JUDGMENT : McDougall J Supreme Court New South Wales Equity Division T&C List 18th February 2008

1 As explained in my reasons given in these proceedings on 15 February 2008, the dispute between the plaintiffs and the first defendant (whom I will call simply "*the defendant*") relates to three construction contracts, and to three determinations made by the second defendant (the adjudicator) in respect of them. The determinations - one for each contract - were made on 14 January 2008. They provided in total that the plaintiffs were liable in an amount of about $340,000. Of that amount some $100,000 (in round figures) related to work done and materials supplied. The balance related to interest calculated at the rate of 9 percent per month compounding.

2 In my earlier reasons, I concluded that the determinations were not liable to be quashed on any of the grounds of invalidity suggested in ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421.

3 The plaintiffs have sought relief also under ss51AA or 51AC of the *Trade Practices Act* 1974. They relied on the contractual rate of interest to which I have referred, submitting that it was a penalty and therefore unconscionable. For the reasons explained at [8] of my earlier reasons, I stood that issue over until today.

Factual Background

4 As I have said, there are three relevant construction contracts. They relate to projects known as Highpoint (in Victoria), Chermside (in Queensland) and Chatswood Chase (in New South Wales).

5 In each case the form of contract utilised was based on a standard form provided by an industry association (ASOFIA) to its members including the defendant.

6 The evidence showed that at some stage the defendant had put the ASOFIA form (as I shall call the standard form) on to its word processing system.

7 Clause 10(v) of the ASOFIA form, which was not changed on the defendant's system, reads as follows:

10(v) Interest shall be payable at the rate stated in item H of the Appendix per month on payments not made at the specified payment time and on outstanding or late payments from the due date of payment until such payment is made.

8 That clause appeared in each of the three contracts with which I am concerned.

9 Item H of the Schedule to the ASOFIA form reads as follows:

H. INTEREST ON OVERDUE PAYMENTS Clause 10(v) ……..% per month.

10 In the Highpoint contract, item H of the Schedule was amended in handwriting. The figure "9.0" was written before the "%" sign.

11 In the Chermside and Chatswood Chase contracts, the ASOFIA form was amended so that the figure "9" was printed to appear immediately before the "%" sign.

12 Mr David Li, the plaintiff's officer who signed each contract, said that he was assured by Mr Paul King of the defendant that the contract included "just standard conditions". Mr King gave no evidence in rebuttal. I accept Mr Li's evidence. Mr King's assurance was wrong. There is no evidence whatsoever that ASOFIA prescribed or recommended, or that its standard form included, any interest rate, let alone the rate that the defendant sought to impose upon the plaintiffs.

13 Mr Li said also that when he signed the contract in each case, he checked the start and finish dates (items A and B of the Schedule) and the scope of works (set out in an annexed quotation), but that he did not read the balance of the document. I accept that evidence.

Jurisdictional Issues

14 The plaintiffs seek an order staying the enforcement of a judgment or judgments that the defendant has recovered in the District Court pursuant to adjudication certificates reflecting the three determinations. The plaintiffs do so, as I have indicated, on the basis that enforcement would include enforcement of a penalty and that the defendant's conduct in proposing and insisting upon the penalty, and in utilising the mechanisms given by the *Building and Construction Industry Security of Payment Act* 1999 (the NSW Act) or its equivalents in Victoria and Queensland, to enforce that penalty is unconscionable.

15 In ***Bitannia Pty Ltd v Parkline Constructions Pty Ltd*** (2006) 67 NSWLR 9, the Court of Appeal held that a judgment founded on a determination under the NSW Act could be stayed if the determination had been procured by misleading or deceptive conduct in breach of s52 of the *Trade Practices Act*. That stay could be granted pursuant to s87 of the *Trade Practices Act* on the application of the party alleging the use of misleading or deceptive conduct. Alternatively, the judgement creditor could be restrained pursuant to s80 (if there were a "proceeding" in which that relief was sought) or s87 (on application for that relief) from enforcing the judgment.

16 The same principles would enable the Court to fashion relief under s87 (or, in a proceeding, under s80) based on s51AA or s51AC. The defendant did not submit otherwise. Nor did it submit that the question should be dealt with in the District Court rather than in this Court (something that I had raised in the course of argument on 15 February 2008).

17 It is unnecessary to consider many of the matters debated in ***Bitannia,*** in particular the difference between a proceeding and an application, given that on any view the summons in these proceedings, and the amended summons on which the plaintiffs moved, is a proceeding invoking federal jurisdiction under the relevant provisions of the *Trade Practices Act* and claiming relief under it.

Unconscionability

18 Sections 51 AA and 51AC of the *Trade Practices Act* provide as follows:

51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories

(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

51AC Unconscionable conduct in business transactions

(1) A corporation must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

(2) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

*(3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the **supplier**) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the **business consumer**), the Court may have regard to:*

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and

(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

(i) any intended conduct of the supplier that might affect the interests of the business consumer; and

(ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and

(ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and

(k) the extent to which the supplier and the business consumer acted in good faith.

*(4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the **acquirer**) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the **small business supplier**), the Court may have regard to:*

(a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:

(i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and

(ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and

(j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and

(ja) whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the small business supplier for the acquisition of the goods or services; and

(k) the extent to which the acquirer and the small business supplier acted in good faith.

(5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:

(a) the supply or possible supply of goods or services to another person; or

(b) the acquisition or possible acquisition of goods or services from another person;

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

(6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):

(a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

(7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.

(9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of $10,000,000, or such higher amount as is prescribed.

(10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of $10,000,000, or such higher amount as is prescribed.

(11) For the purposes of subsections (9) and (10):

(a) subject to paragraphs (b), (c), (d) and (e), the price for:

(i) the supply or possible supply of goods or services to a person; or

(ii) the acquisition or possible acquisition of goods or services by a person;

is taken to be the amount paid or payable by the person for the goods or services; and

(b) paragraph 4B(2)(c) applies as if references in that paragraph to the purchase of goods or services by a person were references to:

(i) the supply of goods or services to a person pursuant to a purchase; or

(ii) the acquisition of goods or services by a person by way of purchase;

as the case requires; and

(c) paragraph 4B(2)(d) applies as if:

(i) the reference in that paragraph to a person acquiring goods or services otherwise than by way of purchase included a reference to a person being supplied with goods or services otherwise than pursuant to a purchase; and

(ii) a reference in that paragraph to acquisition included a reference to supply; and

(d) paragraph 4B(2)(e) applies as if references in that paragraph to the acquisition of goods or services by a person, or to the acquisition of services by a person, included references to the supply of goods or services to a person, or the supply of services, to a person, as the case may be; and

(e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

(12) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

(13) Expressions used in this section that are defined for the purpose of Part IVB have the same meaning in this section as they do in Part IVB.

*(14) In this section, **listed public company** has the same meaning as it has in the Income Tax Assessment Act 1997.*

19 It is plain that if equity relieves against a penalty or a forfeiture, it does so on the ground that those matters are of their nature unconscionable. This is one of the oldest heads of equitable intervention into what was insisted upon by the common law pursuant to the sacred doctrine of freedom of contract. If authority is needed for this head of equitable power, it may be found in decisions such as ***Legione v Hately*** (1983) 152 CLR 406 and *Stern v McArthur* (1988) 165 CLR 489.

Penalty

20 Much of the debate focused on the allegedly penal character of the contractual interest rate. That rate - 9 percent per month compounding - may be shown to equate to simple interest at about 180 percent per annum on monthly rests.

21 The relevant principles are clear. In ***Esanda Finance Corporation Ltd v Plessnig*** (1989) 166 CLR 131, Wilson and Toohey JJ referred more than once to the decision of the House of Lords in ***Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*** [1915] AC 79. Their Honours extracted from that decision the proposition that a payment of a stipulated sum on breach will be a penalty only if it is out of all proportion, or extravagant, exorbitant or unconscionable, having regard to the likelihood and quantification of actual damage flowing from the breach. See their Honours' reasons in particular at 139 to 141. Brennan J at 143 expressed himself in similar terms.

22 Thus put, the question involves a comparison of the maximum damage that one might reasonably foresee would be sustained by reason of a breach of the contract with the amount stipulated as the pre-estimate or liquidated sum.

23 A similar approach is demonstrated by the judgment of the High Court of Australia in ***Ringrow Pty Ltd v BP Australia Pty Ltd*** (2005) 224 CLR 656. Their Honours discussed the question, in particular by reference to the supposed requirement for "proportionality", from 667 [26]. Their Honours concluded at 669 [32] that for a pre-estimate of damage, or a stipulated sum, to be judged penal, it must be found to be extravagant and unconscionable in amount. Proportionality of itself was not the test. Their Honours said:

Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged "extravagant and unconscionable in amount. It is not enough that it should be lacking in proportion. It must be "out of all proportion". It would therefore be a reversal of longstanding authority to substitute a test expressed in terms of mere disproportionality. However helpful that concept may be in considering other legal questions (54), it sits uncomfortably in the present context.

24 It is also clear from the judgment of Wilson and Toohey JJ in ***Esanda*** at 142 that the question, whether a contract or a contractual provision is penal, is to be assessed as at the time the contract is made. The answer to the question requires the Court to have regard to circumstances then known or reasonably foreseeable.

25 The defendant adopted with enthusiasm the proposition that the contractual rate was imposed in an attempt to ensure prompt payment. It said in each adjudication application:

The applicable interest rate as per item H of the appendix is 9% (per month). This indicates why the Respondent has run up such a massive interest liability. The contract is the standard form of contract of the Australian Shop and Office Fitting Industry Association (ASOFIA). Its members, such as the Claimant, are typically small businesses. The nature of this industry is requires that these small contractors supply and install goods to the value of many hundreds of thousands of dollars over a very small period of time, as clients want to trade from their shops as soon as possible. Even a small shop can run into six figures. Therefore the contractor is carrying massive outgoings which it cannot afford to do over any extended period.

ASOFIA, to protect its members' interest, have quite deliberately included this provision for interest charges which is very clear in its application, and the fact that the rate applies every month (not per annum) and that it is for <u>all payments not made</u>. This means that interest charges will attract further interest charges, and be cumulative. It is supposed to be a strong disincentive for late payers.

26 This proposition was repeated in the defendant's written outline of submissions dated 14 February 2008:

The interest provisions of the contract are deliberate. They are intended and it is submitted, to attract interest at the stated rate (see appendix paragraph H) for all payments not made.

This is intended by ASOFIA to assist its members – being a strong disincentive for persons who pay late.

27 In the course of argument, Mr Peter Murphy, solicitor, who appeared for the defendant referred to the contractual rate as an "interest penalty". That may have been a slip of the tongue, and I place no reliance on it as constituting some form of concession.

The rate is penal

28 For the reasons I have given, it is wrong to submit that the rate of 9 percent per month compounding was chosen by ASOFIA to assist its members, and it was wrong to suggest that - as, in my view, the adjudication applications plainly did - to the adjudicator.

29 Mr Murphy submitted repeatedly that the contractual rate of interest, although only imposed on default in payment, was not penal. He referred to an affidavit of Ms Joanne McMahon sworn 10 February 2008. In that affidavit Ms McMahon sought to set out the various kinds of damage that, she said, had flowed from the plaintiff's default in payment. Paragraph 10 of that affidavit reads as follows:

[10] I refer to paragraph 12 of the Mimis affidavit under the heading "Reasons in support of injunction or stay application by Katherine and Seduce". I say that the business of CCD, which first commenced trading in 1992, has been damaged by the failure of Seduce and Katherine to pay the claims under the contracts in respect of Chatswood Chase (NSW), Highpoint Shopping Centre (VIC) and Westfield Chermside (Qld), the subject of the determination of Ian Hillman dated 14 January 2008 in the following ways:

a. Increase in the CCD overdraft limit with an overdraft interest rate of 10% and 17.3% in excess of that limit;

b. Lay off of three company staff and inability to employ more staff resulting in longer hours being worked by CCD's management;

c. Cancellation of annual holidays;

d. Sale of investment properties being a dwelling at Mosman and two factories at Dee Why;

e. Sale of vehicles being a flat top truck and a station wagon; and

f. Business loan from Craig McMahon's parents' retirement funds.

30 The only one of those assertions that was proved by documentary (or for that matter other) evidence is the first, relating to the defendant's overdraft. The evidence showed that the defendant's bank presently imposes a rate of 9.8 percent whilst the overdraft account was within limits and a rate of 16.5 percent when it was over limit.

31 An examination of the defendant's bank statements shows no correlation between the extent or amount of the overdraft from time to time and the non-payment of the invoices in question (I repeat that, according to the adjudicator, they totalled in round figures $100,000 before interest).

32 The invoices in question were rendered over time between 30 September 2006 and 28 February 2007. The Highpoint store was handed over from the defendant to the relevant plaintiff on 20 September 2006. The Chermside store was handed over from the defendant to the relevant plaintiff on 2 December 2006. The Chatswood Chase store was handed over on 4 November 2006. Presumably, most of the work, and most of the associated expense to the defendant, had been incurred by the last of those dates.

33 The evidence shows that the defendant's overdraft had increased sharply from March through to October 2006, and declined sharply from then to December 2006. From January 2007, the overdraft increased very substantially. It is to be noted that even if the amount of $100,000 had been paid in full at the end of November 2006, the overdraft by February 2007 would have stood at a rate very much higher than in fact it stood in December 2006.

34 The increase in the overdraft to mid-2006 cannot be explained by the work done for the plaintiffs nor by their failure to pay the invoices. Undoubtedly, some part of the overdraft after September 2006 can be explained by those means; but in November and December 2006, the overdraft declined to a level that it has not since touched.

35 Further, as I have indicated, even if the amount found by the adjudicator to be owing were to be taken into account, the overdraft would now be (and for most of 2007 would have been) substantially higher than it was at any point in 2006.

36 Thus, whilst I accept that non-payment of the invoices might have been seen to result in the defendant's incurring finance costs, I do not accept that the complaints made out by Ms McMahon in paragraph 10(a) of her affidavit are made good.

37 There is no evidence in support of the other matters set out in paragraph 10. Indeed, a study of the fluctuations in the overdraft, compared to the amount said to be owed by the plaintiffs, suggests that there is no connection between the plaintiffs' failure to pay and the other matters complained of in paragraph 10. I might add that the plaintiffs called for the production of documents going to these matters; none was produced.

38 Ms McMahon also said, in paragraphs 11 and 12 of her affidavit:

[11] In addition to the above hardships directly related to the failure of Katherine and Seduce to pay the sums owing under the contracts, CCD has been forced to decline acceptance of new business which I estimate to be approximately 20 contracts each being approximately $100,000.00 or in excess of that figure.

[12] Due to the inability of CCD to pay its own creditors as a result of the failure of Katherine and Seduce to pay the monies due under the contracts, CCD is now unable to make use of approximately 12 of its long term suppliers who are no longer willing to trade with CCD as a credit risk.

39 Again, there is no extrinsic evidence in support of these assertions. Again, although documents were called for that might have thrown light upon the assertions, no documents were produced. Again, a study of the overdraft fluctuations suggests that the complaints have little factual foundation.

40 As I have indicated, I think it was clearly foreseeable, at the time each of the contracts was made, that if the plaintiffs did not pay, the defendant might incur interest or additional interest expense. However, on the evidence, the rate of those interest expenses is not within even a remote distance of interest according to the contractual rate when the two are put on a comparable basis.

41 For these reasons, I conclude that the only evidence of loss to be compared to the contractual rate of interest is the overdraft interest rates. Even assuming that the relevant rate is the over - limit rate (and the evidence does not really support that assumption) the comparison is between a cost of 16.5 percent per annum on monthly rests and a contractual rate equivalent to about 180 percent per annum on monthly rests.

42 In my view, that comparison, taken in conjunction with the failure to demonstrate any other head of loss, demonstrates beyond doubt that the contractual rate is so disproportionate to the foreseeable actual loss that the contractual rate must be regarded as a penalty.

43 On that finding, the defendant is guilty of unconscionable conduct under the unwritten law. Section 51AA of the *Trade Practices Act* is therefore enlivened. It is unnecessary to consider s51AC. (Mr Murphy did not submit that s51AC would be enlivened, to the exclusion of s51AA).

44 Mr Murphy addressed many other submissions to the court on this point. Most of them were based, one way or the other, on the proposition that the contractual rate was not penal. Since I have found that it is, they must be rejected. Many - indeed most - of his other submissions on this point traversed, if they did not cross altogether, the outer limits of relevance. I do not propose to deal with them except to say that they had, as a common thread, a failure to grapple with the central issue: the basis on which equity relieves against penalties.

Should relief be granted?

45 Mr Murphy submitted that relief should not be granted. He relied on the fact that Mr Li had signed the contract in each case without reading it or checking its terms. He submitted further that the plaintiffs were the authors of their own misfortune, because they had brought the interest consequences upon themselves through their failure to pay and through their failure to raise the issue in their payment schedules.

46 There is something to be said for those submissions. It is clear that the plaintiffs did not have adequate regard for their own interests, and that they have been, to put it mildly, lax in their attention to their payment obligations.

47 However, I think that it would be an injustice to permit the defendant to have the full benefit of a bargain that, through its incorporation of a penalty, is unconscionable. That is particularly so having regard to the defendant's stated intention in relying on the contractual interest rate: to spur its debtors to prompt payment. It is also relevant to consider that the real detriment to the defendant flowing from non-payment - the incurring of an interest expense - can be accommodated in the moulding of relief.

48 Again, to the extent that Mr Murphy relied on the underlying policy of the NSW Act or its interstate equivalents - prompt payment of progress claims with the postponement of ultimate disputes - that can be reflected in the moulding of relief. Nor is there anything that I can discern in the underlying policy of those Acts that entitles those who perform construction work or supply related goods and services to use the mechanisms provided by those Acts to recover a penalty.

49 It is also relevant to bear in mind, in this context, my findings as to the defendant's repeated incorrect assertions (including to Mr Li) that the relevant contractual provision is a standard form proffered by ASOFIA in its members' interest and for their protection.

50 On balance, therefore, I think that this is an appropriate case for the grant of relief.

The form of relief

51 In my view, the defendant should be permitted to enforce the judgment or judgments (or determination, if there is yet no judgment) to the extent of the amounts found by the adjudicator except for interest. It should have interest on those amounts - more accurately, on the underlying invoices to the extent that the adjudicator allowed them - from their due dates for payment until the date of payment. That interest should be allowed at the overdraft rate applicable from time to time on the assumption that the defendant's overdraft account was kept within limits, unless it can be shown that, by reason of a non-payment, an account otherwise conducted within its limit was forced over the limit.

52 However, the defendant should be restrained from otherwise enforcing the judgment or judgments in the District Court founded on the determinations, or the determination, as the case may be.

53 If the plaintiffs do not pay amounts calculated according to the formula that I have just described within a short time, the defendant should have access to the amount paid into Court by the plaintiffs as part of the price of obtaining interlocutory relief.

Orders

54 I stand the proceedings over to 9.30am on Wednesday 20 February 2008.

55 I direct the parties to bring in short minutes of order reflecting these reasons.

Costs

56 My present view is that the defendant should have its costs of the issues heard and determined on 15 February 2008, but otherwise should pay the plaintiffs' costs. If either party wishes to argue for a different result, I will hear argument on the point.

CC Hodgekiss SC (Plaintiffs) instructed by Rutland's Law Firm (Plaintiffs)
Peter Murphy (Defendants) instructed by Peter Murphy & Associates Solicitors (Defendants)