

# FEDERAL COURT OF AUSTRALIA

## Zomojo Pty Ltd v Hurd (No 5) [2014] FCA 537

Citation: Zomojo Pty Ltd v Hurd (No 5) [2014] FCA 537

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), TRADEMACH PTY LTD (ACN 155 683 864), ARK INTERNATIONAL GROUP PTY LTD, ARK INTERNATIONAL HOLDINGS PTY LTD, THOMAS CLINTON MADDOCK and JOHN BARRIE HURD**

File number: VID 1478 of 2011

Judge: **TRACEY J**

Date of judgment: 28 May 2014

Catchwords: **CONTEMPT OF COURT** – failure to comply with court orders – whether charges of contempt proven beyond reasonable doubt – contravention of inter parte undertakings – aiding and abetting – whether breach enforceable in the proceeding

**EVIDENCE** – admissibility of affidavit material – dispensation of Rule 42.12(b) of the Rules – whether affidavit material contained admissions – whether deponents protected by privilege against self-incrimination

Legislation: *Evidence Act 1985 (Cth)* ss 81, 82, 83  
*Federal Court of Australia Act 1976 (Cth)* s 31  
*Federal Court Rules 2011 (Cth)* rr 1.34, 41.06, 42.12, O 40  
*Judiciary Act 1903 (Cth)* s 24

Cases cited: *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 – considered  
*Australian Competition and Consumer Commission v Hughes* (2001) ATPR 41-807 – considered  
*Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (No 2)* (1985) 9 FCR 194 – cited  
*Heatons Transport v TGWU* [1973] AC 15 – cited

*Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314 – cited  
*Lazar v Taito (Aust) Pty Ltd* (1985) 5 FCR 395 – considered  
*Louis Vuitton Malletier SA v Design Elegance Pty Ltd* (2006) 149 FCR 494 – considered  
*Memory Corporation v Sidhu* [2000] Ch 645 – cited  
*O Limited v Z* [2005] EWHC 238 – cited  
*Re A (a Child)* (2000) 115 A Crim R 1 – considered  
*R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR – cited  
*R v GH* (2000) 105 FCR 419 – considered  
*U & I Global Trading (Australia) Pty Ltd v Tasman-Warajay Pty Ltd* (1995) 60 FCR 26 – cited  
*Windsurfing International Inc v Sailboards Australia Pty Ltd* (1986) 19 FCR 110 – cited  
*Witham v Holloway* (1995) 183 CLR 525 – considered  
*Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458 – considered

Date of hearing: 9, 10 and 17 May 2013

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 139

Counsel for the Applicant: Dr M J Collins SC and Dr M R Sharpe

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondents and the Fourth Third Party: Mr C D Wood

Counsel for the First, Second and Third Third Party: Mr J Karkar QC and Mr R Pintos-Lopez

Solicitor for the Respondents: McCabes

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION**

**VID 1478 of 2011**

**BETWEEN: ZOMOJO PTY LTD (ACN 114 604 269)  
Applicant**

**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**

**AND BETWEEN: ARK INTERNATIONAL GROUP PTY LTD  
First Third Party**

**ARK INTERNATIONAL HOLDINGS PTY LTD  
Second Third Party**

**THOMAS CLINTON MADDOCK  
Third Third Party**

**AND: JOHN BARRIE HURD  
Fourth Third Party**

**JUDGE: TRACEY J**

**DATE OF ORDER: 28 MAY 2014**

**WHERE MADE: MELBOURNE**

**THE COURT ORDERS THAT:**

1. The hearing of the contempt motions be stood over to 10:15 am on 22 July 2014.
2. On or before 5:00 pm on 1 July 2014 the respondents file and serve:
  - (a) any affidavits on which they propose to rely at the penalty hearing; and
  - (b) an outline of their written submissions.
3. On or before 5:00 pm on 15 July 2014 the applicants:
  - (a) file and serve any answering affidavits on which they propose to rely at the penalty hearing; and
  - (b) an outline of their written submissions.

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

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First Third Party  
ARK INTERNATIONAL HOLDINGS PTY LTD  
Second Third Party**

**THOMAS CLINTON MADDOCK  
Third Third Party  
JOHN BARRIE HURD  
Fourth Third Party**

**AND:**

**JUDGE: TRACEY J**

**DATE: 28 MAY 2014**

**PLACE: MELBOURNE**

## REASONS FOR JUDGMENT

1           The Applicant, Zomojo Pty Ltd (“Zomojo”) is a company involved in what is known  
as high frequency trading. The company was incorporated on 3 June 2005. From its  
inception until early 2011 the first respondent, Mr Matthew Hurd, was a director, an officer,  
an employee, the company secretary and a shareholder of Zomojo.

2           Mr Hurd was employed by Zomojo under a service agreement.

3           Mr John Hurd was Mr Matthew Hurd’s father. Mr John Hurd was an accountant  
employed by Zomojo.

4           Mr Matthew Hurd became frustrated with the manner in which Zomojo was  
conducting its business. In the year prior to his resignation in January 2011 he embarked on a  
project to create a business which was to compete with Zomojo. His scheme was further  
developed after he left Zomojo.

5           Zomojo commenced a proceeding in this Court against Mr Matthew Hurd and a  
number of corporate entities which he had established or with which he was associated.  
It was alleged, amongst other things, that Mr Matthew Hurd had breached his contractual,  
fiduciary and statutory obligations to Zomojo thereby causing the company substantial  
damage.

6           The hearing of the proceeding commenced before Gordon J on 22 October 2012 and  
concluded on 2 November 2012. The trial was divided into two parts. The first part of the  
trial dealt with issues of liability. The second part which considered appropriate relief for  
Zomojo was heard before Jessup J on 25 and 26 March 2014.

7           Gordon J published extensive reasons for judgment on 19 December 2012:  
see *Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458.

8           Her Honour found that Mr Matthew Hurd had breached his contractual, fiduciary and  
statutory duties to Zomojo. She also found that a number of the corporate respondents  
associated with Mr Matthew Hurd had assisted and participated in Mr Hurd’s misuse of  
Zomojo’s confidential information. Those respondents were Zeptonics Pty Ltd

(“Zeptonics”), Crosswise Pty Ltd (“Crosswise”), Zepto Markets Pty Ltd (“Zepto Markets”), Zepto Fabrics Pty Ltd (“Zepto Fabrics”), Zeptoip Pty Ltd (“Zeptoip”) and Trademach Pty Ltd (“Trademach”).

9           In her reasons her Honour set out the terms of various injunctions and declarations which she considered should be made.

10           In paragraph [377] of her reasons Gordon J referred to certain injunctions which she considered should be made against Mr Matthew Hurd. She said that:

“The quantification of damages flowing from those various breaches is to be determined at a later hearing. Is Zomojo entitled to the injunctions that it seeks? Appropriate injunctions must be tailored to the findings of breach. In the present case, Zomojo is entitled to the following injunctions:

- (a) that Hurd assign, or procure the assignment of, each of OptiCast, ZeptoLink, ZeptoNIC, ZeptoAccess KRX and the Crosswise ATS to Zomojo;
- (b) that Hurd deliver up to Zomojo, or to procure the delivery up to Zomojo of, all prototypes and parts of prototypes, and products or parts of products, in his possession, power or control or in the possession, power or control of any of the corporate Respondents, relating to or based on Opticast, ZeptoLink, ZeptoNIC, ZeptoAccess KRX and the Crosswise ATS; and
- (c) that Hurd deliver up to Zomojo, or to procure the delivery up to Zomojo of, all documents (including electronic documents and files) in his possession, power or control or in the possession, power or control of any of the corporate Respondents, that record or refer to any of the prototypes or products known as or based on Opticast, ZeptoLink, ZeptoNIC, ZeptoAccess KRX and the Crosswise ATS.”

11           Gordon J ordered that the parties confer and bring in orders to give effect to her reasons for judgment and orders for the future management of the proceeding. She ordered that these steps be taken by 21 January 2013.

12           On the same day on which her Honour’s reasons were published Zomojo’s solicitors wrote to the respondents’ solicitors seeking undertakings from Mr Matthew Hurd and some of the corporate respondents about the conduct of their businesses pending the making of final orders.

13           Later that day Mr Matthew Hurd provided an undertaking that, until 21 January 2013, he would not take any “steps to put [himself] in a position from which [he] would be unable

to comply with an injunction ordered by the Court in the terms set out in paragraph 377 of Justice Gordon's reasons for judgment, dated 19 December 2012." It was common ground that, although it did not say so in terms, the undertaking was given to Zomojo's solicitors.

14 On 9 January 2013 the respondents applied to the duty judge for an extension of time within in which to comply with her Honour's orders. On 11 January 2013 Middleton J extended the period stipulated in her Honour's order to 31 January 2013. The enlargement of time was made conditional upon Mr Matthew Hurd extending the operation of his undertaking until the making of final orders. Mr Hurd subsequently provided the extended undertaking.

15 In accordance with her Honour's direction the parties submitted minutes of proposed orders. Having considered them her Honour made a series of declarations and orders on 5 February 2013. Her Honour's orders were forwarded by electronic transmission to the solicitors acting for the various parties. The order did not bear an endorsement of the kind contemplated by Rule 41.06 of the *Federal Court Rules 2011* (Cth) ("the Rules").

16 Her Honour made declarations that these corporate respondents held profits derived from relevant activities as constructive trustee for the benefit of Zomojo and were liable to account to Zomojo for those profits.

17 Paragraphs 12 to 21 of the order read:

"12. By 4:00 pm on 26 February 2013, each Respondent take all necessary steps within his or its power to assign the ownership of all of his or its rights in each of the following to the Applicant:

- (a) the product or products (including any parts thereof) known as 'OptiCast';
  - (b) the product or products (including any parts thereof) known as 'ZeptoCast';
  - (c) the product or products (including any parts thereof) known as 'ZeptoLink';
  - (d) the product or products (including any parts thereof) known as 'ZeptoNIC';
  - (e) the product or products (including any parts thereof) known as 'ZeptoAccess KRX'; and
  - (f) the product or products (including any parts thereof) known as the 'Crosswise ATS',
- (collectively, the 'Products', and, individually, a 'Product').

13. By 4:00 pm on 26 February 2013, each Respondent deliver up to the

Applicant:

- (a) the Products; and
  - (b) the prototypes and parts of prototypes relating to or based on each Product,
  - (c) in his or its possession, power or control.
14. By 4:00 pm on 26 February 2013, each Respondent deliver up to the Applicant all documents (including electronic documents and files) in his or its possession, power or control that record or refer to each Product, or any prototypes for each Product, including:
  - (a) all patents held or applications for patents lodged by any of the Respondents concerning the technology or techniques employed in each Product;
  - (b) all purchase orders, agreements, invoices and receipts concerning the sale of each Product;
  - (c) all purchase orders, agreements, invoices and receipts concerning the production of each Product;
  - (d) all agreements and arrangements entered into by any of the Respondents concerning the use of or access to (directly or indirectly) each Product; and
  - (e) all agreements and arrangements entered into by any of the Respondents with investors concerning the ownership of, or rights to the proceeds of sale of, each Product.
15. Each Respondent forthwith cease:
  - (a) using or accessing (directly or indirectly) the Products; and
  - (b) assisting, facilitating or enabling any other person to use or access (directly or indirectly) the Products.
16. By 4:00 pm on 26 February 2013, Zeptonics (by its proper officer) file and serve an affidavit:
  - (a) deposing to all profits it derived by reason of or arising out of the Leading Agreement; and
  - (b) deposing to the precise manner of calculation of that profit or those profits stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified.
17. By 4:00 pm on 26 February 2013, Crosswise (by its proper officer) file and serve an affidavit:
  - (a) deposing to all profits it derived by reason of or arising out of the development, marketing and sale of the Product referred to in Order 12(f) of these Orders known as 'Crosswise ATS'; and
  - (b) deposing to the precise manner of calculation of that profit or those profits stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified.
18. By 4:00 pm on 26 February 2013, Zepto Markets (by its proper officer) file and serve an affidavit:

- (a) deposing to all profits it derived by reason of or arising out of the development, marketing and sale of the Product referred to in Order 12(e) of these Orders known as 'ZeptoAccess KRX';
  - (b) deposing to the precise manner of calculation of the profit or those profits in (a) stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified;
  - (c) deposing to all profits it derived by reason of or arising out of the SunGard Agreement; and
  - (d) deposing to the precise manner of calculation of the profit or those profits in (c) stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified.
19. By 4:00 pm on 26 February 2013, Zepto Fabrics (by its proper officer) file and serve an affidavit:
- (a) deposing to all profits it derived by reason of or arising out of the development, marketing and sale of the Product referred to in Order 12(c) of these Orders known as 'ZeptoLink'; and
  - (b) deposing to the precise manner of calculation of that profit or those profits stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified.
20. By 4:00 pm on 26 February 2013, Zeptoip (by its proper officer) file and serve an affidavit deposing:
- (a) to all profits it derived by reason of or arising out of it holding any patents concerning the Applicant's confidential information identified in Annexure A to the Reasons for Judgment of 19 December 2012; and
  - (b) deposing to the precise manner of calculation of that profit or those profits stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified.
21. By 4:00 pm on 26 February 2013, Trademach (by its proper officer) file and serve an affidavit:
- (a) deposing to all profits it derived by reason of or arising out of the development, marketing and sale of each Product; and
  - (b) deposing to the precise manner of calculation of that profit or those profits stating in each case the amount of gross receipts in respect of that product and the amount and occasion of each expenditure allowed against those receipts in the calculation of the profits identified."

18 On 28 February 2013 Mr John Hurd filed an affidavit which he had sworn on the previous day in which he purported, on behalf of the various corporate entities, of which he deposed that he was the director, to comply with paragraphs 16 to 21 inclusive of her Honour's orders.

## **THE CHARGES**

19 Zomojo alleged that Mr Matthew Hurd and a number of corporate respondents had failed to comply with her Honour's orders. It was also alleged that Mr John Hurd had aided and abetted a contravention of the 19 December 2012 undertaking given by Mr Matthew Hurd and orders 12 to 21 inclusive made by Gordon J on 5 February 2013. Each statement of charge was dated 7 March 2013.

20 The statements of charge were supported by affidavit sworn by a solicitor, Ms Janet Whiting, on 7 March 2013 ("Ms Whiting's first affidavit").

## **PROCEDURAL MATTERS**

21 Zomojo accepted that no statement of charge against MD Hammer Pty Ltd ("MD Hammer") had been filed or served on the company. As a result it did not press charges against that respondent.

22 The statement of charge against Zeptonics was prepared in the offices of Zomojo's solicitors. It was developed through a number of drafts. The final version was served on Zeptonics. An earlier version was, however, filed in the Court Registry. The statements served on Zeptonics contained more charges than were contained in the draft. As the error had occurred as a result of an innocent mistake and because Zeptonics was in no way prejudiced by the error, I gave Zomojo leave to proceed on the statement of charge in the form in which it had been served.

23 There was no copy of the statement of charge against Zepto Fabrics on the Court file. A statement of charge, had, however, been served on that company. Leave was granted to file a copy of the statement of charge in Court for the same reasons that leave was granted in relation to the Zeptonics statement.

## **EVIDENTIARY ISSUES**

24 Objection was taken to a number of paragraphs in Ms Whiting's first affidavit. Because of those objections the following paragraphs were not read: 6-17 inclusive, 19, 22-27 inclusive, 29, 33, 34 (save that exhibit JMVW-7 referred to therein went into evidence), 35-42 inclusive, 54 and 58.

25 Zomojo also sought to rely on a second affidavit which was sworn by Ms Whiting on 8 May 2013 (“Ms Whiting’s second affidavit”). This affidavit referred to certain procedural matters including the form in which Gordon J’s orders were provided to Zomojo’s solicitors, communications between Zomojo’s solicitors and Middleton J’s Chambers and the extension of the period of operation of Mr Matthew Hurd’s undertaking.

26 The respondents submitted that this affidavit should not be received or considered by the Court.

27 The respondents contended that an interlocutory application for punishment for contempt must be accompanied by a statement of charge *and* the affidavits on which the person making the charge intends to rely to prove the charge: see Rule 42.12(b). I rejected the submission and admitted the affidavit into evidence.

28 Rule 42.12 does not, in terms, or, in my view, implicitly preclude a prosecutor from relying on additional affidavit evidence which has been filed after the interlocutory application. The rule plainly contemplates, as a matter of fairness, that as much evidence as possible to support the charges should be provided to the accused person with the statement of charges. The extent to which a prosecutor may rely on additional affidavit material, served before trial, must be a matter within the discretion of the Court. It is also to be borne in mind that a prosecutor may wish to call evidence from persons who are not willing to swear affidavits but who are prepared to give oral evidence at trial.

29 Rule 1.34 confers a wide discretion on the Court to dispense with compliance with any other rule “either before or after the occasion for compliance arises.” In *Lazar v Taito (Aust) Pty Ltd* (1985) 5 FCR 395 McGregor J (at 403-4) said that the power conferred by the predecessor of Rule 1.34 may be exercised in contempt proceedings, particularly “where there is no apparent injustice and the alleged error can only be one of procedure.” Neaves J (at 414) accepted that, in contempt proceedings, there will be limited circumstances in which the discretion conferred by the Rule should be exercised. Fox J agreed (at 396) with McGregor and Neaves JJ on this point. In *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (No 2)* (1985) 9 FCR 194 at 199 Smithers and Northrop JJ held that the affidavits referred to in the then O 40, r 8, which dealt with personal service are the

affidavits filed in support of the motion and that O 40, r 8, did not apply to other affidavits which may be used at the hearing of the motion. Toohey J said (at 226) that:

“In my view r 8 does not impose an absolute prohibition on the use of material that has not been served personally on an accused person. The intention of the rule is to ensure that no injustice is done to an accused person by reason of a failure to provide him with the material filed in support of the charge against him. Rule 7(2) contemplates that evidence may be given orally in support of the charge. Again the question is one of fairness to the accused. Evidence, whether orally *or by some later affidavit*, may represent such a departure from the material served on the accused person or may introduce such new matter that the applicant ought not to be permitted to adduce that material without service of the affidavit or notification of the proposed oral evidence to the accused person. But where, as in the present case, an accused person or someone with authority to speak on his behalf makes some comments at the time of service of material, the reception of that additional material is one for the discretion of the judge before whom the contempt motion comes.” (Emphasis added).

30 Ms Whiting’s second affidavit did no more than amplify material which had appeared in paragraph 47 of her first affidavit. She exhibited material, much of which appeared on the Court file. That material related to procedural matters of which the respondents were aware. The admission of the affidavit did not cause any injustice to the respondents. In these circumstances I considered it appropriate to exercise, to the extent necessary, the dispensation power conferred by Rule 1.34.

31 Zomojo also sought to tender and rely at trial on affidavits which had been filed by Mr Matthew Hurd and Mr John Hurd. Zomojo contended that the affidavits contained admissions against interest and were admissible under the *Evidence Act 1985* (Cth) (“the Evidence Act”).

32 The respondents submitted that the affidavits were inadmissible for a variety of reasons. These included a denial that they contained any admissions, that real prejudice was caused to the respondents by what was said to be a late tender of the affidavits and, in the case of Mr John Hurd’s first affidavit, that, if the affidavit contained admissions, he should be protected by the rule against self-incrimination.

33 Mr John Hurd’s first affidavit was described by him in it as an “[a]ffidavit of John Barrie Hurd in support of Federal Court Orders dated the 5<sup>th</sup> February 2013 for compliance with clauses 16 to 21 inclusive ...”. As already noted the affidavit was sworn by Mr John Hurd on behalf of some of the corporate respondents, namely, Zeptonics, Crosswise, Zepto Markets, Zepto Fabrics, Zeptoip and Trademach. He deposed that each of Zeptonics,

Crosswise and Zepto Markets had no profits to disclose and he exhibited financial statements for each company “in verification” of those claims. He deposed that the other three companies had never commenced business, had made no profits and had no financial accounts.

34 The affidavit was filed in purported compliance with orders made by Gordon J. No objection had been taken by Mr Hurd to complying with her Honour’s orders on the ground that, to do so, might incriminate him.

35 Mr John Hurd swore a second affidavit on 18 March 2013 (“Mr John Hurd’s second affidavit”). He said that the affidavit had been filed “in support of compliance with Federal Court Orders of the 5<sup>th</sup> February 2013...”. It was sworn on behalf of Zeptonics, Crosswise, MD Hammer, Zepto Markets, Zepto Fabrics and Zeptoip. In the affidavit he stipulated the dates on which he said that compliance with paragraphs 12-21 inclusive and 23 of Gordon J’s orders had occurred either in part or in full. Mr John Hurd raised no objection to being required to file this affidavit on the ground of self-incrimination or otherwise.

36 Zomojo also sought to rely on certain passages in an affidavit sworn by Mr Matthew Hurd on 5 April 2013. He said, in the affidavit, that it was made “in response to the Statement of charge dated 7 March 2013”. The affidavit contained a series of explanations and apologies for his failure to comply with various orders made by Gordon J.

37 In respect of paragraphs 12 and 13 of her Honour’s orders, Mr Matthew Hurd deposed that:

“I believe that by 14 March 2013 the companies and I were in compliance. I believe the Products (including any parts thereof) within the Respondents (sic) control were delivered on time. An assignment agreement for all rights was not delivered on time. When I engaged legal representation it was pointed out to me that a formal document should be provided for the assignment. I had wrongly assumed that because the court had ordered the assignment and we delivered the Products, the relevant rights were assigned. ... I apologise for the fact that the assignment agreement was not prepared on time.”

38 In respect of paragraph 14 of her Honour’s orders, Mr Matthew Hurd deposed that:

“I believe the Respondents were in full compliance by 14 March 2013. I know that my staff provided many documents by 26 February 2013. A substantial number of documents were not delivered. Over twenty five thousand further documents were provided after 26 February 2013 that were hand delivered ... to Zomojo’s ... Office ... I apologise to the court that the delivery of these documents was not timely and

the majority of the documents were delivered after the [statement of charge had been filed and served].”

39 In dealing with the alleged contravention of paragraph 15 of Gordon J’s orders Mr Matthew Hurd deposed that:

“Two Korean brokers, NewEdge Korea and Leading Investment and Securities, were running the ZeptoAccess KRX system in Korea on 5 February 2013. One Korean broker, Hyundai Futures, was having the ZeptoAccess KRX system installed prior to 5 February 2013. My staff and I stopped work on any support and any installation activity related to ZeptoAccess KRX from 5 February 2013. ... I believe there was no legal action we could take to force a return or to disable the systems in foreign jurisdictions. It would have been an illegal action for my staff or me to reach into a Korean broker’s production financial system and interfere with their system.”

40 The first question is whether the material in these affidavits upon which Zomojo wishes to rely is, in each case, properly to be regarded as an admission. If it is, the material is admissible in evidence as an exception to the hearsay rule. Section 81(1) of the Evidence Act provides that the hearsay rule does not apply to evidence of an admission. The term “admission” is defined in the dictionary to the Act as:

“**Admission** means a previous representation that is:

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- (b) adverse to the person’s interests in the outcome of the proceeding.”

A “**previous representation**” is defined in the dictionary to mean “a representation made otherwise than in the course of giving evidence in the proceeding in which the evidence of the representation is sought to be adduced.” By s 82(b) of the Evidence Act it is provided that s 81 does not prevent the application of the hearsay rule to evidence of an admission unless it is in a document in which the admission is made. Section 83(1) prevents evidence of an admission by one respondent from being used against another respondent. It provides that “[s]ection 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party.”

41 An affidavit sworn at an interlocutory stage of a proceeding may be treated as a “previous representation” and contain admissions for the purposes of ss 81, 82 and 83 of the Evidence Act if it is sought to rely on such material at a later trial: see *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314 at 322 (per Rares J).

42           The respondents submitted that some, at least, of the material appearing in the affidavits on which Zomojo sought to rely did not constitute “admissions”. This was because, so it was contended, exculpatory statements could not constitute an admission and because omissions could not constitute admissions.

43           The contentions that exculpatory statements cannot be treated as admissions for the purposes of the Evidence Act was founded on a judgment of Spender J, sitting as a member of a Full Court of this Court, in *R v GH* (2000) 105 FCR 419. His Honour held that a false account of events given to police did not constitute an admission because a “statement which is exculpatory on its face is not a representation which is adverse to the interests of the accused: it is the addition of other circumstances which may import that quality. It is not the representation, but the proof of its untruth, which is or may be adverse”: see at 422. The other members of the Court (Miles and Madgwick JJ) were prepared to accept that a false denial could constitute an implied admission. On either analysis the false statement did not constitute an admission because the prosecution did not seek to rely on it as revealing a consciousness of guilt but as an act constituting an element of the charge of conspiracy to give false information to the police.

44           It was not suggested that any of the statements contained in the affidavits on which Zomojo sought to rely were false. Some were exculpatory in a different sense: they sought to explain and excuse non-compliance with Gordon J’s orders. Whether those statements can be regarded as being adverse to the maker’s interests or those on whose behalf the statements were made, will need to be examined on a case by case basis.

45           The contention that an omission to say something cannot amount to an admission within the dictionary meaning was said to be supported by some observations of Bryson J in *Re A (a Child)* (2000) 115 A Crim R 1. The issue before his Honour was whether the word “no” spoken by a person which indicated a lack of consent to taking part in an identification parade could be treated as an admission. His Honour held that it could not: rather it was “a direct statement on the subject of the plaintiff’s wishes about taking part in [the parade], and was not in any sense an admission ... about whether some state of facts existed”: at 9 [28]. *Re A* does not, therefore, support the broad proposition which is advanced by the respondents. It establishes the necessity of focussing attention on the terms of any alleged admission, the purpose served by the words and the circumstances in which they were spoken

or written. In an appropriate case it may be that a statement of facts which omits to mention some material fact may amount to a tacit admission. Again, attention will need to be given separately to each alleged representation appearing in the affidavits to determine whether or not any of them constituted admissions.

46           The respondents contended that any admissions contained in the affidavits of Mr John Hurd and Mr Matthew Hurd could not be used in evidence against the other: see s 83 of the Evidence Act. This may be accepted. Mr John Hurd's affidavits were sworn on behalf of various corporate respondents of which he was, at relevant times, a director. Any admissions contained in those affidavits may be treated as admissions by each of the corporate respondents to which they relate.

47           It was submitted that, if Mr John Hurd's affidavits contained any admissions against his personal interests, those affidavits, to that extent, were not admissible because they were self-incriminatory. This submission cannot be accepted. The privilege against self-incrimination enables a natural person to refuse to answer questions or produce documents, if to do so would have a tendency to expose the person to a civil penalty or conviction for a crime. Once, however, the words have been spoken or the written representation has been published any potential claim to the privilege is destroyed: see *O Limited v Z* [2005] EWHC 238 at [64]. The material may be relied on in subsequent criminal proceedings: see *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 33-4, including contempt proceedings: see *Memory Corporation v Sidhu* [2000] Ch 645 at 661.

48           When he swore and filed his two affidavits Mr John Hurd made no claim to privilege against self-incrimination. Those affidavits were sworn in purported compliance with Gordon J's orders. Whether or not the privilege would have been available to him at that time need not be decided. The issue in the present proceeding is whether the affidavits are inadmissible because some of their contents might expose Mr John Hurd to a criminal penalty. The privilege against self-incrimination was lost when the affidavits were filed and may not be relied on to exclude them from evidence.

## CONTEMPT OF COURT

49 Pursuant to s 31(1) of the *Federal Court of Australia Act 1976* (Cth), the Federal Court “has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court”. The power of the High Court to punish for contempt is the same as that which was possessed by the Supreme Court of the Judicature in England as at 1903: see s 24 *Judiciary Act 1903* (Cth).

50 In *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* (2006) 149 FCR 494 at 497-8 Merkel J summarised the current state of the law on when disobedience of a Court order will constitute a contempt of court. His Honour said:

“Deliberate conduct which is in breach of a court order will constitute wilful disobedience of the order, and therefore a civil contempt, unless the conduct be casual, accidental or unintentional: see *Australasian Meat Industry Employee’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106-107 and 112-113. However, the disobedience will amount to a criminal contempt if it involves ‘deliberate defiance or, as it is sometimes said, if it is contumacious’: see *Witham v Holloway* (1995) 183 CLR 525 at 530 ... However, as all proceedings for contempt are now regarded as criminal in nature, all of the charges must be proved beyond reasonable doubt: see *Witham* at 534.”

See also *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 112-113; *Heatons Transport v TGWU* [1973] AC 15 at 109.

51 In *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 Gillard J identified the elements which it is necessary for a complainant to establish in order to make good a charge of civil contempt of Court. His Honour said:

“[31] In order to prove a civil contempt of court involving a breach of an order of the court, the plaintiff has to prove the following:

- (i) that an order was made by the Court;
- (ii) that the terms of the order are clear, unambiguous and capable of compliance;
- (iii) that the order was served on the alleged contemnor or excused in the circumstances, or service dispensed with pursuant to the Rules of Court;
- (iv) that the alleged contemnor has knowledge of the terms of the order;
- (v) that the alleged contemnor has breached the terms of the order.

[32] ... in proving element (v) it must be proven that the act or omission which constituted the breach of the order was deliberate and voluntary.”

52 If a party gives an undertaking to a court that undertaking has the same legal effect as an injunction imposed by the Court. As a result, any breach of such an undertaking by the

party who proffers it may constitute a contempt of court: see *Windsurfing International Inc v Sailboards Australia Pty Ltd* (1986) 19 FCR 110 (Burchett J). Where, however, an undertaking is given inter partes that undertaking is not enforceable in proceedings for contempt of court if it is alleged to have been breached: see *U & I Global Trading (Australia) Pty Ltd v Tasman-Warajay Pty Ltd* (1995) 60 FCR 26 at 29-31 (Cooper J).

53 In every case where the Court exercises its power to punish contempt it seeks to vindicate its authority and preserve the rule of law. In *Australian Competition and Consumer Commission v Hughes* (2001) ATPR 41-807 Tamberlin J described the rationale behind the contempt power at [15] as follows:

“Ultimately, in the case of mandatory or prohibitory orders made by it, the sanction which the Court has in order to enforce its decisions is the power to punish for contempt. This is the way in which the Court preserves respect for its role and the rule of law. Without the enforcement of court orders the whole process of adjudication becomes a hollow exercise. If a losing party can defy the orders of the Court then such disobedience renders futile, in the perception of the community, the remedy secured by the successful party. Orders are not made simply to suggest or advise persons that they ought to keep to the law as proclaimed but to ensure that the law is carried out as determined by the decision pursuant to which the order is made. Defiance of court orders diminishes the authority of courts and removes the incentive of parties, if such conduct is left unpunished, to comply with the requirements of the courts.”

54 In *Witham v Holloway* the High Court determined that a critical element of the distinction between civil contempts and criminal contempts, the differing standards of proof, was not justified and held that all charges of contempt, whether civil or criminal, must be proved beyond reasonable doubt: see *Witham v Holloway* (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ; at 548 per McHugh J.

55 Having regard to these principles, and in particular the rationale underlying the Court’s powers to punish contempts, I turn to the various charges and the evidence adduced by Zomojo to support them. In doing so I note that Zomojo did not press charges against any respondent of contravention of Order 13 of Gordon J’s orders.

## **BREACH OF UNDERTAKINGS**

56 Zomojo alleged that Mr John Hurd and Mr Matthew Hurd aided and abetted and otherwise caused the contravention of the undertakings provided by Mr Matthew Hurd on

19 December 2012 as a result of the sale of certain “ZeptoLink” units. Zomojo also alleged that Zeptonics aided and abetted the contravention of the undertaking by making those sales.

57           The undertaking, given by Mr Matthew Hurd to Zomojo’s solicitors on 19 December 2012, was that he would “take no steps to put [himself] in a position from which [he] would be unable to comply with an injunction ordered by the Court in the terms set out in paragraph 377 of Justice Gordon’s reasons for judgment” which had been published earlier that day. Paragraph [377] (set out above at [10]) foreshadowed injunctions, inter alia, requiring Mr Matthew Hurd to deliver up to Zomojo all products in his possession or in the possession of the corporate respondents including Zeptonics.

58           Zomojo alleged that, in contravention of these undertakings, Mr Matthew Hurd had caused Zeptonics to make sales of certain of its products as follows:

- Zeptonics sold a ‘ZeptoLink’ unit to Jump Systems LLC on 20 December 2012 as stated on an invoice from Zeptonics to Jump Systems LLC dated 20 December 2012;
- Zeptonics sold a ‘ZeptoLink’ unit to Ark International Group Pty Ltd on 4 January 2013 (at a significantly discounted price) to be shipped to a Korean address as stated in an invoice from Zeptonics to Ark International Group Pty Ltd dated 4 January 2013;
- Zeptonics sold two ‘ZeptoLink’ units to Jump Systems LLC on 11 January 2013 as stated on an invoice from Zeptonics to Jump Systems LLC dated 11 January 2013; and
- Zeptonics sold and delivered two ‘ZeptoLink’ units to Jump Systems LLC on 15 January 2013 as stated on an invoice from Zeptonics to Jump Systems LLC dated 4 January 2013 and a purchase order from Jump Systems LLC to Zeptonics dated 7 January 2013.

In so doing, it was alleged, he caused Zeptonics to aid and abet the contravention of the undertaking.

59           Each of these sales (apart from the last) occurred during the currency of the original undertaking. The other sale occurred after the undertaking had been renewed as a condition of the granting of the extension of time sought by the respondents.

60 At the time each of these sales was made Mr Matthew Hurd and Mr John Hurd were directors of Zeptonics.

61 Invoices evidencing the sales were tendered by the prosecutor. Their authenticity was not questioned.

62 The relevant respondents did not deny that the sales had occurred.

63 The undertakings, given by Mr Matthew Hurd on 19 December 2012, were not given to the Court. They were given to Zomojo through its solicitors. The existence of this undertaking was known to the Court on 11 January 2013 when Middleton J granted an extension of time within which the parties were to confer and draft orders giving effect to her Honour's reasons for judgment. The extension of time was granted on the condition that the operation of the undertaking be extended until the making of final orders. Although Mr Matthew Hurd agreed to this condition and renewed his undertaking until the making of final orders he again gave the undertaking to Zomojo through its solicitors. Whilst there may be other avenues by which Zomojo is able to seek redress for the breaches of these undertakings (assuming them to have been breached) a proceeding for contempt is not an available option: see *U & I Global*.

64 This charge must be dismissed.

#### **CONTRAVENTIONS OF PARAGRAPH 12**

65 Paragraph 12 of Gordon J's orders is set out above at [17]. It required each respondent to "take all necessary steps within his or its power to assign the ownership of all of his or its rights" in various named products to Zomojo by 4:00 pm on 26 February 2013.

66 Zomojo alleged that Mr John Hurd, Mr Matthew Hurd, Zeptonics, Crosswise, Zepto Markets and Zepto Fabrics had each contravened paragraph 12 in that:

- Mr John Hurd, Mr Matthew Hurd and Zeptonics had failed to deliver up or otherwise produce any documents evidencing or referring to their compliance with the order to assign his or its rights to the products named in the order to Zomojo.

- Crosswise had failed to deliver up or otherwise produce and documents evidencing or referring to the assignment of its right to the “Crosswise ATS” product to Zomojo.
- Zepto Fabrics had failed to deliver up or otherwise produce any documents evidencing or referring to the assignment of its rights to the “ZeptoLink” product to Zomojo.
- Zepto Markets had failed to deliver up or otherwise produce any documents evidencing or referring to the assignment of the products to Zomojo, including the “ZeptoAccess KRX” unit which was the subject of the services agreement between Zepto Markets and NewEdge Financial Hong Kong Limited.

67 Zomojo’s submissions proceeded on the realistic assumption that any assignment of rights in relation to a particular product would require the creation of legal documentation by the relevant respondent and the service of those documents on Zomojo, thereby effecting the assignment. In each case this was to have occurred by 26 February 2013. Zomojo alleged that no assignment had occurred by 7 March 2013 when the charges were laid.

68 Zomojo relied on what it contended were admissions made by Mr Matthew Hurd and Mr John Hurd each on his own behalf and on behalf of the relevant respondent companies.

69 Referring specifically to paragraphs 12 and 13, in an affidavit, sworn on 5 April 2013, Mr Matthew Hurd deposed that “[a]n assignment agreement for all rights was not delivered on time” and apologised for this failure: see above at [37].

70 In an affidavit sworn by Mr John Hurd on 18 March 2013 he deposed that he was a director of Zeptonics, Crosswise, Zepto Markets, Trademach and Zeptoip and that he made the affidavit on their behalf. He further deposed that “the provisions of paragraph 12 of the orders have been complied with in full by a document sent to [Zomojo] on the 14<sup>th</sup> of March 2013.”

71 I consider that each of the statements referred to in the two preceding paragraphs are properly to be treated as admissions which are admissible under s 81 of the Evidence Act. Mr Matthew Hurd’s statement is admissible against him only. Mr John Hurd’s statement is admissible against him and the companies on whose behalf he made it. Both statements assert that no legally effective assignment of rights occurred until after 26 February 2013.

The respondents did not seek to suggest that these statements were untrue. Each was adverse to the interests of the person making it and the persons on whose behalf it was made because they averred that paragraph 12 of Gordon J's orders had not been complied with by the prescribed date. These failures constituted a deliberate and voluntarily contravention of paragraph 12 of Gordon J's orders.

72 Charge 12 has been proven against Mr Matthew Hurd, Mr John Hurd, Zeptonics, Crosswise, Zepto Markets and Zepto Fabrics.

#### **CONTRAVENTIONS OF PARAGRAPH 14**

73 Paragraph 14 of Gordon J's orders is set out above at [17]. It required each respondent to "deliver up to [Zomojo] all documents ... in his or its possession ... that record or refer" to each of the range of identified products or the prototypes of those products by 4:00 pm on 26 February 2013.

74 Zomojo alleged that all respondents had contravened paragraph 14 in that:

- Mr John Hurd, Mr Matthew Hurd, Zeptonics and Zepto Markets had failed to deliver up all documents in their possession which were comprehended by the order. Although some documents had been produced other documents such as internal e-mails, communications with investors, patent applicants, bank statements and financial accounts had not been provided to Zomojo.
- Crosswise, Trademach and Zepto Fabric had done so because the items delivered up by them on 26 February 2013 in purported compliance with order 14 were incomplete: classes of relevant documents, which were identified in each statement of charge, were not delivered up.
- Zeptoip had done so because the items delivered up by Zeptoip in purported compliance with order 14 were incomplete: they did not include any patents held or applications for patents lodged by Zeptoip concerning the technology or techniques employed in each Product and other certain types of documents, which were identified in the statement of charge, were not delivered up.

75           The substance of Zomojo’s complaint was that by no means all of the relevant documents in the hands of the respondents against whom the charges were laid had been delivered up to it by 26 February 2013.

76           Zomojo again relied on what it submitted were admissions to this effect by Mr Matthew Hurd and Mr John Hurd.

77           In his affidavit of 5 April 2013, Mr Matthew Hurd deposed that a “substantial number of documents” covered by paragraph 14, had not been delivered until after 26 February 2013. He apologised for untimely delivery: see above at [38].

78           In his affidavit of 18 March 2013 Mr John Hurd deposed that the provisions of paragraph 14 “were complied with in full by the 14<sup>th</sup> [of] March 2013.” He made the affidavit on his own behalf and on behalf of the companies of which he was a director and which are identified above at [70].

79           I consider that each of the statements referred to in the two preceding paragraphs are properly to be treated as admissions which are admissible under s 81 of the Evidence Act. Mr Matthew Hurd’s statement is admissible against him only. Mr John Hurd’s statement is admissible against him and the companies on whose behalf he made it. Mr Matthew Hurd’s statement expressly admitted that he had not fully complied with paragraph 14 by 26 February 2013. Mr John Hurd’s statement that full compliance did not occur until 14 March 2013, in context, necessarily implies that there had not been full compliance by 26 February 2013.

80           As was the case with their evidence in relation to paragraph 12, neither respondent sought to suggest that the statements were untrue. Each statement was adverse to the interests of the person making it and persons on whose behalf it was made because it acknowledged that paragraph 14 had not been complied with by 26 February 2013. These failures constituted a deliberate and voluntarily contravention of paragraph 14 of Gordon J’s orders.

81           Charge 14 has been proven against Mr Matthew Hurd, Mr John Hurd, Zeptonics, Crosswise, Zepto Markets, Trademach, Zepto Fabrics and Zeptoip.

## CONTRAVENTIONS OF PARAGRAPH 15

82 Paragraph 15 of Gordon J's orders is set out above at [17]. It required each respondent to cease using or accessing the identified products and in assisting, facilitating or enabling any other person to use or access the products.

83 Zomojo alleged that Mr John Hurd, Mr Matthew Hurd and Zeptonics had each contravened paragraph 15. It alleged that:

- Mr John Hurd and Mr Matthew Hurd had each:
  - failed to cause Zeptonics and Zepto Markets to disable the “ZeptoAccess KRX” units provided under the services agreements with Leading Investment and Securities Co Ltd (“Leading Investment”), Hyundai Futures Corporation (“Hyundai Futures”) or NewEdge Financial Hong Kong Ltd (“NewEdge”) on 5 February 2013, or at all; and
  - Zeptonics and Zepto Markets had thereby facilitated and enabled Leading Investment, Hyundai Futures and NewEdge and their respective customers to continue to access and use the “ZeptoAccess KRX” units after 5 February 2013.
- Zeptonics had:
  - failed to disable the “ZeptoAccess KRX” units provided under the service agreements with Leading Investment, Hyundai Futures or NewEdge on 5 February 2013, or at all; and
  - it had thereby facilitated and enabled Leading Investment, Hyundai Futures and NewEdge and others to continue to access and use the subject “ZeptoAccess KRX” units after 5 February 2013.

84 Zomojo withdrew charges that Zepto Markets and MD Hammer had contravened paragraph 15.

85 Zeptonics was established by Mr Matthew Hurd in January 2010 (albeit under a different name). In October 2011 Mr Matthew Hurd, acting through Zeptonics, had entered into a software licensing agreement with Leading Investment: see reasons of Gordon J at [358]. It was a term of the agreement that, if the use of the KRX units were to be prohibited “by a temporary injunction or legally binding decision” for any reason Zeptonics was able, at

its discretion, to terminate the agreement. Zomojo contended that Zeptonics should have but did not exercise this power prior to 5 February 2013 with the result that Leading Investment continued to use the KRX units.

86 On 3 May 2012 Zeptonics entered into a software licensing and service agreement with NewEdge Financial Hong Kong Ltd, Seoul Branch. The agreement was executed on behalf of Zeptonics by Mr Matthew Hurd. While the agreement provided for the intellectual property in “the deliverables” (including KRX units) provided by Zeptonics to vest in Zeptonics it did not provide for termination, at the option of Zeptonics, if the use of KRX units were to be restrained by law.

87 On 23 November 2012 Zeptonics entered into a similar software licensing and service agreement with Hyundai Futures, a Korean company. The agreement was executed on behalf of Zeptonics by Mr Matthew Hurd. As was the case with the NewEdge agreement, this agreement provided that the intellectual property in the “deliverables” (including KRX units) provided by Zeptonics to Hyundai Futures vested in Zeptonics. It did not provide for Zeptonics to terminate the agreement if the use of KRX units were to be prohibited by legal decision.

88 In his affidavit of 5 April 2013, on which Zomojo relied, Mr Matthew Hurd, in the passage set out above at [39] acknowledged that certain brokers, including Leading Investment had access to the KRX system on 5 February 2013.

89 Mr Matthew Hurd asserted a belief that there was no legal action he or Zeptonics was in a position to take to disable the systems in Korea. He thereby acknowledged, so Zomojo contended, a failure to disable Leading Investment and the two other licensees from using the KRX units.

90 At relevant times Mr Matthew Hurd was a director of Zeptonics. Mr John Hurd was a director of Zeptonics when it entered into software licencing and service agreements with NewEdge and Hyundai Features.

91 I consider that Mr Matthew Hurd’s evidence, set out above at [39] is admissible for the same reasons as was his evidence relating to paragraphs 12 and 14 of Gordon J’s orders.

Mr Matthew Hurd, as a director of Zeptonics, could have but did not take steps under the licensing agreement with Leading Investment, to prevent the licensee from continuing to use KRX. This failure was a deliberate and voluntary contravention of paragraph 15 of her Honour's orders. The licensing agreement with Hyundai Futures and NewEdge did not provide for Zeptonics to terminate these agreements if required to do so by an order of the kind made in paragraph 15. Zomojo did not advance any alternative basis on which the individual respondents or Zeptonics might have lawfully disabled the use of the KRX units by Hyundai Futures or NewEdge. Their failure to do so does not constitute a contravention of the order.

92 Charge 15 has been proven against Mr Matthew Hurd and Zeptonics.

#### **CONTRAVENTIONS OF PARAGRAPH 16**

93 Paragraph 16 of Gordon J's orders is set out above at [17]. It required Zeptonics (by its proper officer) to file and serve an affidavit which deposed to all profits the company had derived from the licensing agreement with Leading Investment and the manner in which that profit had been calculated by 4:00 pm on 26 February 2013.

94 Zomojo alleged that Zeptonics and Mr John Hurd had contravened paragraph 16 in that the affidavit, sworn by Mr John Hurd on 28 February 2013, did not account for, or depose to, certain matters contemplated by the order which were specified in each statement of charge. These matters included monies received from a number of companies and revenue derived from sales of ZeptoLink units.

Gordon J found that Zeptonics was the corporate entity through which Mr Matthew Hurd had developed and marketed certain products including ZeptoLink: see at [358]. The licensing agreement referred to was the same agreement referred to above at [85]. Gordon J held that Mr Matthew Hurd designed, developed and marketed the product known as ZeptoLink during his employment by Zomojo and thereafter: see at [308] and [309]. At [399] her Honour held that a declaration should be made that Zeptonics held the profits it had derived by reason of its development and marketing of ZeptoLink and its entry into the agreement with Leading Investment as constructive trustee for the benefit of Zomojo and was liable to account to Zomojo for those profits.

95 In an affidavit, which he swore on 27 February 2013, Mr John Hurd said, on behalf of Zeptonics, that “there are no profits to be deposited” in relation to that company. He appended what he said were “financial statements in verification”. The appended documents were a balance sheet for Zeptonics “[a]s of November 2012”, a profit and loss statement for Zeptonics “July 2012 through November 2012”, a document headed “Profit & Loss [With Last Year] July 2011 through June 2012” for Zeptonics and a further document headed “Balance Sheet [Last Year Analysis] June 2012”.

96 In a second affidavit on 18 March 2013, which was sworn on behalf of Zeptonics, Mr John Hurd deposed that “the provisions of paragraph 16 of the orders were complied with in full on the 14<sup>th</sup> [of] March 2013.”

97 At relevant times Mr John Hurd was the sole director of Zeptonics.

98 Zomojo contended that Mr John Hurd and Zeptonics had both contravened paragraph 16. The affidavit had not contained evidence relating to all profits derived by Zeptonics from the licensing agreement with Leading Investment and the attempt to comply with the order had, in any event, been made belatedly.

99 Mr John Hurd swore both affidavits on behalf of Zeptonics. Both affidavits post-dated 26 February 2013. Neither of them contained any material which might reasonably be regarded as being comprehended by Gordon J’s order. The various financial statements appended to Mr Hurd’s first affidavit did not provide any specific information relating to the profits derived by Zeptonics from its licensing agreement with Leading Investment. Nor did those statements deal specifically with revenue generated by the marketing of ZeptoLink units. Moreover, the documents related to only part of the period during which the licensing agreement was in force.

100 Charge 16 has been proven against Mr John Hurd and Zeptonics.

#### **CONTRAVENTIONS OF PARAGRAPH 17**

101 Paragraph 17 of Gordon J’s orders is set out above at [17]. It required Crosswise (by its proper officer) to file and serve an affidavit deposing to all profits derived by it from

the development, marketing and sale of Crosswise ATS and to the precise manner of calculation of those profits.

102           Zomojo alleged that Mr John Hurd and Crosswise had contravened paragraph 17 in that the affidavit sworn by Mr John Hurd on 27 February 2013 on behalf of Crosswise did not account for, or depose to, certain matters comprehended by the order which were specified in each statement of charge. These matters included research and development claims which had been made by Crosswise, funds received from investors, profits derived by Crosswise from the development, marketing and sale of Crosswise ATS and the manner in which such profits were calculated.

103           Crosswise was a company established by Mr Matthew Hurd and the entity through which he solicited and obtained investors and marketed and developed the Crosswise ATS product: see reasons of Gordon J at [358] and [359]. Mr Matthew Hurd had developed the Crosswise ATS using his knowledge of a similar product which had been devised by Zomojo: see at [271]. Mr Matthew Hurd had conceived or invented the Crosswise ATS, using this knowledge, during his period of employment by Zomojo: see at [276]. After leaving Zomojo Mr Matthew Hurd actively marketed the Crosswise ATS: see at [310].

104           At [399] her Honour held that a declaration should be made that Crosswise held the profits it had derived by reason of its fundraising, marketing and development of the Crosswise ATS as constructive trustee for the benefit of Zomojo and was liable to account to Zomojo for those profits.

105           In the affidavit, sworn by him on 27 February 2013, Mr John Hurd said, on behalf of Crosswise, that there were “no profits to be deposited” and referred to the same financial documents on which he relied in dealing with the alleged contravention of paragraph 16. This may have been the result of a clerical error. In the body of his affidavit Mr John Hurd, when dealing with Crosswise, referred to and relied on annexure JBH-01 as “verification” of the “no profits” statement. This annexure contained the Zeptonics financial documents. There was, however, also an annexure JBH-02 which was not referred to in the affidavit but which contained documents relating to Crosswise. It contained the following documents: a “Balance Sheet [a]s of June 2012”, a “Profit & Loss Statement July 2011 through June 2012”, a “Balance Sheet [a]s of June 2011” and a “Profit & Loss Statement January 2011

through June 2011”. I proceed on the basis that these were the documents on which Mr John Hurd intended to rely for the purpose of establishing compliance with Gordon J’s order. No specific mention is made in any of them to income and expenditure relating to the Crosswise ATS product. In his second affidavit, on 18 March 2013, Mr John Hurd said, on behalf of Crosswise, that paragraph 17 of the orders were “complied with” on 27 February 2013.

106           Zomojo contended that Mr John Hurd and Crosswise had failed to make any bona fide attempt to comply with the orders contained in paragraph 17. Such attempt as had been made was made after the prescribed time had passed.

107           I accept these submissions. The documents which were filed in purported compliance with the order related to the general financial affairs of Crosswise. The order required Crosswise to provide information relating to all profits derived by *it* from the development, marketing and sale of the Crosswise ATS product. Gordon J had found that such development, marketing and sales had occurred. No attempt was made to provide financial details relating to these matters. The various financial statements which dealt with the affairs of Crosswise did not provide information relating to the profits (or lack of them) derived by that company which could be attributed to its Crosswise ATS product. Furthermore, the documents related to only part of the period during which the development, marketing and sale of Crosswise ATS had occurred.

108           Charge 17 has been proven against Mr John Hurd and Crosswise.

#### **CONTRAVENTIONS OF PARAGRAPH 18**

109           Paragraph 18 of Gordon J’s orders is set out above at [17]. It required Zepto Markets (by its proper officer) to file and serve an affidavit deposing to all profits derived by it from the development, marketing and sale of ZeptoAccess KRX and what was described as the “SunGard Agreement” and as to the manner of calculation of the profit in each case by 4:00 pm on 26 February 2013.

110           Zomojo alleged that Mr John Hurd and Zepto Markets had contravened paragraph 18 in that the affidavit sworn by Mr John Hurd on behalf of Zepto Markets on 27 February 2013 was deficient in certain respects which were specified in the statement of charge.

These deficiencies included the failure to account for an invoice from NewEdge, a failure to account for payments received in response to invoices issued by Zepto Markets to NewEdge and a failure to provide information relating to the calculation of profits in both cases.

111 In order better to understand these allegations it is necessary to refer to some of the findings made by Gordon J. Mr Matthew Hurd had been an employee of Zomojo until 11 February 2011. He had been that company's co-managing director, a director and company secretary. In those capacities he was involved in the development of certain products which were later to become the ZeptoAccess KRX. Two days before he left Zomojo Mr Matthew Hurd sent an e-mail to SunGard Global Trading (Singapore) Pte Ltd. The e-mail attached a sheet entitled "Zeptonics". As has already been noted, Zeptonics had been established by Mr Matthew Hurd during his employment by Zomojo. Products being developed by Zeptonics were identified. They included the forerunners of ZeptoAccess KRX. On 20 April 2011 Mr Matthew Hurd caused a company named Zepto DMA to be incorporated. This company was later to change its name to Zepto Markets. Mr Matthew Hurd was its sole director and shareholder until 22 February 2012: see at [155], [157].

112 On 8 June 2011 Zepto DMA and SunGard entered into what was described in the proceeding as "the SunGard Agreement". It provided for Zeptonics to provide services to SunGard: see at [159]. Her Honour found (at [359]) that Zepto Markets "was engaged in the business of marketing and selling Zeptonics' gateway products, such as ZeptoAccess KRX, to professional traders and institutions." At [346] Gordon J found that Mr Matthew Hurd had caused Zepto Markets to enter into the SunGard Agreement and offered advice and assistance to SunGard. At [399] her Honour held that a declaration should be made that Zepto Markets held the profits it had derived by reason of its marketing and sale of ZeptoAccess KRX as constructive trustee for the benefit of Zomojo, and was liable to account to Zomojo for those profits.

113 NewEdge was a company with which Mr Matthew Hurd had had communications, as early as September 2010, whilst he was employed with Zomojo: see at [69]. The invoices issued by Zepto Markets to NewEdge may be put to one side as the evidence relating to them was not read.

114 In the affidavit, sworn by him on 27 February 2013, Mr John Hurd said, on behalf of Zepto Markets, that there were “no profits to be deposited” and referred to the same financial documents on which he relied in dealing with the alleged contravention of paragraph 16. This may have been the result of a clerical error. In the body of his affidavit Mr John Hurd, when dealing with Zepto Markets referred to and relied on annexure JBH-01 as “verification” of the “no profits” statement. This annexure contained the Zeptonics financial documents. There was, however, also an annexure JBH-03 which was not referred to in the affidavit but which contained documents relating to Zepto Markets. It contained the following documents: a “Balance Sheet [Last Year Analysis] June 2012”, and a “Profit & Loss [With Last Year]” statement “July 2011 through June 2012”. I have assumed for the purposes of this analysis, that it was these documents on which Mr Hurd intended to rely. No specific mention is made in any of them to income and expenditure relating to the ZeptoAccess KRX product. In his second affidavit, on 18 March 2013, he said, on behalf of Zepto Markets, that the orders contained in paragraph 18 “were complied with in full on the 14<sup>th</sup> [of] March 2013.”

115 Zomojo contended that Mr John Hurd and ZeptoAccess had failed to make any bona fide attempt to comply with the orders contained in paragraph 18. Such attempt as had been made was made after the prescribed time had passed.

116 I accept these submissions. The order required ZeptoAccess to provide information relating to all profits it derived from the development, marketing and sale of ZeptoAccess KRX and the SunGard Agreement. The documents which were appended to the 27 February 2013 affidavit which dealt with ZeptoAccess’ finances did not contain any material which might reasonably be regarded as being comprehended by Gordon J’s order. The various financial statements which dealt with the affairs of Zepto Markets did not provide information relating to the profits (or lack of them) derived by that company which could be attributed to its ZeptoAccess KRX product. Furthermore, the documents related to only part of the period during which the development, marketing and sale of the product had occurred.

117 Charge 18 has been proven against Mr John Hurd and Zepto Markets.

#### **CONTRAVENTIONS OF PARAGRAPH 19**

118 Paragraph 19 of Gordon J’s orders is set out above at [17]. It required Zepto Fabrics (by its proper officer) to file and serve an affidavit deposing to all profits derived by it from

the development, marketing and sale of ZeptoLink and to the manner of calculation of those profits by 4:00 pm on 26 February 2013.

119           Zomojo alleged that Mr John Hurd and Zepto Fabrics had contravened paragraph 19 in that the affidavit sworn by Mr John Hurd on behalf of Zepto Fabrics on 27 February 2013 did not depose to certain matters contemplated by the order which were specified in the statement of charge. These matters included any reference to profits derived by Zepto Fabrics relating to ZeptoLink or the manner of calculation of such profits.

120           In the affidavit, sworn by him on 27 February 2013, Mr John Hurd said, on behalf of Zepto Fabrics, that there were “no profits to depose as [sic] has never commenced business and has no financial accounts.” In his second affidavit, on 18 March 2013, he said, on behalf of Zepto Fabrics, that paragraph 19 of the orders “were complied with on the 27<sup>th</sup> [of] February 2013” presumably by way of the filing of his earlier affidavit.

121           Zomojo contended that Mr John Hurd and Zepto Fabrics had failed to make any bona fide attempt to comply with the order contained in paragraph 19. Such attempt as had been made was made after the prescribed time had passed.

122           I accept these submissions. Mr Matthew Hurd had developed and marketed the product which came to be known as ZeptoLink while he was in the employ of Zomojo. Gordon J had determined (at [309]) that, after leaving Zomojo’s employ, Mr Matthew Hurd had engaged in the further design and development of ZeptoLink and had marketed the product.

123           Gordon J had found (at [359]) that Mr Matthew Hurd had established Zepto Fabrics on 7 March 2012 for the purpose, inter alia, of exploiting the ZeptoLink product. At [399] her Honour held that a declaration should be made that Zepto Fabrics held the profits it had derived by reason of its exploitation of ZeptoLink as a constructive trustee for the benefit of Zomojo and was liable to account to Zomojo for those profits. In the light of these holdings the dismissive statement, made by Mr John Hurd in his affidavit on 27 February 2013, was a wholly inadequate response to the order contained in paragraph 19. If the true position was, as Mr Hurd appears to have asserted, that Zepto Fabrics had never traded, he was, at the very least, required to explain how it came about that the company, which had been established by

Mr Matthew Hurd for the purpose of exploiting ZeptoLink, had not pursued the intended course. Mr John Hurd, as a director of Zepto Fabrics must be taken to have possessed the relevant knowledge.

124 Charge 19 has been proven against Mr John Hurd and Zepto Fabrics.

#### **CONTRAVENTIONS OF PARAGRAPH 20**

125 Paragraph 20 of Gordon J's orders is set out above at [17]. It required Zeptoip (by its proper officer) to file and serve an affidavit deposing to all profits derived by it arising out of it holding any patents concerning Zomojo's confidential information and the manner of calculation of that profit by 4:00 pm on 26 February 2013. The confidential information was identified in an annexure to Gordon J's reasons for decision.

126 Zomojo alleged that Mr John Hurd and Zeptoip had contravened paragraph 20 in that the affidavit sworn by Mr John Hurd on behalf of Zeptoip on 27 February 2013 did not depose to certain matters contemplated by the order which were specified in the statement of charge. These matters included reference to any profits derived by Zeptoip from its holding any patents concerning Zomojo's confidential information and the manner of the calculation of the profits.

127 In the affidavit, sworn by him on 27 February 2013, Mr John Hurd said, on behalf of Zeptoip, that there were "no profits to depose as [sic] has never commenced business and has no financial accounts." In his second affidavit, of 18 March 2013, he said, on behalf of Zeptoip, that the orders contained in paragraph 20 "were complied with on the 27<sup>th</sup> [of] February 2013."

128 Zomojo contended that Mr John Hurd and Zeptoip had failed to make any bona fide attempt to comply with the orders contained in paragraph 20. Such attempt as had been made was made after the prescribed time had passed.

129 I accept these submissions. Gordon J had found (at [359]) that Zeptoip had been incorporated by Mr Matthew Hurd on 7 March 2012 for the purpose of holding Zeptonics' intellectual property including patents and trademarks. She also found that Mr Matthew Hurd had caused Zeptoip to file a patent application relating to what he called "negative latency"

but which she held “was in fact an implementation of Zomojo’s fast ordering, speculative transmission and transmit fragmentation techniques.” At [399] her Honour held that a declaration should be made that Zeptoip held the profits it had derived by reason of its assistance, its lodgement or holding of any patents concerning Zomojo’s confidential information as constructive trustee for the benefit of Zomojo and was liable to account to Zomojo for those profits.

130 Mr John Hurd’s assertion that Zeptoip had never commenced business does not sit comfortably with these findings. In the circumstances his response was inadequate. As a director of Zeptoip he was well placed to explain how it was that Zeptoip’s activities had not been profitable despite its entry into the intellectual property field which, it may be assumed, involved expenditure. This he failed to do.

131 Charge 20 has been proven against Mr John Hurd and Zeptoip.

#### **CONTRAVENTIONS OF PARAGRAPH 21**

132 Paragraph 21 of Gordon J’s orders is set out above at [17]. It required Trademach (by its proper officer) to file and serve an affidavit deposing to all profits it derived from the development, marketing and sale of each of the identified products and to the manner of calculation of that profit by 4:00 pm on 26 February 2013.

133 Zomojo alleged that Mr John Hurd and Trademach had contravened paragraph 21 in that the affidavits sworn by Mr John Hurd on behalf of Trademach on 27 February 2013 did not depose to certain matters contemplated by the order including profits derived by Trademach from a licensed trading agreement with Leading Investment which related, in part, to the use of Zeptonics products.

134 In the affidavit, sworn by him on 27 February 2013 Mr John Hurd said, on behalf of Trademach, that there were “no profits to depose as [sic] has never commenced business and has no financial accounts.” In his second affidavit, on 18 March 2013, he said, on behalf of Trademach, that the orders contained in paragraph 21 “were complied with on the 27<sup>th</sup> [of] February 2013.”

135 Zomojo contended that Mr John Hurd and Trademach had failed to make any bona fide attempt to comply with the orders contained in paragraph 21. Such attempt as had been made was made after the prescribed time had passed.

136 I accept these submissions. Gordon J had found (at [360]) that Trademach had been established by Mr Matthew Hurd on 14 February 2012. In the following month the company had started conducting test trades on a Korean futures and options exchange. The license agreement with Leading Investment had been entered into on 15 March 2012. At [399] her Honour held that a declaration should be made that Trademach held the profits it had derived by reason of its entry into the licensed trading agreement as constructive trustee for the benefit of Zomojo and was liable to account to Zomojo for those profits. Plainly she contemplated that Trademach had derived profits under the agreement. Again Mr John Hurd's response was wholly inadequate and dismissive. His assertion that Trademach had never commenced business does not sit comfortably with her Honour's findings about it having entered into the agreement and undertaken test trades. If the true position was, as he appeared to suggest, that Trademach had derived no profits from its agreement with Leading Investment, it was necessary for him to explain why it was that the licensing arrangements had proven to be unprofitable. As a director of Trademach Mr John Hurd was in a position, had he chosen to do so, to respond appropriately to her Honour's order.

137 Charge 21 has been proven against Mr John Hurd and Trademach.

## **CONCLUSIONS**

138 Each of the charges of contravention of paragraphs 12 and 14 to 21 inclusive have been established against the respondents against whom they were pressed beyond reasonable doubt save that charge 15 has not been proven against Mr John Hurd.

139 I will give directions as to the steps which need to be taken in advance of a hearing on penalty.

I certify that the preceding one hundred and thirty nine (139) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 28 May 2014