreign law but *Regie* is clear on the obligations of the applicant in its pleading. Spotwire is not obliged to plead this issue but is, in my view, obliged to provide sufficient information by way of material facts and particulars to enable Visa to form a view. It is no answer to say that Visa can make its own enquiries. This is a matter as to which no directions were sought but it should be resolved expeditiously.

95 Accordingly, Spotwire is not obliged to identify the applicable law in pleading its claim but is obliged to provide sufficient information to enable Visa to determine questions of applicability.

PARTICULARS

96 Mr Macfarlan points to the fact that Spotwire has neither provided particulars nor has it produced for inspection the documents referred to in its pleading, despite the service of a notice to produce under Order 15 rule 10 of the Federal Court Rules.

97 On 7 November 2003 Visa served on Spotwire a notice to produce pursuant to Order 15 rule 10, seeking production of a number of documents referred to in the ASC. On 19 November 2003, Spotwire provided only a few documents and stated that the rest of the documents were either not in its possession, custody or control or privileged. Spotwire has not served a notice to produce on Visa to obtain the documents. Some comments were made as to the desirability of Spotwire filing its evidence before discovery takes place. Mr Gibson resists that course. There have also been comments raised as to the difficulties that may arise in discovery. There is no evidence as to that.

98 Visa is, *prima facie*, entitled to the documents referred to in the ASC. I will not, at this stage, make an order under Order 15 rule 16 of the Federal Court Rules as various

alternative approaches were mentioned but were not the subject of detailed submissions.

99 Visa asserts that Spotwire has, in the ASC, made a series of assertions and failed to provide particulars in respect of matters, some of which may have no connection with Visa and should not be permitted to '*fish*' in discovery. Consideration of this matter does not arise on the present notice of motion and would be more appropriately dealt with in directions and with the benefit of any evidence on which the parties might wish to rely.

100 Mr Macfarlan also points to the absence of particularisation of the emails and conversations alleged to give rise to the inducing of the breach of contract, in particular, the identity of the person said to have made the communications on behalf of Visa. He says that these matters cannot be left to a fishing expedition on discovery. While there is no evidence before me to the effect that Visa has insufficient information to continue the interlocutory process, Mr Macfarlan has a good point. Mr Macfarlan makes a suggestion that directions could be given such as those made by Lockhart J in *Australian Competition and Consumer Commission v Golden West Network Pty Ltd* [1997] FCA 792 in order to enable Visa to know the claim that it has to meet. In particular, he suggests a direction that Spotwire file and serve affidavits to show that there really are facts which can be proved and which, if proved, would support the statements made in the ASC.

101 Mr Gibson submitted that the appropriate course is for Visa to file a defence and the interlocutory steps that are available can then be considered by the parties and directions made accordingly.

102 Clearly, in view of the present application, no defence has yet been filed. Some of these interlocutory matters are being raised prematurely. However, it seems to me that if Spotwire cannot provide sufficient particulars, it may be appropriate at this stage to direct that Spotwire file and serve affidavits as suggested. I will hear from the parties as to the future conduct of the matter.

LEAVE TO TAX COSTS FORTHWITH

103 Visa seeks an order that it be permitted to tax forthwith its costs of *Spotwire No 1*, in which I made an order for costs in its favour.

104 Order 62 rule 3 of the Federal Court Rules provides:

> *'(1) The Court may in any proceeding exercise its powers and discretions as to costs at any stage of the proceeding or after the conclusion of the proceeding.*
>
> *(2) Where the Court makes an order in any proceeding for the payment of costs the Court may require that the costs be paid forthwith notwithstanding that the proceeding is not concluded.*
>
> *(3) An order for costs of an interlocutory proceeding shall not, unless the Court otherwise orders, entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded or further order.'*

From the cases that have discussed Order 62 rule 3, such as *Life Airbag Co of Australia Pty Ltd & Ors v Life Airbag Co (New Zealand) Ltd* [1998] FCA 545, *Thunderdome Racetiming and Scoring Pty Ltd v Dorian Industries Pty Ltd* 36 FCR 297, *Allstate Life Insurance Co. v Australia & New Zealand Banking Group Ltd (No 14)* [1995] FCA 660, *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 13)* [1995] FCA 626, *Vasyli v AOL International Pty Ltd* [1996] FCA 804, *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639, *Brasington v Overton Investments Pty Ltd* [2001] FCA 571, *Eunson v Beaulieu United Ltd* (2002) 190 ALR 110, *Murran Investments Pty Ltd v Aromatic Beauty Products Pty Ltd* (2000) 191 ALR 579, *Bailey v Beagle Management Pty Ltd* (2001) 105 FCR 136, *Australian Competition and Consumer Commission v Chaste Corp Pty Ltd (in liq)* (2003) 127 FCR 433 and *Bridgetown Greenbushes / Friends of the Forest Inc v Department of Conservation and Land* (unreported, Western Australian Supreme Court, 30 April 1997) , the following principles emerge:

- The general principle is that costs ought to be resolved when the proceeding has been concluded and the rights of the parties have been finally determined. However, Order 62 rule 3(3) contemplates that, in certain circumstances, the general principle can be varied, as a matter of the court's discretion.

- The exercise of the discretion should only be exercised where the interests of justice in the particular case require a departure form the general practice.

- The discretion should be exercised in favour or a party who establishes that the demands of justice require that there be a departure from what appears to be the general practice envisaged by the rule.

- One consideration is the length of time that the proceedings will conclude, in the ordinary course of events.

- Where costs are sought in respect of a successful strike out application, the fact that the unsuccessful party failed to remedy defects despite clear notice of those defects, may make appropriate immediate taxation and payment.

- Costs incurred by reason of an ill-considered pleading may give rise to an exception to the principle that the costs await the final resolution of the issues between the parties.

- In ordinary circumstances, it would be inappropriate that an unsuccessful party in an interlocutory proceeding be required to pay costs immediately, since that party might ultimately be entitled to an order for costs in the substantive proceeding.

105 A Practice Note has issued in the Supreme Court of New South Wales for the Commercial and Technology and Construction Lists so that the usual order is that a party who obtains a costs order on an interlocutory matter may proceed to assessment forthwith. I was urged by Visa to adopt this '*modern and sensible approach*'.

106 It is fair to say that there is a dearth of evidence before me on which to determine the demands of justice. There is, for example, no particular disadvantage or prejudice that Visa can point to, nor is there any evidence to suggest that the litigation would be stifled on the part of Spotwire if an order were made.

107 Visa refers to the deficiencies identified in the original statement of claim and the fact that Visa's solicitors identified those deficiencies in correspondence with Spotwire's solicitors prior to filing the notice of motion. Visa also points to the complexity of the issues and the time that will necessarily be taken to bring the matter to hearing. In submissions, Visa asserts that it has '*legitimate concerns as to the recoverability of its costs*' but, as noted, there would seem to be agreement that Spotwire provide security for costs.

108 The proceedings undoubtedly raise complex issues and will take some time, probably many months, in preparation and hearing. In *Spotwire No 1*, Visa was successful in establishing a basic deficiency in the Part IV pleading. Spotwire effectively conceded that its pleading of the inducing breach of contract allegation was inadequate and, indeed, abandoned

that alleged tort at the previous hearing (only to embrace it again in the ASC in a different form of pleading). For these reasons, the statement of claim was struck out and costs awarded against Spotwire.

109 That is not to say, however, that the demands of justice require the exercise of discretion to depart from the ordinary course envisaged in Order 62 Rule 3. Spotwire has repleaded the statement of claim and, while some minor deficiencies have been identified, I have concluded that its case is not unarguable. Visa has not pointed to any particular prejudice if the order for immediate taxation and payment is not made and Visa is protected as to its costs by an agreement that Spotwire provide security for those costs. In the circumstances, I decline to make the order sought.

SUMMARY

Contract, arrangement or understanding

110 The ASC is not liable to be struck out for failure to plead offer and acceptance.

111 The ASC does, arguably plead a contract, arrangement or understanding within the meaning of s 4D of the TPA.

112 Paragraph 11(c)(iii) of the ASC should be repleaded to reflect the distinctions between conduct by which the alleged agreement was formed and conduct which is said to evidence that agreement.

113 Paragraph 11 of the ASC should also be repleaded to make clear the date upon which it is alleged that the Acquiring Members accepted the TIMF Program Provisions as an amendment to the Visa Rules.

114 Paragraph 25 of the ASC should be repleaded to refer to Internet Merchants and not to the applicant as the alleged target of the exclusionary provision.

Inducing breach of contract

115 The pleading of inducing breach of contract does, arguably, disclose a cause of action.

116 Spotwire should give sufficient information by way of material facts and particulars to enable Visa to determine the applicable foreign law.

Particulars

117 Spotwire is obliged to provide the documents referred to in the ASC, the subject of Visa's notice to produce.

118 Visa is entitled to particulars of the letters, emails and conversations alleged to give rise to the inducing of the breach of contract.

Leave to tax costs forthwith

119 In the absence of evidence on which to determine the demands of justice, there has been no reason established to depart from the ordinary course that the taxation of costs of the previous interlocutory application await the conclusion of the principal proceeding.

FUTURE CONDUCT

120 I will hear from the parties as to the appropriate orders to give effect to these reasons, the future conduct of the matter and costs.

I certify that the preceding one hundred and twenty (120) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.

Associate:

Dated: 7 May 2004

Counsel for the Applicant	GJ Gibson QC with DA Kelly
Solicitor for the Applicant	Nyst Lawyers
Counsel for the First Respondent:	R Macfarlan QC with PJ Brereton

Solicitor for the First Respondent:	Blake Dawson Waldron
Counsel for the Second Respondent:	AG Bell SC
Solicitor for the Second Respondent:	Gilbert + Tobin
Date of Hearing:	4 and 5 February 2004
Date of Judgment:	7 May 2004