FEDERAL COURT OF AUSTRALIA

Zomojo Pty Ltd v Hurd (No 4) [2014] FCA 441

Citation:	Zomojo Pty Ltd v Hurd (No 4) [2014] FCA 441
Parties:	**ZOMOJO PTY LTD (ACN 114 604 269) v MATTHEW HURD, ZEPTONICS PTY LTD (ACN 141 647 716), CROSSWISE PTY LTD (ACN 140 717 317), MD HAMMER PTY LTD (ACN 149 869 189), ZEPTO MARKETS PTY LTD (ACN 150 529 301), ZEPTO FABRICS PTY LTD (ACN 156 138 000), ZEPTOIP PTY LTD (ACN 156 133 087) and TRADEMACH PTY LTD (ACN 155 683 864); MATTHEW HURD, JOLENE (TAS) PTY LTD and HURD FAMILY SUPERANNUATION FUND; ZOMOJO PTY LTD (ACN 114 604 269)**
File number:	VID 1478 of 2011
Judge:	**JESSUP J**
Date of judgment:	6 May 2014
Corrigendum:	27 May 2014
Catchwords:	**DAMAGES** – quantum – liability determined by reference to time spent by the first respondent working on other business – liability calculated as a fraction of the first respondent's annual remuneration – first respondent liable to pay the applicant's recruitment costs of replacing employees who left the applicant to join the first respondent's business
Legislation:	*Corporations Act 2001* (Cth) s 471B
Cases cited:	*Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 *Miles v Wakefield Metropolitan District Council* [1987] AC 539 *National Coal Board v Galley* [1958] 1 WLR 16 *The Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64 *Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458
Date of hearing:	25-26 March 2014
Date of last submissions:	8 April 2014

Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	53
Counsel for the Applicant:	M Collins SC with B Carew
Solicitor for the Applicant:	Corrs Chambers Westgarth
Counsel for the First Respondent:	D Parish
Counsel for the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents:	G Scott
Solicitor for the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents:	Hall & Wilcox

FEDERAL COURT OF AUSTRALIA

Zomojo Pty Ltd v Hurd (No 4) [2014] FCA 441

CORRIGENDUM

1 In paragraph 21 of the Reasons for Judgment published 6 May 2014, the last bullet point should read:

- The steps taken by Mr Hurd in the development of the Crosswise ATS, as set out in G[267] (G[270]) and G[268].

I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 27 May 2014

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1478 of 2011**

BETWEEN:	**ZOMOJO PTY LTD (ACN 114 604 269)** **Applicant**
	MATTHEW HURD **First Cross-Claimant**
	JOLENE (TAS) PTY LTD **Second Cross-Claimant**
	HURD FAMILY SUPERANNUATION FUND **Third Cross-Claimant**
AND:	**MATTHEW HURD** **First Respondent**
	ZEPTONICS PTY LTD (ACN 141 647 716) **Second Respondent**
	CROSSWISE PTY LTD (ACN 140 717 317) **Third Respondent**
	MD HAMMER PTY LTD (ACN 149 869 189) **Fourth Respondent**
	ZEPTO MARKETS PTY LTD (ACN 150 529 301) **Fifth Respondent**
	ZEPTO FABRICS PTY LTD (ACN 156 138 000) **Sixth Respondent**
	ZEPTOIP PTY LTD (ACN 156 133 087) **Seventh Respondent**
	TRADEMACH PTY LTD (ACN 155 683 864) **Eighth Respondent**
	ZOMOJO PTY LTD (ACN 114 604 269) **Cross-Respondent**

JUDGE:	**JESSUP J**
DATE OF ORDER:	**6 MAY 2014**
WHERE MADE:	**MELBOURNE**

THE COURT DECLARES THAT:

1. Each of the patent applications identified in the first column hereunder records or refers to, and concerns the technology or techniques employed in, the Product (within the meaning of Order 12 made by the court on 5 February 2013) correspondingly identified in the second column hereunder.

Patent applications	**Products**
P0001AU – A Method and a System for Sending an Electronic Message	Zepto Access KRX
P0001PCT – A Method and a System for Sending an Electronic Message	Zepto Access KRX
P0003AU – [No title in text provided]	ZeptoLink CrossWise ATS
P0003US – A Networking Device and a Method for Networking	ZeptoLink CrossWise ATS
P0007US – Managing Risk Associated with Trading	Zepto Access KRX ZeptoNIC
P0022AU – A Processor and a Method for Processing a Received Order	Zepto Access KRX CrossWise ATS
P0023AU – A System and a Method for Reducing Latency	Zepto Access KRX CrossWise ATS
P0023US – A System and a Method for Reducing Latency	Zepto Access KRX CrossWise ATS
P0025AU – A System and a Method for Reducing Latency	Zepto Access KRX CrossWise ATS

THE COURT ORDERS THAT:

2. On the applicant's case in damages, there be judgment in favour of the applicant against the first respondent in the sum of $93,498.72.
3. The applicant have liberty to apply, on 14 days' written notice, for the relief claimed in para 1(c) of the orders sought in the applicant's Interlocutory Application dated 13 February 2014.
4. The proceeding be listed at 2:15 pm on 9 May 2014 for the purpose of receiving the parties' submissions on interest and costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1478 of 2011**

BETWEEN:	**ZOMOJO PTY LTD (ACN 114 604 269)** **Applicant**
	MATTHEW HURD **First Cross-Claimant**
	JOLENE (TAS) PTY LTD **Second Cross-Claimant**
	HURD FAMILY SUPERANNUATION FUND **Third Cross-Claimant**
AND:	**MATTHEW HURD** **First Respondent**
	ZEPTONICS PTY LTD (ACN 141 647 716) **Second Respondent**
	CROSSWISE PTY LTD (ACN 140 717 317) **Third Respondent**
	MD HAMMER PTY LTD (ACN 149 869 189) **Fourth Respondent**
	ZEPTO MARKETS PTY LTD (ACN 150 529 301) **Fifth Respondent**
	ZEPTO FABRICS PTY LTD (ACN 156 138 000) **Sixth Respondent**
	ZEPTOIP PTY LTD (ACN 156 133 087) **Seventh Respondent**
	TRADEMACH PTY LTD (ACN 155 683 864) **Eighth Respondent**
	ZOMOJO PTY LTD (ACN 114 604 269) **Cross-Respondent**
JUDGE:	**JESSUP J**
DATE:	**6 MAY 2014**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 These reasons, and the orders which accompany them, are concerned with the following matters:

(a) the damages to which the applicant, Zomojo Pty Ltd, is entitled as against the first respondent, Matthew Hurd, in consequence of the findings made, and the conclusions reached, by Gordon J in her Honour's judgment on liability on 19 December 2012: *Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458;

(b) the disposition of the outstanding claims made in the applicant's interlocutory application dated 13 February 2014; and

(c) interest and costs.

DAMAGES

2 One of the orders made by Gordon J on 5 February 2013 was that:

> *Nunc pro tunc*, the hearing of the proceeding be split between liability (including all of the cross claim) and quantum.

All questions of liability were determined by her Honour in her reasons of 19 December 2012 and her orders of 5 February 2013. My task now is to deal with questions of quantum.

3 The applicant's claim for damages against Mr Hurd has two compartments. First, the applicant claims the value of the time which Mr Hurd devoted to his other business interests while he was still employed by the applicant in the period down to 11 February 2011. This claim arises under cl 3 of Mr Hurd's service agreement. And secondly, the applicant claims out of pocket losses arising from the need to engage a recruitment agency to replace the staff to whom Mr Hurd, in breach of that agreement, offered other employment. I shall deal with those two compartments in turn.

4 Clause 3 of the service agreement provided as follows:

> 3.1 The Managing Director shall:
>
> a. diligently perform the Services; and
>
> b. obey the reasonable and lawful directions of the Board.
>
> 3.2 The Managing Director may be required to perform duties not only on behalf of the Company but also on behalf of any Related Body Corporate or any company in which the Company has a material shareholding ('Associated Company').

3.3 Unless absent on leave or through illness or injury, the Managing Director shall devote the whole of his time and attention to the performance of the Services during normal business hours and at such times as may reasonably be necessary to the business of the Company or as reasonably required by the Board, and the Managing Director acknowledges that travel away from home may also be required within any constraints of item 5 of Schedule A.

3.4 The Managing Director shall at all times use his best endeavours to promote the interests of the Company.

3.5 The Managing Director shall not while employed by the Company (without the written consent of the Board) be directly or indirectly involved or interested in any other business or occupation which:

a. materially interferes with the performance of the Services; or

b. competes in any respect with the business for the time being of the Company of any Related Body Corporate or Associated Company, however this provision shall not prohibit the Managing Director from holding:

i. less than 10% of the issued capital in a publicly listed company; or

ii. any interest in a business unassociated with the core businesses of the Company.

3.6 The Managing Director shall not accept any payment or other benefit from any person other than the Company as an inducement or reward for any act of forbearance in connection with any matter of business transacted by or on behalf of the Company or any Related Body Corporate or Associated Company.

The damages which the applicant claims are based upon the monetary value, to it, of the time which Mr Hurd devoted to his other evolving business interests, which time was, under cl 3, its own contractual entitlement.

5 This claim gives rise to questions in three areas: first, the legal question whether the applicant, which in fact suffered no direct pecuniary loss from Mr Hurd's failure to devote himself fully to its business, is entitled to quantify its damages by applying his salary rate to the amount of time which he spent on other activities; secondly, the contractual question as to which of the provisions of cl 3 of the service agreement should be regarded as relevant to a damages claim of this nature; and thirdly, the factual question as to what that amount of time was. There is no issue as to the rate of salary that Mr Hurd received in the employ of the applicant: it was $400,000 pa.

6 Dealing first with the legal question, counsel for Mr Hurd argued that, where an employee, in breach of his or her contract, has either been absent from work or failed to work for all or part of the contracted period, the measure of the employer's damages is the pecuniary loss which

it suffered as a result of the work in question not having been done, or done completely. Counsel for the applicant did not suggest that this approach would not be available and appropriate where there was evidence of such loss, but they argued that, in other situations, the employer's loss, and thus the damages to which it would be entitled, might be measured, at least as a sufficient approximation, by the remuneration which it paid in respect of the time when no work was done: since the payment would be for no consideration received, it was necessarily a loss which the employer suffered because of the employee's breach. Counsel for Mr Hurd submitted, in effect, that such an approach did not constitute a proper reflection of the employer's actual, as distinct from its notional, loss.

7 As stated by Mason CJ and Dawson J in *The Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64, 80:

> The general rule at common law, as stated by Parke B. in *Robinson v. Harman* [(1848) 1 Ex. 850, 855], is "that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".

See also the concurring observations of Deane, Toohey, Gaudron and McHugh JJ (174 CLR at 116, 134, 148 and 161 respectively).

8 In the facts of the present case, however, to say that the applicant should be placed in the situation it would have occupied had Mr Hurd given undivided attention to its business leaves unaddressed the critical question of how to calculate, or to assess, the monetary award that would achieve that objective. As it happens, although there appears to be no Australian authority on the subject, such English authority as exists provides a clear indication of the approach that should, or at least might, be taken.

9 The leading case is *National Coal Board v Galley* [1958] 1 WLR 16. There, the defendant was employed as a deputy in the Board's mine. It was a term of his contract of employment that he work such days or part days each week as may reasonably be required. As part of a campaign by his trade union, the defendant refused to work Saturday voluntary shifts, as did the other deputies at the mine. It was held that the Board's requirement that the deputies work these Saturday shifts was a reasonable one, and that the defendant was, therefore, in breach of his contract by refusing to do so. The first Saturday on which the defendant so refused to work was 16 June 1956, and the writ in the action for damages by the Board was issued on 21 June 1956. Although the Board eventually made arrangements for substitute

deputies, who were prepared to work on Saturdays, to be employed, that had not been possible on 16 June (the trade union's notice of industrial action having been given only on 14 June).

10 With respect to the calculation of damages (and ignoring for the purpose of analysis the complication introduced by the circumstance that the defendant was one only of a number of deputies who had refused to work), the Court of Appeal held ([1958] 1 WLR at 29) that the measure of damages would be the net value to the Board of the work which the defendant would have performed if he had worked the shift which he should have worked on 16 June. Pearce LJ said:

> The question in each case must be: what would his services have contributed to the net value of the output of the shift if the deputy concerned had duly worked it? That is in each case a question of fact.

However, on the facts of the case, had the defendant worked on 16 June, he would have been engaged "doing safety work". His failure to do that work was not responsible for the Board losing any output, and it had not, therefore, made good its case for damages based on loss of output.

11 To this point, *Galley* would be the source of some encouragement for Mr Hurd in the present case, where it likewise has not been established that the applicant lost any output as a result of his dereliction of duty. However, Pearce LJ's reasons concluded as follows ([1958] 1 WLR at 29):

> In these circumstances we do not think it can be said that any damage has been proved against him beyond the cost of a substitute, say £3 18s 2d.

That is to say, the cost of a substitute was, it seems uncontroversially, used as a proxy for the Board's loss. In fact, no substitute had been employed on 16 June. The inescapable implication of an award of damages in the sum of £3 18s 2d was that the wages cost attributable to the time that the defendant should have worked, at least, represented the loss to the Board arising from his breach of contract.

12 In *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373, Stadlen J said (at [424]):

> In my judgment a more precise formulation of the proposition for which [*Galley*] is authority is that in a contract for services where there is no proof of consequential financial loss by reason of the breach, the claimant is nonetheless entitled to damages

> for breach of contract, the measure for which is the value to the claimant of the services which were not provided. In an appropriate case the measure of the value to the claimant of the services which should have been but were not provided may be the notional cost to the claimant of obtaining those services elsewhere, it not being a conditional precedent for the award of such damages that equivalent services were in fact purchased elsewhere.

I would add that the fact that, in *Galley*, the sum of £3 18s 2d was arrived at by reference to the Board's later outlays on substitutes, rather than by reference to the defendant's own hourly rate of pay, is a distinction which does not affect the principle involved – if anything, one would expect damages calculated in the way proposed by the Court of Appeal in *Galley* to be somewhat greater than those that were based only on the rate of pay of the employee concerned.

13 That was the view of Lord Templeman in *Miles v Wakefield Metropolitan District Council* [1987] AC 539. Speaking of *Galley*, his Lordship said ([1987] AC at 562): "The cost of a substitute will not be less than the value placed by the contract on the services of the worker." *Miles* was a no work – no pay case and, as chance would have it, also involved industrial action on Saturdays. The plaintiff was a superintendent registrar of births, deaths and marriages and, conformably with a campaign being conducted by his trade union, refused to conduct weddings on Saturdays. He was told by the Council that, so long as the refusal continued, he was not required to attend for work on Saturdays at all, and would not be paid for them. His weekly pay was reduced accordingly and, after the industrial dispute had ended, he sued to recover the shortfall. He failed, substantially because he was unable to prove that he was ready and willing to perform the work for which he was employed. Although not a contract of employment case as such, their Lordships treated it analogously with such a case. Further, although the Council's defence did not depend on the existence or viability of a counterclaim in damages, some passages in the speeches of Lords Templeman and Oliver of Aylmerton dealt with the very question which arises in the present case.

14 Lord Templeman said ([1987] AC at 560):

> A strike may involve the employer in a loss of profits but it is impossible to show that any particular proportion of the loss is attributable to the industrial action of any individual worker. If a chauffeur goes on strike for one day, his employer may only suffer the inconvenience or enjoyment of driving his own car for once. My Lords, an employer always suffers damage from the industrial action of an individual worker. The value of those services to the employer cannot be less than the salary payable for those services, otherwise most employers would become insolvent.
>
> In the present case, if the council were obliged to pay for the services of the plaintiff

> on Saturday morning, the council would suffer the loss of the money thus paid for services to the public which the plaintiff declined to perform. A man who pays something for nothing truly incurs a loss. The value of the lost services cannot be less than the value attributable to the lost hours of work. Indeed, the plaintiff embarked on industrial action because his union believed that the value of his service exceeded his current salary.

Lord Oliver of Aylmerton said ([1987] AC at 567-568):

> The relationship between the council and the plaintiff has all the incidents which one would expect from a contract of employment save that the power of dismissal is vested from the Registrar General and not in the appointing authority which has the responsibility for paying the plaintiff, providing him with premises, and regulating his hours and conditions of work. If, as a matter of law, he were employed by the council I do not, for my part, see any difficulty in finding a juristic basis for the retention of salary which the council has made. The simple fact would be that the council had suffered damage to the extent that it was liable to pay for what was, in effect, a period of voluntary absence from work and I see no particular difficulty in quantifying that damage, since the employee could hardly contend successfully that that of which his employer had been deprived by his absence (i.e. his services) was worth less than the sum he was claiming to be paid for them.

15 Limited though they are, the authorities to which I have referred are consistent in holding that, where an employee fails or refuses to work for the full time for which he or she has been contracted, the employer's damages may be measured (at least) by reference to the value of the employee's remuneration in respect of the period of the failure or refusal. The employer does not, as a general rule, have to establish some loss of production or output, it being presumed that the value to the employer of the employee's work is no less than what the employer was paying for it.

16 Thus I accept the submission made on behalf of the applicant that its loss consequent on Mr Hurd's failure to devote his full working time to the business of which he was a managing director may be measured by applying to his monthly salary a fraction representing the amount of time that he spent working on his other business.

17 This leads me to the contractual question identified in para 4 above. It is necessary to address that question because I am not at liberty to make findings of breach of the service agreement beyond those made by Gordon J. But not all of her Honour's findings of breach of cl 3 lead naturally to a viable claim for damages under the legal principles which I have discussed above. Whether the applicant suffered loss or damage as the result of the breach of a particular provision of cl 3 depends on the nature of the obligation established by that provision. Clause 3.3 is obviously central to the applicant's case. A breach of it will be

constituted by the failure of Mr Hurd to devote the whole of his time and attention to the performance of the services referred to (subject to the detailed provisions of the subclause). The loss flowing from such a breach would be quantified by the value of time spent otherwise than performing the services. The applicant's case in this respect would come four-square within the principles referred to above.

18 By contrast, subcll 3.1a and 3.4 are not concerned with time. They are concerned with diligence and the quality of Mr Hurd's performance. While Gordon J made a number of findings of breaches of these provisions, absent a co-extensive finding of breach of cl 3.3, the nature of the applicant's damages case was not appropriate to prove the occurrence of loss arising from such breaches. In other words, on the applicant's case, I have no way of measuring the loss which it might have sustained by Mr Hurd's failure to perform the services diligently (to take the example of cl 3.1) in circumstances where it could not point to a finding by her Honour that part of Mr Hurd's *time* was lost to the applicant. Neither was I invited to assess damages other than by reference to time lost.

19 Gordon J also made a number of findings of breach of cl 3.5. But, absent a contemporaneous finding of a breach of cl 3.3, the loss sustained by the applicant with respect to a breach of the former character would not properly be quantified by reference to the time which Mr Hurd spent on the activities which constituted the breach. Clause 3.5 specified what Mr Hurd was *not* to do, while the applicant's assessment case was based upon an accumulation of the time spent by him in breach of the *positive* requirements of subcl 3.

20 For the above reasons, I consider that I am confined to breaches of cl 3.3 of the service agreement as a basis for assessing the monetary value of the losses sustained by the applicant.

21 Dealing finally with the factual question identified in para 4 above, I must, of course, proceed in accordance with the findings made by Gordon J. To the extent that they related to cl 3.3 of Mr Hurd's service agreement, those findings were made in the following areas (I have identified numbered paragraphs in her Honour's reasons of 19 December 2012 according to the format "G[XXX]"):

- Mr Hurd's correspondence with Mr Gilbert on 2 October 2010 (G[231]);
- The steps taken by Mr Hurd in the development of Opticast, as set out in G[239] (G[240]);

- The steps taken by Mr Hurd in the development of the Crosswise ATS, as set out in G[267], G[270] and G[268].

It is the time occupied on these activities, which ought to have been devoted to the business of the applicant, that should form the basis of the calculation of the applicant's loss in respect of Mr Hurd's breaches of cl 3.3.

22 It was, at times, implicit in the case put by the applicant that its damages should be assessed by reference to all the "non-Zomojo" work done by Mr Hurd over the relevant period. That would, in my view, involve a misconception of the task presently at hand. I am not taking an account of the benefit derived by Mr Hurd from being able to give attention to his other business interests at the time that he might otherwise have been working for the applicant. I am assessing the loss suffered by the applicant in respect of Mr Hurd's failure to carry out work for it. And, as noted above, I must work within the findings of breach made by Gordon J.

23 The parties' submissions were not responsive to Gordon J's findings of breach in other respects too. The debate before me was played out as a contest of estimate with respect to the issue of the amount of time that Mr Hurd had spent on his own business ventures over the period September 2010 to 11 February 2011. With respect to the period of Mr Hurd's notice, commencing on 11 January 2011, it was submitted on behalf of the applicant that the whole of Mr Hurd's time was spent in that way, on the basis of an email which he had sent to his investors in Crosswise on 23 January 2011 stating that he was "currently at more than full time equivalent in time allocation". On the strength of that statement, the applicant contended that, between 11 January and 11 February 2011, Mr Hurd must be taken to have been denying the applicant the whole of his services. With respect to the period before that, the applicant contended that it should be estimated, as an approximation, that Mr Hurd devoted on average one half of his effective working time to his own business ventures. This estimate was not based upon any analysis of the conduct of Mr Hurd which Gordon J had found to be in breach of the service agreement.

24 For his part, Mr Hurd contended that, for the whole of the relevant period down to 11 February 2011, it should be held that he was occupied for about two hours per week, on average, on his own business ventures. Under cross-examination, he admitted that this was a "guess" on his part. There are at least two reasons why this guess should be rejected as a credible basis for estimating the time in question: first, it was well within Mr Hurd's own

competence to keep a record of the time he spent on these activities, and he failed to do so; and secondly, as with the estimate proffered on behalf of the applicant, the guess was wholly unrelated to the findings of breach made by Gordon J.

25 As mentioned above, those findings were set out in G[231], G[239], G[267] and G[268]. I am not entitled to reject or to reverse any of those findings. Neither, of course, am I entitled to add to them. That leaves the question of the period of time that should be assigned, as an estimate, to the breach involved in each such finding. Again, this was not a matter upon which I received any specific assistance from the parties. The making of these estimates is, however, a necessary part of the task of assessment upon which the court is presently engaged.

26 In the paragraphs which follow, I have identified the findings of breach of cl 3.3 made by Gordon J in the relevant parts of her reasons, and assigned to each my estimate of the time that Mr Hurd was in all probability engaged in the conduct referred to. This has been, necessarily, an imprecise undertaking. I have not made discriminations of less than 15 minutes' duration. I have looked not only at the paragraphs in Gordon J's reasons referred to, but also at the other paragraphs referred to therein and at the documents upon which the findings were based.

27 With respect to G[231], the correspondence with Mr Gilbert on 2 October 2010, my estimate is that Mr Hurd spent about one hour on the matter.

28 With respect to G[239]:

- Item 4: On 4 October 2010, a post on the Internet blog "Beowulf". Estimate: 15 mins.
- Item 5: On 7 October 2010, entering a non-disclosure agreement with Cavium Networks. Estimate: 1 hr.
- Item 6: On 12 October 2010, sending email to Michael Routh at Tresmine Pty Ltd . Estimate: 15 mins.
- Item 7: On 13 October 2010, entering a non-disclosure agreement with Chopper Trading LLC; on 15 October 2010, sending a marketing message, including a specification sheet for Opticast, to that company; on 23 October 2010, informing that company that he would send an evaluation unit of Opticast. Estimate: 3 hrs.

- Item 8: On 15 and again on 22 October 2010, sending emails to Winnie Liu of Ascendtek Electronics. Estimate: 30 mins.
- Item 9: On 25 October 2010, responding to inquiry from Tresmine Pty Ltd. Estimate: 15 mins.
- Item 10: On 29 October 2010, communicating with Andy Kowalewski at Advantage PCB Pty Ltd. Estimate: 15 mins.
- Item 11: On 8, 10 and 11 November 2010, corresponding with Andy Kowalewski regarding the schematics for OptiCast (having had Snowdon provide his opinion). Estimate: 1 hr 30 mins.
- Item 12: On 23 November 2010, receiving email from Kowalewski; on 26 November 2010, sending email to Kowalewski. Estimate: 30 mins.
- Item 13: On 9 December 2010, sending an email to Tom Pregastis at the National Australia Bank. Estimate: 15 mins.
- Item 14: Receiving and paying an invoice from Advantage PCB dated 13 December 2010. Estimate: 15 mins.
- Item 15: On 14 December 2010, engaging in email communications with Metromatics Pty Ltd. Estimate: 15 mins.
- Item 16: On 11 January 2011, sending an email to Tim Berry at Tibra Capital; on 12 January 2011, sending an email to Paul James of that company. Estimate: 30 mins.
- Item 17: On 24 January 2011, sending a non-disclosure agreement to Tibra Capital. Estimate: 15 mins.
- Item 18: On 3 February 2011, sending an email to Kowalewski. Estimate: 15 mins.

Total estimate for G[239]: 9 hrs 15 mins.

29 With respect to G[267]:

- Item 1: On 10 November 2010, sending an email to Sabine van der Poort at ABN Amro. Estimate: 30 mins.
- Item 2: On 3 December 2010, sending an email to Sean Nunan at CredX. Estimate: 15 mins.
- Item 3: In early December 2010, preparing the Crosswise conceptual brief. Estimate: 8 hrs.

- Item 4: On 9 December 2010, sending the Crosswise conceptual brief to potential investors. Estimate: 30 mins.
- Item 5: On 16 December 2010, sending the Crosswise conceptual brief to two potential investors. Estimate: 30 mins.
- Item 6: On 17 December 2010, sending an email to Nunan at CredX, attaching a copy of the Crosswise conceptual brief. Estimate: 15 mins.
- Item 7: On 20 December 2010, sending an email to Gilbert at Newedge attaching a copy of the Crosswise heads of agreement. Estimate: 15 mins.
- Item 8: On 22 [sic] December 2010, sending emails to SIG and to ABN Amro inviting them to be Crosswise foundation investors. Estimate: 30 mins.
- Item 9: On 28 December 2010, responding to Gilbert's correspondence. Estimate: 1 hr.
- Item 10: On 29 December 2010, sending an email to Gilbert and attaching an amended Crosswise heads of agreement. Estimate: 45 mins.
- Item 11: On 7 January 2011, executing Crosswise heads of agreement with Mr and Mrs Gilbert. Estimate: 1 hr.
- Item 12: On 8 January 2011, sending emails to three Crosswise foundation investors. Estimate: 30 mins.
- Item 13: On 10 January 2011, executing a Crosswise heads of agreement with Wessel Brent van der Scheer. Estimate: 30 mins.
- Item 14: On 11 January 2011, having tendered his notice of resignation, informed Tibra of that fact. Estimate: 15 mins.
- Item 15: On 20 and 21 January 2011, executing Crosswise heads of agreement with three additional investors. Estimate: 1 hr 30 mins.
- Item 16: On 23 January 2011, sending email to Crosswise investors. Estimate: 30 mins.

Total estimate for G[267]: 16 hrs 45 mins.

30 With respect to G[268], most of the items there referred to (2, 3, 5 and 6) are repetitions of corresponding items in G[267], and have already been taken into account. Item 1 does not refer to any particular activity on the part of Mr Hurd, and, to the extent that it is said to amount to a breach of cl 3.3, there can be no quantification of the time involved.

31 Item 4 in G[268] is more problematic. It reads:

> Hurd accepted that, by 3 December 2010, he had in fact conceived of the method and the design for a sub 10 micro exchange platform using standard equipment;

This finding seems to imply that Mr Hurd spent some of the time which belonged to the applicant under cl 3.3 reaching the point of this conception. However, there is a difficulty in assigning an actual period to this undertaking. Her Honour did not do so in her reasons. Item 4 in G[268] does not include a cross reference to the primary evidence as did most of the other items with which I have been dealing. Mr Hurd's task in conceiving this method and design was, of course, simplified by the knowledge he had of the applicant's own work on a similar product. That he may have used that knowledge in the development of the Crosswise ATS counted strongly against him in the applicant's case in equity and under the *Corporations Act 2001* (Cth), but it does not bespeak the application of many hours of work outside the performance of his duties under the service agreement on the project: if anything, the contrary.

32 I would have to say that I received no assistance from the final submissions made on behalf of the applicant in the resolution of this problem. An otherwise very comprehensive table of the activities by Mr Hurd which were said to justify an award of damages did not deal with item 4 in G[268]. Neither was the subject explored in the otherwise very thorough cross-examination of Mr Hurd. Perhaps that (in each case) is because the applicant's assessment case proceeded at a much greater level of generality than I have held to be appropriate, but the fact of the omissions remains.

33 In the circumstances, I can only conclude that the applicant has not done enough to quantify its loss from the presumptive breach of cl 3.3 mentioned in item 4 of G[268].

34 It follows that I would estimate the time occupied by Mr Hurd on activities that have been held to involve breaches of cl 3.3 of the service agreement at 27 hours.

35 What was the monetary value of this period of time? Here the problem is that Mr Hurd did not have an hourly rate of pay. However, the reference to "normal business hours" in cl 3.3 disposes me to use (40 x 52) as a divisor into Mr Hurd's annual salary of $400,000 to derive a notional hourly rate. That rate would be $192.31.

36 It follows that the applicant's damages for Mr Hurd's breaches of the service agreement should be assessed at $5,192.37.

37 Turning to the recruitment agency costs incurred by the applicant, it was not contested that the applicant engaged three agencies in the period following the resignations of Messrs Newham, Fitzpatrick and Snowdon, that three new employees were taken on as the result of that process, Messrs Li, Dalzell and von Konigsmark, or that the fees invoiced by, and paid to, the agencies amounted to $88,306.35. On behalf of the applicant, it was submitted that this combination of facts completed its title to an award of damages in the sums mentioned.

38 Assisted, to an extent, by evidence given under cross-examination by a director of the applicant, Ian Heddle, counsel for Mr Hurd contested the applicant's entitlement on two bases. First, it was said that the three new employees did not in fact replace the three who had resigned on a "like-for-like" basis, and, indeed, that one of the former probably replaced another staff member who had resigned at about the same time in circumstances unrelated to the applicant's case against Mr Hurd. And secondly, it was said that two of the three who had resigned had been working on something described as the "North American project" which was terminated at about the time when they did resign. It was submitted, in effect, that, regardless of the miscreations of Mr Hurd, those two employees were not thenceforth required by the applicant and would not have been replaced.

39 With respect to the first point, it is true that the applicant lost two software experts and one hardware expert and hired two hardware experts and one software expert. But Mr Heddle held to his evidence that those hired in fact replaced those who had resigned, emphasising in this respect the range of skills that had to be found in consequence of the resignations moreso than the formal categories of work in which the replacements had backgrounds. In my view, it comes ill from the mouth of someone who has enticed employees away from their employer in circumstances of the kind referred to by Gordon J to advance these kinds of nice distinctions in the choices made by the employer to replace the range of skills that it lost. I accept Mr Heddle's evidence that work of the kind performed by the employees who resigned was henceforth performed by those who had been taken on, albeit that the arrangement of the ongoing work as between them might well have differed from that previously obtaining.

40 It is true that, temporally, there was a coincidence between the resignation of the employee whose circumstances are irrelevant to this case, a software expert, and the engagement of the new employee whose background was in software. But Mr Heddle made it clear that the work area of the former was quite distinct from that of the three employees whom Mr Hurd enticed to leave. I accept that evidence.

41 With respect to Mr Hurd's second point, if it was intended to suggest thereby that at least two of the employees lost by the applicant would have been retrenched in any event because of the termination of the North American project, so much was not put to Mr Heddle directly while he was under cross-examination. It was put to him, and he accepted, that the two were so engaged (although it was never entirely clear whether they were wholly so engaged) and that the project was terminated, but it should not be left to the court to use inference to close the evidentiary gap which could, and should, have been closed by questions put directly to the applicant's witness. The closest that counsel came to dealing with the issue directly was to put to Mr Heddle that the applicant was able to replace Messrs Newham and Fitzpatrick with one new employee because the North American project had been shut down and the applicant needed fewer software engineers. Mr Heddle rejected the suggestion, and the matter was not pursued further.

42 I am not prepared to assume, without evidence, that the applicant's business was of such a character that employees of the quality that were induced to resign by Mr Hurd would be let go and re-engaged, month-to-month effectively, for no reason other than that a project on which they were working was terminated. I do not know enough about the business to have any doubt as to Mr Heddle's denial of the proposition put to him by counsel for the applicant, as mentioned above.

43 It follows that the applicant's damages arising from the engagement of the recruitment agencies should be assessed at $88,306.35.

44 When that sum is added to the sum which represents the applicant's loss from Mr Hurd's breach of the service agreement, the result is that the applicant is entitled to $93,498.72 by way of damages from Mr Hurd.

INTERLOCUTORY APPLICATION OF 13 FEBRUARY 2014

45 The applicant's interlocutory application of 13 February 2014 sought the following order:

> 1. Pursuant to section 471B of the *Corporations Act 2001* (Cth), the Applicant have leave to proceed against the Second to Eighth Respondents and move for:
>
> a. orders in relation to further discovery;
>
> b. declarations in relation to patents held or applications for patents lodged by any of the Second to Eighth Respondents;
>
> c. declarations of contempt; and
>
> d. orders in relation to costs.

46 On 24 February 2014, I dealt with para 1(a) of the interlocutory application.

47 On 25 March 2014, I gave the applicant the leave which it sought in para 1(b) of the interlocutory application. In the hearing before me on that and the following day, the applicant advanced its case for the declarations referred to, and I shall deal with that presently.

48 The applicant proposed that I should go no further than to give liberty to apply in relation to the matter dealt with in para 1(c) of the interlocutory application, and I am content to adopt that course.

49 On 25 March 2014, I also gave the applicant the leave which it sought in para 1(d) of the interlocutory application.

50 The applicant's case for further declaratory relief arises in the following circumstances. A number of the orders made by Gordon J on 5 February 2013 imposed obligations on the corporate respondents to take certain steps (assignment, delivery up etc) in relation to six products which her Honour had found to be beneficially the property of the applicant. Her Honour described these products as "the Products". A question has arisen whether 13 patent applications "record or refer to … the technology or techniques employed in each Product" within the meaning of Order 14(a) as made on 5 February 2013. The liquidator of the corporate respondents requires that question to be the subject of a court determination. The declarations sought by the applicant have that purpose. The liquidator neither opposes nor consents to the making of those declarations.

51 The applicant engaged Philip Leong, Associate Professor and Director of the Computer Engineering Laboratory in the School of Electrical and Information Engineering at the University of Sydney, to provide an expert report on the incorporation of the technology or techniques described in each of the 13 patent applications in each, or any, of the Products. A/Prof Leong provided such a report. In relation to nine of the applications, he found that there was such an incorporation and, in relation to the remaining four applications, either he found that there was not such an incorporation or he was unable to express a concluded view. It was only in respect of the first group of nine that the applicant sought declarations. A/Prof Leong's evidence was not challenged, or the subject of any submission at all, by or on behalf of the liquidator. I accept that evidence.

52 Given the need to resolve the question to which I have referred, I am satisfied that it is appropriate to act on the evidence of A/Prof Leong and to make the declarations sought by the applicant. In the declarations which accompany these reasons, I have changed the drafting proposed by the applicant, but not in any way that affects the substance of the matter. I have done this to align the declarations more closely with the terms of the order made by Gordon J and with the specific conclusions of A/Prof Leong.

INTEREST AND COSTS

53 I shall list the proceeding again for the purpose of receiving the parties' submissions on interest and costs.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 6 May 2014