

# FEDERAL COURT OF AUSTRALIA

## Zomojo Pty Ltd v Hurd (No 3) [2013] FCA 54

Citation: Zomojo Pty Ltd v Hurd (No 3) [2013] FCA 54

Parties: **ZOMOJO PTY LTD v MATTHEW HURD, ZEPTONICS PTY LTD, CROSSWISE PTY LTD, MD HAMMER PTY LTD, ZEPTO MARKETS PTY LTD, ZEPTO FABRICS PTY LTD, ZEPTOIP PTY LTD and TRADEMACH PTY LTD; MATTHEW HURD, JOLENE (TAS) PTY LTD and HURD FAMILY SUPERANNUATION FUND; ZOMOJO PTY LTD**

File number: VID 1478 of 2011

Judge: **GORDON J**

Date of judgment: 5 February 2013

Date of hearing: Determined on the papers

Date of last submissions: 4 February 2013

Place: Melbourne

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 3

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

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondents: Mr C D Wood with Mr D Parish

Solicitor for the Respondents: Clayton Utz

**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 115 683 864)  
Eighth Respondent**

**AND BETWEEN MATTHEW HURD  
First Cross-Claimant**

**JOLENE (TAS) PTY LTD (ACN 082 267 516)  
Second Cross-Claimant**

**HURD FAMILY SUPERANNUATION FUND  
Third Cross-Claimant**

**AND: ZOMOJO PTY LTD (ACN 114 604 269)  
Cross-Respondent**

**JUDGE: GORDON J**

**DATE OF ORDER: 5 FEBRUARY 2013**

**WHERE MADE: MELBOURNE**

**THE COURT ORDERS THAT:**

1. The Applicant has leave to file and serve a Further Amended Statement of Claim and Further Amended Originating process in the form provided to the Court and the parties on 4 November 2012.
2. The Orders made on 23 October 2012 splitting the hearing be vacated.
3. Nunc pro tunc, the hearing of the proceeding be split between liability (including all of the cross claim) and quantum.

**THE COURT DECLARES THAT:**

4. The Second Respondent (**Zeptonics**) holds the profits it derived by reason of, or arising out of, the development, marketing and sale of each Product (as defined in paragraph 12 of these Orders), as constructive trustee for the benefit of the Applicant, and is liable to account to the Applicant for those profits.
5. Zeptonics holds the profits it derived by reason of, or arising out of, the Software Licence Agreement between Zeptonics and Leading Investments & Services Co dated 17 October 2011 (**Leading Agreement**), as constructive trustee for the benefit of the Applicant, and is liable to account to the Applicant for those profits.
6. The Third Respondent (**Crosswise**) holds the 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' as constructive trustee for the benefit of the Applicant and is liable to account to the Applicant for those profits.
7. The Fifth Respondent (**Zepto Markets**) holds the 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' as constructive trustee for the benefit of the Applicant and is liable to account to the Applicant for those profits.
8. Zepto Markets holds the profits it derived by reason of, or arising out of, the Services Agreement between Zepto Markets and SunGard Global Trading (Singapore) Pte Ltd dated 8 June 2011 (**SunGard Agreement**) as constructive trustee for the benefit of the Applicant and is liable to account to the Applicant for those profits.
9. The Sixth Respondent (**Zepto Fabrics**) holds the 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' as constructive trustee for the benefit of the Applicant and is liable to account to the Applicant for those profits.

10. The Seventh Respondent (**Zeptoip**) holds the profits it derived by reason of, or arising out of, its holding of any patents concerning the Applicant's confidential information (identified in Annexure A to the Reasons for Judgment of 19 December 2012) as constructive trustee for the benefit of the Applicant and is liable to account to the Applicant for those profits.
11. The Eighth Respondent (**Trademach**) holds the profits it derived by reason of, or arising out of, the development, marketing and sale of the Products as constructive trustee for the benefit of the Applicant and is liable to account to the Applicant for those profits.

**THE COURT FURTHER ORDERS THAT:**

12. By 4:00pm 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 4:00pm 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, in his or its possession, power or control.
14. By 4:00pm 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 using or accessing (directly or indirectly) the Products, and to forthwith cease assisting, facilitating or enabling any other person to use or access (directly or indirectly) the Products.
16. By 4:00pm 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;
  - (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 4:00pm 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 4:00pm 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 4:00pm 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 4:00pm 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 4:00pm 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.

22. The Applicant is released from any implied undertakings to the extent that they would otherwise prevent the Applicant from communicating with any of the persons referred to in Part 1 of the Annexure to this Order.
23. By 4:00pm on 11 March 2013, each Respondent file and serve an affidavit of documents enumerating all documents that are or have been in his or its control within the categories set out in Part 2 of the Appendix to these orders.
24. By 4:00pm on 11 March 2013, the Applicant file and serve an affidavit of documents enumerating all documents that are or have been in its control within the categories set out in Part 3 of the Appendix to these orders.
25. By 4:00pm on 22 April 2013, the Applicant file and serve any witness statements, including any expert witness statements, in relation to the further trial of the proceedings.
26. By 4:00pm on 20 May 2013, the Respondents file and serve any witness statements, including any expert witness statements, in relation to the further trial of the proceedings.
27. By 4:00pm on 3 June 2013, the Applicant file and serve any witness statements in reply.
28. On or before 1 July 2013, there be a mediation, such mediation to be conducted before a Registrar of the Court on a date to be advised to the parties.
29. On or before 15 July 2013, Counsel for the parties are to confer in relation to any objections to evidence, and to file and serve a table identifying any objections to evidence they have been unable to resolve between themselves.
30. The further trial of the proceeding is fixed for hearing on 22 July 2013 with an estimated duration of three days.

#### **FURTHER ORDERS**

31. The cross claim is dismissed.
32. Costs reserved.
33. Liberty to apply.

## APPENDIX

### Part 1

- 1 ABN Amro.
- 2 Advantage PCB Pty Ltd.
- 3 Ainsdale Trading Corporation.
- 4 Alpha Group.
- 5 Ark Trading.
- 6 Artic Group.
- 7 Ascendtek Electronics Inc.
- 8 AusOptic International Pty Ltd.
- 9 Australian Securities Exchange.
- 10 Barclays Capital.
- 11 Bombay Stock Exchange.
- 12 Broadhaven Asia Pacific (HK) Limited.
- 13 Cavium Inc.
- 14 Chopper Trading LLC.
- 15 Christopher Brown.
- 16 CIBC World Markets.
- 17 Citigroup Global Markets.
- 18 Clint Maddock.
- 19 Commonwealth Bank of Australia.
- 20 Credit Suisse.
- 21 CredX.
- 22 David Hoddle.
- 23 Deutsche Bank.
- 24 Direct Edge Inc.
- 25 Dorian Holdings Pty Ltd.
- 26 Dsquare Trading.
- 27 Fulcrum Microsystems Inc.
- 28 GE Intelligent Platforms Embedded Systems.
- 29 Gennum Corporation.
- 30 Getco Asia Pte Ltd.
- 31 Global Powertex Pty Ltd.
- 32 Goldman Sachs.



- 33 Hong Kong Stock Exchange.
- 34 IMC Pacific.
- 35 Interactive Brokers.
- 36 ITG Inc.
- 37 Joshua Rose.
- 38 JP Morgan.
- 39 KB Investments & Securities Co.
- 40 Lattice Semiconductor Corporation.
- 41 Leading Investment & Securities Co. Ltd.
- 42 Lime Brokerage LLC.
- 43 Lionel Ghouilia-Houri.
- 44 Macquarie Equities.
- 45 Maddock Super Pty Ltd.
- 46 Madison Tyler Asia-Pacific Pty Ltd.
- 47 Merrill Lynch.
- 48 Mike Gilbert.
- 49 Morgan Stanley.
- 50 National Australia Bank.
- 51 New York Stock Exchange Technologies.
- 52 New York Stock Exchange.
- 53 New Zealand Stock Exchange.
- 54 NewEdge.
- 55 Optiver.
- 56 Parfour Ltd.
- 57 RBS.
- 58 Rosenblatt Securities Ltd.
- 59 Samsung Inc.
- 60 Scotia Capital.
- 61 SIG Susquehanna.
- 62 Softek.
- 63 Strategic Investments Inc.
- 64 Sungard Global Trading (Singapore) Pte Ltd.
- 65 Tabb Group.
- 66 Takaho Daley.

- 67 TD Securities.
- 68 Tibra Capital.
- 69 Timber Hill Securities Hong Kong Limited (Interactive Brokers).
- 70 Toby Lawson.
- 71 Toronto Stock Exchange.
- 72 Tressamine Pty Ltd.
- 73 Trine Gilbert.
- 74 UBS Securities.
- 75 Wessel Brent Van Der Sheer.
- 76 Woori Investments & Securities.
- 77 Xilinx.

**Part 2 – Categories of documents to be discovered by the Respondents:**

- 1 All bank statements and tax returns for each of the Respondents for the period from 1 July 2010 to the present.
- 2 All audited and unaudited profit and loss statements, balance sheets and management accounts for each of the Second to Eighth Respondents for the period from the incorporation of each of those Respondents to the present.
- 3 All bank statements, payroll records and tax returns for each of the Second to Eighth Respondents for the period from the incorporation of each of those Respondents to the present.
- 4 All documents including, without limitation, quotations, purchase orders, invoices and receipts, relating to, recording or evidencing sales of any of the Products.
- 5 All documents relating to, recording or evidencing agreements and arrangements entered into by any of the Respondents concerning the use or access to (directly or indirectly) of any of the Products.
- 6 All documents relating to, recording or evidencing agreements and arrangements entered into by any of the Respondents with any investors concerning the ownership of, or rights to the proceeds of sale of, any of the Products.
- 7 All documents including, without limitation, quotations, purchase orders, invoices and receipts, relating to, recording or evidencing amounts derived or to be derived by Zeptonics by reason of or arising out of the Leading Agreement.
- 8 All documents including, without limitation, quotations, purchase orders, invoices and receipts, relating to, recording or evidencing amounts derived or to be derived by Zepto Markets by reason of or arising out of the SunGard Agreement.

- 9 All documents relating to, recording or evidencing amounts derived or to be derived by Zeptoip by reason of or arising out of its holding of any patents concerning the Applicant's confidential information, including without limitation the patent in evidence as Exhibit 17.

**Part 3 – Categories of documents to be discovered by the Applicant:**

- 1 All documents upon which the Applicant intends to rely at trial in support of its entitlement to damages in respect of the breaches of fiduciary duty, sections 181(1) and 183(1) of the *Corporations Act*, and clauses 3.1, 3.3, 3.4, 3.5, 9, 10, 12.1(b) and 12.1(c) of the Service Agreement identified in paragraphs 305, 351, 368 of the Judgment, as well as documents which adversely affect the Applicant's case.

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

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Third Cross-Claimant**

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Cross-Respondent**

**JUDGE: GORDON J**

**DATE: 5 FEBRUARY 2013**

**PLACE: MELBOURNE**

## REASONS FOR JUDGMENT

- 1 On 19 December 2012, reasons for judgment were published: *Zomojo Pty Ltd v Hurd (No 2)* [2012] FCA 1458 (the **December Reasons**). The parties were directed to confer and to bring in orders to give effect to the December Reasons and for the future management of the proceeding.
- 2 Consistent with the past history of this matter, the parties have been unable to reach agreement. The Applicant and the Respondent filed competing orders and a two page submission directed at the areas of dispute. The disputed areas were numerous. Senior Counsel were directed to confer and seek to resolve the disputes. A further form of proposed orders was sent to the Court. That form of order was not agreed.
- 3 Having considered the various submissions and draft orders, the orders attached to these reasons for judgment are necessary and appropriate and give effect to the December Reasons.

I certify that the preceding three (3) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gordon.

Associate:

Dated: 5 February 2013